



EMPLOYMENT TRIBUNALS

Claimant: Christopher Jones

Respondent: Midlands Partnership NHS Foundation Trust

Heard at: Birmingham **On:** 30 October 2024 and 19 November 2024 (in Chambers)

Before: Employment Judge Britton

Appearances

For the claimant: In person

For the respondent: Mr B Amunwa (Counsel)

RESERVED JUDGMENT FOLLOWING A PRELIMINARY HEARING

The Judgment of the Tribunal is that the Claimant is found to have met the definition of disability under the Equality Act 2010 from 22 March 2023 to 16 June 2023 which is part of the alleged material time only.

Reasons

Introduction and Issues

1. The claimant was employed by the respondent as a Peer Support Worker from 08 August 2022 to 16 June 2023. The claim is about unwanted conduct that the claimant says he received from a Senior Manager and the respondent's response to his complaint about the matter. The claimant is bringing a number of complaints, including direct disability discrimination, harassment related to disability and a failure to make reasonable adjustments.
2. The purpose of the Hearing held on 30 October 2024 was to determine whether the claimant was disabled within the meaning of Section 6 and Schedule 1 of the Equality Act 2010 by reason of a mental impairment, namely, Emotionally Unstable Personality Disorder, otherwise known as Borderline Personality

Disorder (EUPD). This was identified at the Case Management Hearing that was held on 08 July 2024. The respondent concedes that the claimant has this mental impairment.

3. As the claimant's employment terminated on 16 June 2023, the material time when the claimant needs to establish that he was a disabled person within the meaning of the Equality Act 2010 was in a period that must end at or around the time of his dismissal.
4. The respondent accepts that the claimant is disabled by virtue of EUPD but does not concede that the claimant was disabled during the material period in which his claims relate, i.e., between 06 December 2022 and 16 June 2023 ("the material time").
5. In order to determine whether the claimant had a disability at the material time, the Tribunal will decide:
 - (i) Did the claimant's EUPD have a substantial adverse effect on his ability to carry out day to day activities at the material time?
 - (ii) If not, did the claimant have medical treatment, including medication, or take other measures to correct the impairment?
 - (iii) Would the claimant's EUPD have had a substantial adverse effect on his ability to carry out normal day to day activities without treatment or other measures?
 - (iv) Were the effects of the mental impairment long-term? The Tribunal will decide whether those lasted at 12 months, were likely to last at least 12 months, or if not, whether they were likely to recur.
6. The Tribunal heard evidence on oath from the claimant, based upon his Updated Impact Statement, and had before it an agreed Bundle of Documents consisting of 203 pages which included, amongst other things, various Reports, letters and medical records provided by both parties. In addition, I was also provided with an NHS extract relating to EUPD and also a paper produced by the Harvard Medical School.

The Relevant Facts

7. It is evident from the claimant's medical records that he has had a long history of anxiety and depression dating back to around 2006. The medical records show that in early 2019 he was under the care of Dr Aldridge, his GP at Weeping Cross Health Centre and was supported by his Care Co-Ordinator Emma Tweedie whilst getting help and support from Adult Mental Health Services, as an outpatient at Foundation House. The claimant's mental health issues appear to have reached a critical point in January/February of 2019 when he required hospital treatment and was referred to the Resolution Home Treatment Team at Hayward Lodge having had suicidal ideations. It appears from the claimant's medical records that he was first diagnosed with EUPD by Dr Bhardwaj when visiting Adult Mental Health Services, Outpatient Clinic, on 20 May 2019.

8. Within the letter that Dr Mathew (Clinical/Counselling Psychologist) sent to the claimant on 31 December 2019 it was explained to the claimant that his difficulties with "emotional regulation" had been the basis for the diagnosis of EUPD and the nature of the treatment the claimant had been receiving in the form of a DBT skill-based intervention aimed at providing the claimant with some skills to be able to manage his difficulties more effectively was explained in detail. The gist of these skills was self-monitoring, the development of adaptive patterns, validation strategies and distress tolerance skills.
9. Since the claimant's diagnosis with EUPD in May 2019 he has been on medication and has received Counselling which has helped him to manage his symptoms, especially the successful completion of the DBT course.
10. When claimant was discharged by Adult Mental Health Services in December 2019 he continued to take medication under the supervision of his GP and was re-referred in October 2020 as a result of a deterioration in his mental health following returning to work from furlough. Such was the deterioration in the claimant's mental health, he visited A&E on 27 November 2020 and was seen by the Liaison Psychiatry Team. The claimant had suffered a breakdown at work and presented at A&E with suicidal ideation. The claimant was seen again by the Crisis Resolution Home Treatment Team at the end of 2020 and an attempt was made to assist him to recover some of his learned DBT techniques. The claimant's medical notes suggest that he was struggling with alcohol consumption at this time and was discharged from CRHT on the basis because he was not engaging sufficiently.
11. The claimant was, however, re-referred to Adult Mental Health Services by his GP on 15 January 2021 and the continued deterioration of the claimant's mental health in 2021 culminated in him being admitted under Section 136 to St George's Hospital on 18 May 2021. The claimant was discharged within 24 hours on the basis that he was to receive follow up care from the Community Mental Health Team and there was to be a further referral to the Crisis Team.
12. The Claimant was sufficiently well to apply for a job with the Respondent for the role of peer support worker in 2022 and he was successful at interview for the post on 13th June 2022. At the time of his appointment the Claimant was required to undergo a occupational health assessment which concluded that the Claimant was fit for employment without adjustments.
13. The claimant's mental health had been relatively stable for approximately 12 months before his employment began in August 2022. The peer support worker role was explicitly a "lived experience" role, meaning that it was a pre-requisite of the employment that the claimant had a lived experience of using Secondary Care Mental Health Services as a service user.
14. The documents provided by the respondent at the outset of the Hearing were helpful to me in understanding the nature of the EUPD. The diagnosis seems to only be made when a person has had a number of the following symptoms, that have been severe in degree and are long-lasting according to the Harvard Academic paper to which I have referred. Those symptoms being poor self-

image; self-destructive/impulsive behaviour; suicidal attempts or threats; self-mutilation; extreme mood reactions; feeling empty or alone; fear of abandonment and short-lived psychotic like distortions of perception or belief, especially under stress. I also took from the Harvard paper that the course of EUPD will vary and depend on the severity of the symptoms; the amount of stress, the availability of support and also the presence of other psychiatric disorders, such as depression or substance abuse.

15. The claimant's up-dated Impact Statement, in particular paragraph 12, which is at pages 145-146 in the Agreed Bundle sets out his account of how the stress during his employment, which he alleges was caused by the respondent in 2022 to 2023, brought about an emotional breakdown.
16. On or around 22nd March 2023 the Claimant suffered an emotional breakdown. The onset of stress caused the Claimant to no longer be able to regulate his emotions and patterns of self-destructive behaviour. The Claimant was unable to get out of bed some mornings and on the mornings that he was able to get out of bed he was unable to leave the house. The Claimant lost his appetite and was unable to eat on some days. The Claimant became in a constant state of panic, fear and hypervigilance. The Claimant experienced extreme mood swings, sickness and nausea which has impacted his ability to drive or even walk on some days. I also accept that on some days he has been able to manage his own personal hygiene such as brushing his teeth or showering. The Claimant refers to the impacts of his disability as being the result of anxiety and I accept that anxiety is a symptom of the Claimant's EUPD. I also accept that the Claimant has been suffering with these symptoms, as explained within his updated Impact Statement, from around 22nd March 2023 and continues to experience those symptoms as explained within his statement and during his oral evidence.
17. The medical records show that the emotional breakdown to which the claimant refers within his Impact Statement necessitated a visit to his GP on 05 April 2023. The claimant was provided with a Fit Note which stated that he was unfit for work due to "stress at work" from 27 March 2023 to 24 April 2023. It is recorded within the GP notes that the claimant was benefitting to some extent from his prescribed medication "Propanolol" and that the claimant was referred, by text message, to the Burton and Uttoxeter Well-Being Team.
18. The claimant continued to be signed off work by his GP, following an assessment on 05 May 2023 during the period 25 April 2023 to 23 May 2023

The Relevant Law

19. Section 6 Equality Act 2010 provides that a person is disabled if they suffer from a physical or mental impairment which has "a substantial and long-term adverse effect" on their ability to carry out normal day to day activities. Long term means has lasted for over 12 months, or is likely do so, or to recur. Likely, in this context, means could well happen. (Boyle v SCA Packaging Limited [2009] UKHL37)

20. It follows, therefore that the definition of disability under the Equality Act 2010 has three key requirements. These are:-

- i. The claimant must have an impairment;
- ii. That impairment must have substantial adverse effect on the claimant's ability to carry out normal day to day activities; and
- iii. The effect must have lasted, or be expected to last, for 12 months at the date of the alleged discrimination. This is requirement that the condition is long-term.

21. It is important to note that the definition of disability does not permit the use of hindsight. The question is not whether it has transpired that the condition was long-term, but whether the condition was long-term (either having lasted 12 months or at the time being expected to last 12 months) as at the date of discrimination.

22. The Equality Act paragraph 2 of Schedule 1 states:

- "2(1) the effect of an impairment is long-term if –
(b) It is likely to last for at least 12 months,..."

23. Under Schedule 1, paragraph 2 (2), it is stated that:

"If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if that effect is likely to recur".

24. The burden of showing disability at the material time lies on the claimant. It is not up to the respondent to disprove it.

25. Guidance on matters to be taken into account on determining questions relating to the definition of disability was issued in 2011. This includes paragraph B16 which says that it is necessary to consider whether, as a consequence of treatment, the impairment would cease to have a substantial adverse effect.

26. "Substantial Adverse effect" simply means more than trivial or minor. The Tribunal is mindful that it is a relatively low threshold.

27. The time for assessing the adverse effect and the potential long-term or otherwise nature of the condition is the "material time", meaning the time of the alleged act of discrimination and not before or after.

28. As to the case law, the respondent cited All Answers Limited v W&R [2021]EWCA Civ 606 which confirms that the question, therefore, is whether, at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. This is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. The Tribunal must make an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effects of the impairment were likely to last at least 12 months from that date. The Tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine

whether the effect did (or did not) last for 12 months. That is what the Court of Appeal have decided in *McDougall v Richmond Adult Community College* [2008] EWCA Civ4.

29. The respondent referred me to the case of *Woodrup v London Borough of Southwark* [2002] EWCA Civ1716 wherein the Court of Appeal held that the Employment Tribunal had not erred in dismissing the Claim for disability discrimination on the basis that the claimant had failed to establish within the meaning of paragraph 6(1) of Schedule 1 to the Disability Discrimination Act 1995 (which applied at that time) that if her psychotherapy treatment for anxiety neurosis had been discontinued, her impairment would have had a substantial adverse effect on her ability to carry out normal day to day activities.
30. In *Woodrup* the Court of Appeal held that in any deduced effects case the claimant shall be required to prove the alleged disability with some particularity. Ordinarily, one would expect clear medical evidence to be necessary. Those seeking to invoke the peculiarly benign doctrine at paragraph 6 should not readily expect to be indulged by the Tribunal of fact. The Court of Appeal found that the EAT were right to conclude that the medical documents which had been produced, coupled with the claimant's own evidence, were insufficient to establish that the case fell within paragraph 6 (1).

Submissions and Conclusions

31. From all of the evidence, the Claimant's EUPD constituted a mental impairment which, was first diagnosed in May 2019, following a long history of mental health issues, such as anxiety and depression dating back around 13 years. However, according to the Claimant's GP notes on 24th September 2021 it was determined that referral to secondary care was not required and he was signposted to the IAPT service, having successfully completed DBT therapy 2 years ago. According to the Claimant's own evidence his condition was much improved after DBT therapy and for some months prior to applying for the position with the Respondent, for which the Claimant was successfully interviewed on 13th June 2022. The Claimant consulted his GP on 5th April 2023 due to stress at work. There was no reference to EUPD at that consultation.
32. There is no evidence that the Claimant's mental impairment had a substantial adverse effect on his ability to carry out normal day to day activities during the period from 6th December 2022 to 22nd March 2023. During this period the Claimant did not seek any assistance from medical professionals and attended work consistently. There is no evidence that there was any concern with regards to the Claimant's performance at work during that time. The symptoms upon which the Claimant relies in order to demonstrate substantial adverse effect as per his updated Impact Statement at paragraph 12 (page 145) were not present prior to 22nd March 2023, on the balance of probabilities, in view of the contemporaneous evidence which demonstrates the Claimant's regular attendance at work during this period. However, I do accept that the Claimant's

mental impairment did have the substantial adverse effect upon his ability to carry out normal day to day activities as explained within his updated Impact Statement from 22nd March 2023 to at least 16th June 2023 onwards.

33. As indicated above, I have found that the symptoms of the Claimant's mental impairment did not have a substantial adverse effect upon his ability to carry out day to day activities during the material time prior to 22nd March 2023. There is no evidence before me in the form of medical records or opinion which would support a contention from the Claimant that his mental impairment would have had a substantial adverse effect during this time had it not been for either DPT techniques adopted by himself or the benefit of medication. I am mindful of the principle set out within the Woodrup case and therefore take the view that in the absence of any evidence of there being a deduced effect beyond the Claimant's assertions it would not be appropriate for me to speculate without the benefit of DBT therapy techniques and/or medication that the Claimant's mental impairment would have had the required substantial adverse effect prior to 22nd March 2023.
34. After 22nd March 2023, I am satisfied that the Claimant's condition of EUPD did have a substantial adverse effect on the Claimant's ability to carry out day to day activities in the way described within his updated Impact Statement.
35. The Claimant has, in my judgment, suffered with the heightened symptoms of EUPD from 22nd March 2023 to date, as explained by him within his updated Impact Statement and during his oral evidence. It follows, therefore, that I am satisfied that the Claimant's condition of EUPD is a mental impairment that has had a substantial adverse effect upon his ability to carry out normal day to day activities for over 12 months. It follows that I am satisfied that during the period from 22nd March 2023 to at least the date upon which the Claimant's employment terminated he met the definition of a disabled person within the Equality Act 2010.

Employment Judge **Britton**
02 December 2024