



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 6000082/2022

5

Held in Glasgow via Cloud Video Platform (CVP) on 11 January 2024

Employment Judge J Hendry

10 Mr John-Paul Pryce

Claimant
In Person

15 Accountant in Bankruptcy

Respondent
Represented by:
Ms E Campbell -
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The Tribunal finds that the claimant was disabled in terms of Section 6 (1) of the
Equality Act 2010 from March 2000.

REASONS

1. The claimant in his ET1 makes claims of disability discrimination and a failure to make reasonable adjustments. The reasonable adjustment contended for was to allow the claimant to work entirely from home. The respondent organisation opposed the claims. They did not accept that the claimant was disabled in terms of the Equality Act and a hearing took place on 11 January 2024 to determine whether or not the claimant was a disabled worker.
2. The Tribunal heard evidence from the claimant and from his partner, Ms McCluckie, and considered the documents contained in the joint prepared for the hearing.
3. The claimant in his ET1 indicated that he has been working from home since March 2020 *“due to anxiety and extreme concern regarding crowded indoor spaces and diseases”*.

4. The Tribunal made the following findings in fact:
5. The claimant has been employed by the respondent since May 2007. His role was that of an Administrative Case Officer in the DAS department (Debt Arrangement Scheme). He was allowed to work from home/remotely during the Covid pandemic. The claimant submitted a flexible working request in March 2022 which would have allowed him to continue working from home. He did not explicitly state the reason for his request related to a disability. He was embarrassed that he found it difficult to leave his house because of a fear of being in groups of people. He framed the application emphasising the positive benefits for the respondent's business.
6. The claimant's line manager met the claimant on 29 March 2022 to discuss the request and following this he was referred to the respondent's occupational health providers. The claimant also explained the advantages, as he saw it, as working from home with less distractions.
7. The respondent sent an email of 13 April 2022 asking about health conditions that the employers should know about.
8. Before the claimant was seen by occupational health, he emailed the respondent's HR department on 4 May 2022 *"for many reasons I find myself happier overall as working from home makes me more comfortable, productive and safe. I have no distractions of background noise, do not need to try and feign interest in what other people did with their weekend or watched on TV the previous night etc. There is no work task which I cannot do far better without the distractions of a toxic, open plan work environment. It is unfair to assume that everyone wants or needs other people around them."*
9. The claimant wrote (JBp30). He wrote:
"Whilst I have never an official diagnosis, I have recently an Autism Spectrum Quotion Test online and my scores came back as 43 the first I did and 41 and the second time. I think I am of an age that when I was at school, I wasn't really anything about that and you would just be the weird kid who didn't play well with others."

It does, however, explain some things about how I find the office environment difficult and thrive when working on my own in the environment which best suits me. This is not to downplay my fears or be exposed to other people and their germs and viruses as this is still my major concern for both my own health and that of my elderly parents who are the only household I have had any contact with in the last two years. Even if people aren't always getting extremely ill, I find it best not to be ill at all. In the last two years, I have not had one day of sickness absence."

- 5
10. The occupational health report which was received in May 2022 indicated that the claimant was not likely to be classed as disabled in terms of the 2010 Act. The claimant had been assessed by a nurse occupational adviser. This had taken place by telephone. His perception of the hearing was that she was not interested in any mental health issues he said he had but focused on his physical health which was good.
- 15 11. The report noted that the claimant had worked from home during the pandemic. It recorded that enjoyed this as he felt that he worked better and there is less distraction while working from home. He discussed that he was worried regarding a return to the office face to face due to the risk of contracting COVID-19. It recorded that he tended go food shopping during more quiet times to reduce contact with others. The report recommended reintroducing the claimant to the workplace and indicated that the adviser was of the view that the claimant's condition was unlikely to be considered a disability, indicating that it has not lasted longer than 12 months and it was not having a significant impact on his ability to undertake normal day to day activities. They recommended a return to work.
- 20
- 25
12. The claimant received a citation to attend for Jury duty. He felt unable to do so because of a fear of sitting in an enclosed room seated with others. He approached his GP for a letter to allow him to refuse to go. On 21 December 2022, Dr Shetty, a partner in the claimant's GP practice, wrote a letter confirming that he was not fit to attend for jury duty (JB56). The claimant's attendance was not insisted upon.
- 30

13. The claimant attended a GP practice run by a Dr K Ghosh and a Dr V Shetty in Ayrshire. They did not meet his GP but made contact with him by telephone. The GP provided the claimant with a letter on 1 March 2023 (JB38) which reads: *“John Pryce suffers from symptoms of agoraphobia and anxiety. I would hence advise for John to work from home if possible.”*
14. The employers required further information. They wrote to Dr Ghosh on 6 June 2023 (JB40). They wrote *“we understand from your previous opinion that John suffers from symptoms of agoraphobia and anxiety and we would like to get a better understanding of his health and the impact any health conditions have on his work. We would normally have sought this information from the occupational health provider. However, John-Paul has not given us his consent to that. Therefore, we hope you can assist.”* There was a list of 15 questions (JB42).
15. On 14 August 2023, Dr Ghosh responded: *“He was last seen in our practice on 3 September 2018. Thereafter, he has not attended the practice for a face to face appointment and appointment after COVID restrictions were lifted. He has a history of agoraphobia, claustrophobia and anxiety and to this effect he was referred to our Mental Health practitioner and he was again assessed over telephone with a provisional diagnosis of social anxiety and mysophobia was made.*
- I have spoke to John a few times over the phone and my last contact with them was on 10 August 2023 when he confirmed that he continued to work from home and he carried out his day to day business online and he conducts meetings by Microsoft Teams. He does shopping online. However, he does go out for shopping to open market places.”*
16. Mr Ghosh further wrote: *“He has no evidence of any severe mental illness. His anxiety has increased due his employer asking him to return to work on site rather than work remotely. He believes that he has explained to a mental health practitioner as well and to me that he does not wish to engage in any sort of therapy including cognitive behaviour therapy which may help him to return to a more active social live.*

5 *He doesn't want any sort of medical treatment in the form of medication or behavioural therapy. He has mentioned to a Mental Health practitioner that he believes that in protecting himself and his family from germs. He denied any excessive obsession with cleaning or handwashing. He had mentioned that before the pandemic, he managed working on site and engaged in social activity with no health issues and I believe before the Pandemic, his belief in protecting himself and family from germs has made him stronger. He feels that he can do his job as efficiently remotely as he could have done on site... I can say John does not suffer from any significant severe mental illness. He has social anxiety and agoraphobia and he feels safe working from home. His symptoms and beliefs have worsened since the outbreak of the Pandemic."*

17. On 9 June 2022, the claimant was advised that the flexible working request had not been accepted. The claimant believed that the respondent had not taken account or sufficient account of his mental health difficulties.

18. The respondents acknowledged the letter on 4 September 2023 (JBp47) and has asked for further information from the claimant's GP. Dr Ghosh responded on 2 October 2023: *"As explained in my previous letter, John worked from home just before the COVID-19 outbreak and he avoids going out apart from essential times like looking after his parents or doing the grocery shopping but only spending minimal time outdoors.*

He was referred to a mental health practitioner and she confirmed that he has social anxiety and mysophobia. He has got no significant mental health illness, however, he is extremely anxious at present because his employers were putting pressure on him to work on site. He denies any other mental health difficulties and believes that he is protecting himself and his family from germs." He indicated that he was a GP and not a psychiatrist.

19. The claimant's partner responded to the questions that had been asked of the GP in a document dated 28 November 2023 (JB52) which set out the impacts she observed on the claimant at the start of the pandemic. She wrote: *"then the pandemic hit in 2020 and he (along with everyone else) became obsessed*

5 *with avoiding being near people and handwashing. His close friend lost both parents to COVID. JP couldn't make himself go to support him due to his current condition, even after 30 years of friendship, he couldn't make himself go although most people have gradually gone back to normal i.e. mixing with others and not being concerned about catching germs, JP has stayed in that 'on edge state'.*"

20. The claimant is unable to enter hospitals because of the sickness and germs he believes he will encounter there.

21. The claimant raised Tribunal proceedings.

10 22. The claimant completed a disability impact statement (JBp30 onwards). He stated that he suffered from severe anxiety and agoraphobia. He described this in the following way: *"this means I avoid indoor spaces as I experience panic attacks when I am in an indoor setting with others, even just thinking about going into these situations bring these on. On a few occasions I have had to go into indoor spaces, I can only spend a few minutes before I start sweating, get angry about anyone remotely coming close to me and feel nauseous and feel the need to leave as soon as possible. I can't stand being near others and see them as coughing, sneezing, germ and virus spreaders."*

15

20 23. The claimant explained that his mother was also agoraphobic and had OCD. She had brought him up very focused on cleanliness. As a child, he was frightened of germs, viruses and illnesses.

24. The claimant explained that as an adult he had these underlying fears and concerns but that he would disguise his reactions to being in the present of illness and germs. He tried to live life normally but certain events impacted on his mental health. He points specifically to the emergence of the COVID-19 pandemic and a serious bout of COVID that affected him in March 2020. He was recuperating in bed and thought he was going to die and as he recovered, he became very focused on the dangers of the virus.

25

25. Since March 2020, the claimant no longer socialises with others. He stopped playing table tennis with friends. This was an activity that he had enjoyed. He

30

did not invite people to his house. He stopped attending concerts and going on holidays. He would become fearful in the presence of others and he would sweat and suffer panic attacks if he was in a situation where other people were close by. He contacted his GP when he was cited to attend as a juror. The GP gave him a letter indicating that he was too anxious to attend a jury trial. The claimant does not visit other people. He visits his parents daily as they live very close by and assists them as they are elderly.

Witnesses

26. I found the claimant to be a credible and reliable witness who answered questions generally in a straightforward manner. He was clearly upset and emotional at points discussing the impact of his condition and how his colleagues and others would react to his phobia. He had minimised its influence on him and had tried to justify working from home for business reasons. I found the claimants partner both credible and reliable. It was clear that his condition had impacted their social and family life and that his ability to interact with others because of a fear of contagion of some sort and his fear of dirt or germs had steadily grown more marked.

Submissions

27. Ms Campbell first of all reminded the Tribunal of the definition of disability contained in the Ac and the questions the Tribunal had to answer. She referred to the case of *Goodwin v Patent Office (1999) IRLR 4 (EAT)*, in which it was established that the Tribunal should ensure that each step is considered separately and sequentially. She turned to the case of *McNicol v Balfour Beatty (2002) IRLR 711* and the guidance that the word impairment bears should be its ordinary meaning. In respect of mental impairment was accepted that the condition does not have to be clinically well-recognised. Nonetheless, the case of *Royal Bank of Scotland v Morris UKEAT/0436/10* in which the E.A.T emphasised the importance of expert medical evidence where an alleged disability takes the form of “*depression or a cognate medical impairment.*” In that case it was stated that: “*the fact is that while in the case of other kinds of impairment the contemporary medical notes or reports*

may...give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability allegedly takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance.” (para 63). The Tribunal went on to state that *“the existence or not of a mental impairment is very much a matter for a qualified and informed medical opinion”*. (para 55)

- 5
28. The Tribunal must also consider whether the impairment has an adverse effect on day to day activities. The solicitor made reference to the assistance provided by the Guidance. She then turned to discuss the evidence. The Tribunal should look at what an employee cannot do or can do only with difficulty. The Guidance to the Act provides that account should be taken of how far a person can reasonably be expected to modify his behaviour, for example through use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day to day activities.
- 10
29. She submitted that the onus is upon the claimant to establish that throughout the relevant period he met the statutory definition set out in section 6 of the Act by leading evidence in connection with the impairment itself, the adverse effects which it had upon his ability to carry out normal day to day activities and the substantial and long term nature of the adverse effect. In my submission, the evidence before the Tribunal is insufficient to discharge that onus. The Tribunal was then directed to the letter from the claimant’s GP dated 2 October 2023. The claimant’s mental health practitioner is stating that the claimant has no significant mental health illness. There is no mention of a diagnosis of agoraphobia. The mental health practitioner assessment and the GP assessment were both conducted by telephone assessment. The claimant has not attended his GP since 2018. The claimant has told his GP over the telephone about his symptoms and the GP has repeated these.
- 15
- 20
- 25
30. The Tribunal lacks any medical evidence showing how longstanding the asserted conditions are. The claimant has not produced any evidence from a mental health specialist, such as a consultant psychiatrist.
- 30

31. The claimant's Occupational Health (OH) report (p35) made no mention of any health conditions. Anxiety and agoraphobia are not mentioned. The OH practitioner did not consider the claimant to have a disability. The claimant says she focussed on his physical health. It is submitted that this is
5 improbable, given the function of OH is to pick up on health conditions and they were aware issues around his isolation, given the practitioner mentions reintegration into society. The claimant was asked directly in an email of 13 April 2022, whether he had any medical conditions (p33). He mentioned a speculative autism diagnosis in his response (page 32) but made no mention
10 of severe anxiety or agoraphobia.
32. The letter from the GP dated 14 August 2023 (pages 44 - 46) states that there was a "*provisional diagnosis of social anxiety and mysophobia*" made by their Mental Health practitioner. This diagnosis was made through a telephone assessment by a Mental Health Practitioner, who did not actually meet the
15 claimant in person. We lack any explanation of the provisional nature of this diagnosis. I would submit it is reasonable to assume that this diagnosis is not certain.
33. The Tribunal should place little weight on the evidence led. It does not show an impairment in the claimant's ability to carry out day to day activities. He
20 goes out to the shops, works, is able to cook, clean and do normal household activities. He can go visit and look after his parents and in the words of his GP, "*he feels fit and well*" (p45).
34. The claimant accepted that he does go out shopping to open marketplaces and food shopping. It is submitted that if he was truly suffering from severe
25 anxiety and agoraphobia which had a substantial impact on him, then he would avoid attending shops. Similarly, the second letter from the doctor dated 2 October 2023, states that "*he avoids going out apart from essential times*". It is clear that he does leave the house for activities he considers to be essential, such as shopping and visiting his parents.
- 30 35. The GP letters states that the Claimant has no evidence of any severe mental illness (45) and then later on "*I can say John does not suffer from any*

5 *significant severe mental illness.” In my submission, this means that any adverse impact from the asserted impairments is minor or trivial. Furthermore, it states that “before the pandemic, he managed working on site and engaged in social activity with no health issues” (p45). This shows that*

10 for thirteen years, the Claimant has managed to work and engage socially as normal. The GP in the letter dated 2 October 2023 (pages 50 – 51), states that: *“he has got no significant mental health illness, however, he is anxious at present because his employer is putting pressure on him to work on site. He denies any other mental health difficulties.”* The Tribunal is invited to find

 that any anxiety is situational and due to being asked to give up home working full time. It is not a wider disability. In fact, the claimant has actually denied any mental health difficulties beyond being asked to return to the office. His reasons for not returning to the office are based on fluorescent lighting and avoiding small talk with colleagues.

15 **Discussion and Decision**

36. The Equality Act 2010 (EA) provides as follows:

Disability

- (1) *A person (P) has a disability if—*
- (a) *P has a physical or mental impairment, and*
- 20 (b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

37. I also considered the Government Guidance on matters to be taken into account in determining questions relating to the definition of disability (“Guidance”). I noted that the question of “mental impairment” is to be given

25 its ordinary meaning and can include mental health conditions such as anxiety, and mental health illnesses such as depression and PTSD. A phobia is defined in most dictionaries as being a mental illness that relates to an “irrational” fear of something.

38. The Guidance says this:

Meaning of 'impairment'

5 A3. *The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.*

10 A4. *Whether a person is disabled for the purposes of the Act is generally determined by reference to the **effect** that an impairment has on that person's ability to carry out normal day-to-day activities*

15 39. The Equality Act 2010 ("Act") provides that "substantial" means more than minor or trivial, and that long-term means that an impairment must have lasted for at least 12 months or be likely to have lasted for at least 12 months, that being determined at the date of the alleged discriminatory act or acts and not the date of the hearing.

20 40. The question of what are "normal day-to-day activities" must also be assessed by reference to the ordinary meaning of those words. The Guidance notes that they are things that people do on a regular or daily basis and can include work related activities such as interacting with colleagues. The Employment Appeal Tribunal ("EAT"), in *Patterson -v- The Commissioner for the Police of the Metropolis* [2007] ICR 1522, noted that normal day-t- day activities must be interpreted as including activities relevant to professional life, but the EAT also clarified. in *Chief Constable of Dumfries and Galloway Constabulary -v Adams* [2009] ICR 1034, that that involves activities found across a range of employment situations.

41. In the case of the Chief Constable of Dumfries & Galloway Constabulary v Adams [2009] IRLR 62 at the EAT: *“What we take from the court’s use of the term ‘professional life’ is that when assessing, for the purposes of section 1 of the 1995 Act, whether a person is limited in their normal day-today activities, it is relevant to consider whether they are limited in an activity which is to be found across a range of employment situations. It is plainly not meant to refer to the special skill case such as the silversmith or watchmaker who is limited in some activity that the use of their specialist tools particularly requires, to whom we have already referred. It does though, in our view, enable a tribunal to take account of an adverse effect that is attributable to a work activity that is ‘normal’ in the sense that it is to be found in a range of different work situations. We do not, in particular, accept that ‘normal day-today activities’ requires to be construed so as to exclude any feature of those activities that exists because the person is at work, which was the essence of the first ground of appeal. To put it another way, something that a person does only at work may be classed as ‘normal’ if it is common to different types of employment.”*

42. In *Sobhi v Commissioner of Police of the Metropolis* UKEAT/0518/12BA, drawing on *Paterson*, the EAT observed at [18]: *“You look to see whether the impairment which the worker has may hinder their full and effective participation in professional life on an equal basis with other workers.”* And at [19]: *“...a person must be regarded as a disabled person if their condition has a substantial and long-term adverse effect on any activity of theirs which relates to their effective participation in professional life.”*

43. I noted the guidance given in the well-known case of *Goodwin v Patent Office* (1999 ICR 302) in which Mr Justice Morrison President sets out four questions for the Tribunal to address:

1) The impairment condition

Does the applicant have an impairment which is either mental or physical?

(2) The adverse effect condition

Does the impairment affect the applicant's ability to carry out normal day to day activities.... and does it have an adverse effect?

(3) The substantial condition

Is the adverse effect (upon the applicant's ability) substantial?

5 **(4) The long-term condition**

Is the adverse effect (upon the applicant's ability) long-term?

44. This is an unusual case and the claimant on whom the onus lies to demonstrate he is disabled is not particularly well assisted by the medical evidence he has brought. The respondent's solicitor criticises the lack of any face to face consultation although their Occupational Health Report is open to the same criticism.

45. I mean no criticism of the claimant's GPs. They are no doubt very busy and specialists in mental impairments such as psychiatrists and psychologists. Nevertheless what we have is not wholly unhelpful to him. In passing one possible reason for the relative lack of detail is that the claimant did not attend his GP or speak to the Mental Health Nurse in person because he has a deep rooted fear of interacting with such people in venues where he is likely to encounter ill people and be exposed to germs and viruses.

46. The documentation produced shows that in December 2022 he had himself released from Jury Duty. His GP wrote that he was unfit to attend. The claimant indicated that he had a fear of being sat in close proximity to other jurors in an enclosed and busy courtroom. This he claims was the source of his anxiety. Little weight can be put in the letter itself other than to perhaps indicate that the fears the claimant complains of are not that recent and there appears to be a common thread. The claimant gave the Tribunal a history of the evolution of his condition from childhood until it became more pronounced after he had experienced a severe bout of Covid. This appears entirely credible. The second report from the other GP mentions "agoraphobia" or a fear of open or crowded places.

47. By August 2023 Dr Ghosh is referring the impact of the pandemic on him and a provisional diagnosis of “*social anxiety and mysophobia*” made by the practice Mental Health professional. Mysophobia being an extreme of irrational fear of dirt and contamination. The report says the claimant does not have a mental severe mental illness. This phrase is not explained and runs contrary to the disabling symptoms narrated. It is unclear whether the disabling effects are said not to be severe or the phobia itself not to be severe or how this observation fits with the statutory test for disability contained in the Equality Act.

48. Ms Campbell quite understandably put some emphasis on the guidance given to Tribunals in the case of Royal Bank v Morris. That case drew heavily on the case of Richmond Adult Community College v McDougall (2008) IRLR 227 and cites the following passage:

“The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted”.

49. There are circumstances in which medical evidence is critical. For example, it would be very difficult without medical evidence for a claimant had to demonstrate that the mental condition founded upon was likely to last more than 12 months or was likely to recur. However, in this case the factual position is that the symptoms of the claimant’s condition have had a disabling effect on his for more than 12 months. This is not a case where I am of the view that the issues are “too subtle” to determine without further medical evidence. The claimant has an entrenched phobia and whatever the label put

on these symptoms the impact is clear. I accept that he has a mental impairment.

50. The claimant lives a very isolated life. His wife's evidence which I accept is that this has become progressively worse over the last two years. He seldom ventures from the house. He would not let a colleague into his house when they delivered a laptop to him insisting that the exchange took place in the open air. Whatever the label put on such behaviour, which is in no way voluntary, the phobia he has which drives his behaviour has an adverse effect. That effect clearly has a substantial effect on the claimant's ability to carry out day to day activities principally being in the close company and interacting with others. This has been the position since March 2020.

51. This hearing was a preliminary hearing and not a final hearing where the reasonableness of the adjustments contended for are assessed. However, it is only fair to caution the claimant that his position is a radical one namely that he should not be required in the future to attend work for any purpose. It must also be clear to him that his condition is not improving and that this impacts on his daily life. He said that he would not take treatment as he was fearful that he would be prescribed the sort of medication his mother was prescribed many years ago which he believed was detrimental to her. I am sure that there have been many advances in such medications which alleviate anxiety and might with other therapies address his phobia.

52. I would urge him to contact the counselling service which I understand the respondents operate and discuss what assistance is open to him which might ameliorate situation he currently finds himself in.

5

J Hendry

10

Employment Judge
5 Feb 2024

Date sent to parties

15

Date
9 Feb 2024
