



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Faulkner

Respondent: Ofsted

Heard at: Manchester

On: 19 July 2022

Before: Employment Judge Dennehy

REPRESENTATION:

Claimant: In person, with their trade union representative Miss
Respondent: Glennon
Mr Tinnion, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. From 1st March to 31 September 2021 the claimant had a disability as defined by section 6 of the Equality Act 2010, as a result of anxiety.

REASONS

Introduction

1. The claimant was employed by the respondent as an administrator from 26 January 2006 and then as an ARC Advisor, until 30 September 2021, when she was dismissed on the grounds of capability.
2. The claimant alleges unfair dismissal, direct disability discrimination, failure to make reasonable adjustments. The respondent disputes the claimant's allegations.
3. This preliminary hearing was arranged to determine whether the claimant had a disability or disabilities at the relevant time.

Previous Preliminary Hearings

4. There have been two previous preliminary hearings. The first was on 15 March 2022 before Employment Judge Robinson for case management purposes and the final hearing date was set for 18,19,22,23,24,25,26 and 29 January 2024.
5. The second was on 28 April 2023 before Employment Judge Buzzard to determine whether the claimant had a disability or disabilities at the relevant time for the purposes of section 6 of the Equality Act 2010. At the request of the claimant this preliminary hearing was postponed to 19 July 2023.
6. At the start of today's hearing, it was confirmed with the parties that the issue to be determined by the Tribunal was whether the claimant was disabled under the S6 of the Equality Act 2010. This hearing has no direct relevance to the second claimant, who nevertheless did attend the hearing today.
7. The claimant confirmed that the impairments upon which she was relying as being a disability or disabilities at the relevant time, were: anxiety.
8. The respondent does not agree that the claimant was disabled at the relevant time.
9. The parties agreed that the relevant time for determining disability was 01 March 2020 through to September 2021.

Procedure

10. The claimant was represented by a trade union representative, Miss Glennon, at the hearing. Mr. Tinnion, Counsel, represented the respondent.
11. There were two witnesses for the respondent, Mr. Fairfield, the line manager of the claimant between February 2017 and June 2020 and Mr. Wallace, the claimant's line manager from June 2020 onwards.
12. A bundle of documents was prepared in advance of the hearing by the respondent. The bundle ran to 205 pages. Where a number is referred to in brackets in this Judgment, that is a reference to the page number in the bundle. During the cross examination of the claimant, it became apparent that Mr. Tinnion's bundle was not the same one that the claimant and I were looking at. The hearing was adjourned while the respondent confirmed the contents of each bundle and a revised bundle provided to the claimant and myself.
13. While the hearing was adjourned, I read the witness statements, the claimant's disability impact statement, further and better particulars and the medical records provided in the bundle.
14. The bundle contained a disability impact statement (pg50and 51) and further

and better particulars (pg 42 -49) both dated 26 May 2022 which had been ordered at the first preliminary hearing. The claimant confirmed that the contents of those documents/statements were true and accurate under oath. The claimant was then cross-examined by the respondent's representative, before I asked her questions, and she was given the opportunity to say anything she wished to by way of re-examination.

15. After all the evidence was heard from all the witnesses, submissions were made by each of the parties. It was agreed that the respondent's representative would make his submissions first, so that the claimant had an opportunity to respond to the respondent's point. The hearing was adjourned for thirty minutes so that the claimant had an opportunity to consider and draft her final submissions. Each of the parties made submissions orally.
16. The respondent requested a reserved judgment as time was pressing and the claimant raised no objection to this.

Issues

17. The issues to be decided before the Tribunal today are:

17.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about 01 March 2020 through to 31 September 2021. The Tribunal will decide:

17.1.1 Did she have a physical or mental impairment ? the claimant says the impairment is anxiety

17.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

17.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

17.1.4 If so. would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

17.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

17.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

17.1.5.2 if not, were they likely to recur?

Facts

18. In her impact statement the claimant stated that her impairment is anxiety which is triggered by having to do call centre work. She further explained that it was incoming calls from members of the public that triggered the anxiety. This is consistent with the occupational health report findings.
19. The effect of the anxiety creates physical symptoms says the claimant is such that *"I feel nauseous and I have been sick on occasions, my heart races, I have trouble sleeping"* and has caused her in the past to have panic attacks, which she describes as *"my heart has been pounding and my chest felt so tight and was unable to catch my breath."*
20. The claimant says she has suffered from anxiety since December 2005 and that she had informed the respondent about this when she commenced employment with them in January 2006.
21. At the request of the respondent the following occupational health reports were commissioned during the relevant time:
 - 21.1 **10 March 2020** (pg79-81) which states the claimant is *"unfit for work due to a high level of anxiety"* and *"her symptoms seem reactionary due to the requirements of her role changing"* The opinion given by the occupational health advisor is that *"anxiety is the body's natural response to stress. It is a feeling of fear or apprehension about what is to come. The unpredictable nature of inbound calls is causing Mrs Faulkner to experience overwhelming anxiety.....I do not see the situation changing even with therapy"*
 - 21.2 **01 December 2020** (pg 82 and 83) the occupational health advisor express the opinion that *"her mental health and well being is likely to be significantly affected if she is forced to undertake the planned call center work"* and goes on to state that the claimant *"is currently being causes increased stress and anxiety due to the possible requirement to undertake call center work"* and that her *"future attendance should not be affected is she is able to remain doing her APPS role"*

Towards the end of the report the occupational health advisor states *"the medical condition would appear to cause substantial impairment of day to day activities and is likely to persist beyond 12 months.."*

- 21.3 **20 January 2021** (pg 84-86) the occupational health advisor states that *"the changing situation at work has replicated her last role in the demands and this has exacerbated her anxiety. The inbound call work activity causes her significant anxiety"* in the opinion section it states that *"a significant underlying medical condition is on-going and this may at times have an effect on performance, reliable service and attendance, the severity and frequency of which is difficult to predict."* In answer to the specific question what is it that triggers stress when taking inbound calls the answer given in the report is *"it is the prospect of performing inbound calls and the unpredictable nature of the calls that causes Mrs Faulkner significant anxiety"*.

The recommendation to the respondent in this report is *"the anxiety causing differences between the two types of work stream from inbound and outbound calls is significant. The effect on Mrs Faulkner's long term mental*

health and well being is likely to be profound..”

21.4 **09 June 2021** (pg 97-99) the occupational health physician says of the claimant “*She was very anxious just discussing the call center work with me*” and that her anxiety “*..may affect areas of mental function such as concentration, social interaction, coping with change, motivation and behaviour but not limited only to these mental function areas.*” and that “*This medical condition would appear to have caused substantial impairment of day to day activities and is likely to have persisted beyond 12 months...*” In answer to the specific question of whether the claimant is fit to return to her current role the occupational health physician states that “*.. only with work adjustments in place/in an alternative role.*”

In summary he states “*..and in my medical opinion, she is unlikely to be able to handle any work related to the call center, making or receiving calls in the foreseeable future.*”

22. All four reports state that the claimant at the time of the reports is well enough to do the existing role, which is comprised of administrative tasks.
23. The claimant did not provide any evidence to show that she had suffered any panic attacks at the relevant time (March 2020-September 21). The claimant says this is because she was working from home (due to covid pandemic) and was only undertaking administrative tasks.
24. The claimant’s evidence was that when she was signed off work on ill health grounds from 20 January 2021 until her employment was terminated and the reasons given were stress at work.
25. The claimant provided sick notes from 10 February 2021 until 21 June 2021. She was advised of termination of her employment on 01 July 2021. I have not endeavoured to reproduce all of the claimant’s medical records in this Judgment (albeit that I did read them all and take them all into account). The first reference in them to anxiety was in an entry on 10 February 2021, which referred to stress at work.
26. The claimant in her oral evidence today confirmed that she can make outbound calls because she can plan what she is going to say and this was consistent with the findings of the occupational health reports. She also gave evidence that she had taken and can take internal calls from colleagues.
27. The respondents witness Mr Fairfield confirmed that he was aware of the claimant’s anxiety and although he had not seen the claimant take any calls from the public, he was aware that she took calls from colleagues and the local authorities.
28. The respondent’s second witness confirmed that he was aware of the claimants anxiety but he had not seen the claimant take any calls from the general public.

29. I made my decision based upon section 6 of the Equality Act 2010 which states:

“A person (P) has a disability if - P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.”

30. Section 212 of the Equality Act 2010 provides that “*substantial*” means “*more than minor or trivial*”.

31. Schedule 1 Part 1 of the Equality Act 2010 (at clause 2) says the following:

“The effect of an impairment is long-term if – (a) it has lasted for at least 12 months, (b) it is likely to last for at least 12 months, or (c)it is likely to last for the rest of the life of the person affected.”

32. Clause 2 goes on to say at subsection (2):

“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.”

33. Clause 5 of Schedule 1 includes provisions that relate to medical treatment. If measures are taken to treat or correct an impairment (including medical treatment) and, but for those measures, the impairment would have the requisite effect on the person’s ability to carry out normal day-to-day activities, then the condition is to be treated as having that effect.

34. There is some guidance on matters to be taken into account in determining questions relating to the definition of disability which has been issued by the Secretary of State and I am required to take account of that guidance. That guidance confirms that “*likely*” means that something “*could well happen*”.

35. The onus is on the claimant to prove that the relevant condition is a disability.

Submissions

36. The respondent’s case is that at no relevant time was the claimant disabled, rather she was suffering from an adverse reaction to something that she didn’t want to do ie call center work. Mr Tinnion broke down the relevant time into five defined periods of time to assist in his argument. In summary he says disability is not proved by the claimant, because at the relevant time there is no reference to the claimant suffering anxiety in gp notes, no reference to normal day to day activities that the claimant could not do (both work and personal) in her disability impact statement. Although the respondent commissioned the occupational health reports, he says the Tribunal should give little weight to them, because the authors have not set out what facts they relied on or the methodology they used to reach their opinions.

37. The claimant says that she was unaware of the exact details that need to be in her disability impact statement and wasn't aware that she could amend it, because when her employment ceased her union support also ceased. She reiterated her symptoms and that the trigger was the fear of the call center work and when she was undertaking administration work, she could manage her anxiety but it was always there and always would be.
38. In their submissions, neither party identified or relied upon any particular case law. They both emphasised their case on the facts.

Application of Law to Facts

39. Whilst I acknowledge that I am assisted by the occupational health reports and all medical evidence the Tribunal is not bound by any opinion expressed in them.
40. Applying the law to the facts, it is my view that the claimant's anxiety was an impairment.
41. The claimant's evidence was that it had a substantial adverse effect on her day-to-day activities, and she described that in her oral evidence, further and better particulars and disability impact statement. The adverse effects included the claimant's heart pounding, tightening of chest, nauseousness, flashbacks to her previous panic attacks. In my view that evidence was clear that her anxiety had a substantial adverse effect on her day-to-day activities.
42. The claimant says her anxiety is always there (and had been since 2005) but whenever there is a trigger event, the anxiety is heightened and becomes more severe. The likelihood of recurrence of panic attacks is always there for the claimant if her trigger event arises.
43. Having to take inbound calls from the public is a trigger event for the claimant. The claimant gave evidence that it was the unpredictability and challenging nature of the calls that caused her anxiety.
44. When a trigger event occurred, it had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities. That effect was in several ways. There was nauseousness, pains in her chest, tightening of chest, heart pounding, inability to sleep, and panic attacks, albeit that a panic attack was temporary. In her disability impact statement, she explained other effects such as, inability to concentrate, constant worry. As the claimant evidenced, that included being unable to do any normal day-to-day activities whilst suffering a panic attack.

45. The claimant stated that it was the fear of having to having to undertake the call centre work that was triggering her anxiety. This fear began to escalate in July 2018 says the claimant, when she was advised that her administration role in the application team would be lost when her team merged with the contact centre team at the relevant time. Her fear and anxiety escalated when she realised that the respondent wasn't taking the recommendations of the four occupational health reports into account.
46. The impact of the impairment of anxiety is susceptible to trigger events and when a trigger event occurs the anxiety escalates. If a trigger event occurs the anxiety starts to escalate leading to debilitating panic attacks. When the claimant is undertaking administration duties her anxiety is manageable, but it is still there. It can be said that the impairment is always there albeit that the symptoms are variable and recurring.
47. Looking at the legal test and how it applied at the relevant time, I must consider whether the impairment was long term at that time (including taking account of the likelihood of recurrence and subsection 2(2) of schedule 1 recited above).
48. All four occupational health reports expressed the opinion that the claimant's anxiety was likely to last longer than 12 months. I am not required to accept the adviser's view, but it is clearly important evidence about the medical impact of anxiety at the relevant time and the view of recurrence, provided by medical professionals.
49. Having applied the test of whether the adverse effect was (at the relevant time) likely to recur based upon the occupational health reports, I found that the condition of anxiety was likely to recur due to the fear of the call centre work (at the relevant time). A small risk that something was likely to happen, is not the same as it being "likely" or meaning that it could well happen.
50. The claimant gave oral evidence that her anxiety "*was like a cloud hanging around which is triggered by phones ringing*" The claimant stated that when she was working from home, she could continue to do her administration job as it did not involve working in the call centre environment, but she was fearful that her anxiety would escalate when she was required to undertake call centre work.
51. At the relevant time (March 2020 – September 2021) I found that the claimant's anxiety was a disability and that the impairment was long term at the time of each of the four occupational health reports because the claimant was in fear of being forced to undertake the call centre work and if this happened she knew her anxiety would escalate and she would suffer panic attacks and this would impact upon the claimants ability to undertake day to day activities.
52. For the anxiety, the claimant took medication only for a short period. She says that she does not like taking medication and that it didn't agree with

her. She says she had also had counselling sessions, but the only thing that could help and stop her anxiety escalating is avoidance of the trigger event.

Conclusion

54. For the reasons explained above, I found that the claimant did have a disability, applying the relevant legal test. That was because of anxiety during the relevant period of 01 March 2020 through to 31 September 2021.

Employment Judge Dennehy

Date 24 July 2023

JUDGMENT SENT TO THE PARTIES ON

1 August 2023

FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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