



EMPLOYMENT TRIBUNALS

Claimant

Mr C Aldred

Respondent

Openreach Limited

v

Heard at: Manchester Employment Tribunal (by Cloud Video Platform ('CVP'))

On: 30 April 2021

Before: Employment Judge Johnson

Appearances

For the Claimant: Mr M Taggart (CWU union representative)

For the Respondent: Mr B Williams (counsel)

JUDGMENT IN THE PRELIMINARY ISSUE

1. The claimant was disabled within the meaning of section 6(1) of the Equality Act 2010 by reason of depression and anxiety.
2. The remaining issues as identified by Employment Judge Benson in her Note of Preliminary Hearing dated 24 December 2020 will be determined at the final hearing.

REASONS

Background

1. The hearing of this preliminary issue arises from a claim which the claimant presented to the Tribunal on 28 June 2020 following a period of early conciliation from 26 May 2020 until 9 June 2020. The claimant made complaints of unfair dismissal, disability discrimination and unpaid annual leave entitlement.
2. The respondent presented a response on 14 July 2020 resisting the claim and asserting that the claimant was fairly dismissed by reason of conduct,

that the claimant was not disabled and even if he was, they denied that he was subject to any discrimination because of his disability.

3. The case was considered by Employment Judge Feeney on 3 December 2020 and she determined that the case be listed for a preliminary hearing today in order that the Tribunal can determine as a preliminary issue, whether the claimant was a disabled person. The claimant Mr Aldred confirmed that he was disabled at the material time by reason of depression and anxiety.
4. The case was also listed for a final hearing from 7 to 10 February 2022 in the Manchester Employment Tribunal. Case management orders were made including the provision of an impact statement and medical records by Mr Aldred and the respondent Openreach confirming whether they continued to dispute that the claimant was disabled. Mr Aldred was also asked to provide further information relating the alleged discriminatory acts and Openreach was given permission to amend the response if so advised. The issues were identified with the discriminatory acts being either direct discrimination contrary to section 13 or harassment contrary to section 26 of the Equality Act 2010.
5. Openreach confirmed that they did not accept that Mr Aldred was disabled on 3 February 2021.

The Evidence Used in the Hearing

6. A hearing bundle was provided and which was prepared by Openreach's representatives and which was agreed with Mr Aldred. It was 70 pages in length and included an impact statement, medical evidence and additional relevant documentation relating to how Mr Aldred communicated his health issues to Openreach.
7. Mr Aldred confirmed that he had a copy of the hearing bundle and I was provided with an electronic copy which I was able to use during this remote hearing.

Findings of fact

8. These findings of fact are made for the purposes of determining the preliminary issue only and should not be treated as findings of fact to be used in the determination of the outstanding issues at the final hearing.
9. Mr Aldred commenced employment on 26 April 2007 as a telephone engineer and was an Openreach Customer Service Engineer when he was dismissed on 8 April 2020.

10. Mr Aldred was 54 years old when he was dismissed. He gave credible and reliable evidence regarding his health and he clearly had a tendency to be self-reliant when it came to managing his personal health. His medical records confirmed that before October 2018, his most recent attendance at his GP surgery was in April 2014 and I accept that he was a man who believed that he should only consult his GP for serious physical complaints.
11. Not surprisingly, his mental wellbeing was not something that bothered him a great deal until 2018. During October 2018, he described himself as reaching a stage where everything became '*overwhelming*', he said he became '*disorientated*' and felt '*lost and useless*'. He admitted that despite these feelings suggesting mental health concerns, '*I didn't want to admit to myself – people might think you are a loony*'. He said that he felt there was a stigma admitting to a mental health problem.
12. He gave an account of how his line manager seemed to allocate him 'underground' jobs to a greater degree than he should have done. Mr Aldred explained that it was not being underground that made this particular job challenging for him, rather that it was high pressured with an outcome being expected quickly and with frequent calls being made as to the engineer's progress. He said that although he might be given a number of jobs, there was no knowing how long each one would take and this created a very pressurised and stressful working pattern.
13. Rather than going to his GP, he made enquiries using Openreach's STREAM web site, which I understood to be a confidential way in which an employee could obtain advice as to whether they were experiencing levels of stress which could be a cause for concern. Mr Aldred completed the questionnaire online and the conclusion reached by STREAM staff was that he should be given '*a RED stress risk rating*'.
14. I was made aware of two consequences arising from this designation being applied to Mr Aldred. First of all, he was contacted and told that he should see his GP as a matter of urgency. Secondly, his line manager Jonathan Haselhum was emailed by STREAM on 29 October 2018 and informed of Mr Aldred's RED stress risk rating. An explanation was provided indicating potentially high levels of stress and that action should be taken quickly by management to address and manage these issues, including a 1:1 meeting to take place between line manager and Mr Aldred within 7 days. Warnings were given about self-harming and support that can be offered with regard to workload and health and wellbeing.
15. Although understandably Mr Aldred's recollection from that time were sketchy, he said that Mr Haselhum did not arrange a 1:1 meeting to take place. I did not need to consider Mr Aldred's relationship with his line

manager in relation to the determination of the preliminary issue, but it would have been most unfortunate if he did not react quickly to the STREAM email and arranged a 1:1 as a matter of urgency. Given the stress rating identified, a 1:1 using the STREAM guidance may well have been able to help Ms Aldred recover quickly from the mental health issues which he had at this time.

16. The GP records for 30 October 2018 record a '*stress related problem (First)*' and confirms that '*Work occ health advised he attend*'. I accept that this entry referred to the conversation which Mr Aldred had had with STREAM and which reflects his overall reluctance to attend his GP surgery of his own volition. He confirmed to his GP Dr Vishal Singh that he was struggling at work and was feeling very stressed. As a consequence, he was finding work more and more difficult and finding it more of a struggle. He stated that his boss was not very understanding and I accept that this referred to Mr Haselhum. An examination recorded the claimant as looking '*close to tears at times and did cry once*'.
17. Dr Singh said that he spoke with Mr Aldred at length and although he denied feeling depressed, it was noted that he was nonetheless offered medication, but refused. Mr Aldred was an ex smoker and he had concerns about becoming addicted to tranquilisers and also tended to avoid taking any medicine when unwell. However, the fact that Dr Singh offered medication in relation to this mental health condition, gave Mr Aldred a '*Sanctuary card/number*' for him to use if he felt his mental health worsened and signed him off work from 30 October 2018 to 13 November 2018 by reason of stress, indicated to me that Dr Singh treated Mr Aldred as having a significant health issue.
18. Dr Singh reviewed Mr Aldred on 13 November 2018 and he was told that he was feeling much better. His fit note in respect of stress was extended by one further day to enable a return to work on 15 November 2018. Mr Aldred was then reviewed by Dr Singh following his first day back at work and informed him that as Openreach had their own counselling service, he was going to have some sessions with them. He was described as appearing '*brighter*' but expressed being '*not keen on meds*' which suggested that Dr Singh felt Mr Aldred's condition might benefit from medication.
19. Mr Aldred confirmed that he was given 6 counselling sessions. He thought that they were helpful but was left with a worksheet describing coping strategies which felt was not particularly helpful. Upon the conclusion of his 6 sessions, he was told that any further sessions would need to be approved by his line manager. No recommendation was made for further sessions by his counsellor and Mr Aldred said that his '*male pride*' meant that he needed to '*step up to the mark*' and get back to work. He also felt

that his manager was unsympathetic towards his mental health and he was concerned that if he raised a grievance, work would become even more difficult.

20. Mr Aldred returned to work and although he was provided with a colleague to assist him on jobs, described himself as having good and bad periods of mental health during 2019. He certainly found work difficult and expressed a feeling of letting people down.
21. Mr Aldred's next attendance with his GP took place some 10 months following his previous attendance. The appointment was on 27 September 2019 and on this occasion he was seen by Dr D Singh. He complained of chest pain and explained that he was fearful because his father had died following a stroke. While Dr Singh would have Mr Aldred's previous attendance record with the GP surgery, she had not been involved with his mental health related attendances in 2018. The examination on this occasion was understandably focused upon the physical condition complained of, which is understandable given Mr Aldred's age and family history. He confirmed that he did not raise any mental health issues with his GP and that his GP did not question him about his mental health. He explained that his GP practice expected patients to only discuss the condition which had been identified when making the appointment. Taking into account the nature of Mr Aldred's condition and Dr Singh having no recent involvement with him in terms of mental health, no adverse inferences are drawn from this health issue not being discussed at this appointment.
22. During November 2019, Mr Aldred was working on an underground job when a colleague known as a 'patch lead', had to be called out to help him. He said that he experienced a severe anxiety attack, broke down in floods of tears and became uncontrollable and disorientated. I accepted that this incident happened as alleged and was an episode with symptoms which were similar to those which had prompted him to make a reference to STREAM and his in GP in October/November 2018.
23. The incident which ultimately resulted in Mr Aldred's dismissal took place on 10 December 2019 and he was suspended the following day pending a disciplinary investigation. He attended his GP on 12 December 2019 and this time he was seen by Dr V Singh, with whom he had seen in 2018. His attendance record described the problem as being '*Low mood (First)*', but in his history, mention was made of the previous year's attendance concerning mental health. He described his mood as '*remaining low in general, stress with work in general*'. On this occasion, Mr Aldred confirmed that he would try antidepressants and was prescribed sertraline 50mg tablets. He was also issued with a fit note indicating stress and dating from 12 December 2019 until 24 December 2019.

24. I noted that this attendance arose immediately after the disciplinary incident and the claimant's subsequent suspension. It is understandable that his mental health suffered as a consequence and that once suspended, he attended his GP surgery. It is a common occurrence in cases involving investigations concerning serious misconduct and any employee in this situation would be placed under a significant degree of stress, especially if they knew their job might be at risk. However, I am also aware that Mr Aldred did have a recent episode of mental health difficulties. Even so, he had decided to carry on with work following his counselling and just decided to carry on. I found his candour about his failure to see his GP following his counselling to be particularly convincing. He stated that *'lots of men my age don't go to the doctors...don't want to trouble or burden [them]. I was stupid, something I regret. If I could do [it] again, I would see my GP'*. This was something which was clearly difficult for him to admit to, but was also something which made a great deal of sense.
25. Stoicism of this nature while self-defeating, is also a behaviour pattern which does happen with some people. Mr Aldred's limited involvement of his GP since 2014 confirms that this was a behaviour which applied to him and he only attended in October 2018 when he had been told to do so following a STREAM application. He was signed off work with stress and although he returned to work and received counselling, I accept that the Mr Aldred had returned to fitness and continued to experience anxiety at work. It is unfortunate that he did not seek additional counselling sessions and visit his GP at an earlier date in 2019, but his failure to take these actions does not indicate the end of his mental health difficulties and his oral evidence was convincing in this regard.
26. Mr Aldred explained that the events arising from 10 December 2019 were the straw that broke the camel's back and the suspension finally persuaded him to return to his GP.
27. Further attendances at his GP took place on 10 January 2020 and on subsequent occasions during 2020. The sertraline which he was initially prescribed was changed to fluoxetine following stomach issues which he experienced when taking the first antidepressant.
28. Although not directly relevant to the preliminary issue today, there was no dispute that Mr Aldred's condition had not improved since he was dismissed and he continues to suffer from depression and anxiety related issues. The claimant says that his antidepressant dosage has been doubled and he presented at the hearing today as someone who was struggling with their mental health.

The Law

Disability discrimination

29. Under section 6(1) of the Equality Act 2010 ('EQA'), a person has a disability if they have a physical or mental impairment and that impairment has a substantial and long-term adverse effect on their ability to carry out normal day to day activities.
30. Reference is made to Schedule 1 of the EQA which provides supplemental information concerning the determination of a disability. In particular, it explains in paragraph 2(1) that 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.
31. Paragraph 2(2) goes on to say that *'[I]f 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 occur.'*

Discussion and Analysis

32. Mr Williams made the very important point during this hearing that I should consider the question of Mr Aldred's disability from the perspective of what was happening at the material time of his employment with Openreach and not from a position of hindsight. I have reminded myself of this consideration in determining the preliminary issue. Mr Williams continues to display health issues concerning his mental health, but I must look at what was happening in the years immediately preceding his dismissal on 8 April 2020.
33. This is case involving a mental health condition relating to depression and anxiety. It was not something which became apparent to Mr Aldred until 2018 when he attended his GP, having not previously raised any issues with the GP since 2014. This was prompted by a reference which he had made to STREAM and which told him to go his GP following his RED stress risk rating designation.
34. Mr Aldred was clearly not a man who would seek medical help until things had become serious. The way in which he ended up attending his GP in October 2018 was a clear indication of that. His evidence concerning the stigma he felt that could be attached to mental health issues was credible and was consistent with how he accessed health services. Indeed, he was keen to avoid accepting he was depressed at his first appointment and he was very resistant to being prescribed anti-depressants even

though his GP felt it was appropriate to offer them. He was signed off sick and although the fit notes referred to stress, the medical evidence supports concerns from Mr Aldred's GP that he might be depressed and Mr Aldred's resistance to such a diagnosis.

35. Although I did not have comprehensive witness and documentary evidence concerning Openreach's initial reaction to the STREAM assessment and RED stress risk rating, I accept that line management would have been informed of his serious mental health difficulties. While the respondent's knowledge of a disability is not something being considered as a preliminary issue at this hearing, the STREAM assessment clearly identifies not only a mental health issue involving Mr Aldred, but something which revealed serious health issues.
36. Mr Aldred also was recorded as telling his GP about how overwhelmed, disorientated, lost and useless he felt. Warnings were made to his line manager about risks of self-harm and how workload could affect his health and well-being. While Mr Aldred had only recently referred this matter to STREAM and his GP, these references clearly involved substantial health issues which affected his day-to-day activities. This necessitated a period of sickness absence and his absence from work appeared to assist an improvement in his health. However, he remained vulnerable and while continuing to decline anti-depressants, he returned to work with 6 counselling sessions being provided.
37. I accepted that the counselling while helping Mr Aldred did not resolve his mental health issues, but that he was unwilling to ask for further sessions and it appears that line management did not offer any independently of a request from him.
38. To some extent, it might seem attractive to argue that this was the end of Mr Aldred's health issues and that this acute episode resolved quickly. However, while he continued to function in terms of a regular attendance at work, his breakdown in November 2019 suggests a continuing vulnerability. Mr Aldred gave convincing evidence of a continuing low mood which continued because of his poor mental health and how the routine tasks which his engineering role required, were a continual source of anxiety.
39. Every person has a breaking point when it comes to mental health and it appears that Mr Aldred reached his in late 2018. While he was able to restore some degree of normal functioning following his initial sickness absence and counselling, a full resolution had not taken place and he continued to be vulnerable to a serious attack of his mental health issues returning. This may have been due to a failure on the part of Mr Aldred to seek further counselling sessions or return to his or because of a failure of

line management to keep him under supervision. However, this is not an issue which I need to consider as a preliminary issue and I am satisfied that the initial episode of poor mental health in late 2018 resulted in an impairment which had a substantial impact upon Mr Aldred's day to day activities. Following his return to work following this initial sickness absence, it remained likely that this impairment would return to a substantial level as was experienced before. Unfortunately, this happened within a year when his breakdown in November 2019 took place and it is likely that his mental health continued to trouble him throughout 2019. .

40. It is unfortunate that line management do not appear to have reacted to Mr Aldred's breakdown in November 2019 and no reference to Occupational Health appears to have been made and to consider whether he was fit for work. Mr Aldred eventually attended his GP following the incident on 10 December 2019. A cynical view might be that he simply attended his GP to ensure that he had mitigating evidence concerning his mental health which might explain his behaviour on 10 December 2019. However, the earlier STREAM assessment, GP referral, sickness absence and more recent breakdown suggested a final recognition by Mr Aldred that he remained unwell and that he needed further support. He even finally accepted anti-depressants despite his resistance to their prescription seemingly because of a combination of his history smoking and fear of stigma in relation to depression.
41. I do not think it is necessary to discuss any distinction between anxiety and depression and how Mr Aldred's condition was referred to in his fit notes produced by his GP. My consideration of the preliminary issue has been to determine whether there was an impairment and whether it had a substantial impact on day-to-day activities. Mr Aldred had a mental health condition which is consistent with depression and anxiety, but more importantly he had reached a stage in late 2018 where he suffered from anxiety, a sense of low self-esteem and potentially with a risk of self-harm and suicide. This clearly affected his ability to do his job without any attack of stress or anxiety and this vulnerability continued throughout 2019.
42. Although this was a difficult matter to consider, Mr Aldred undoubtedly began to develop depression and anxiety during late 2018 and that this resulted in an impairment which had a substantial adverse impact upon his day-to-day activities. He did not appear to properly return to full fitness during the remainder of his employment and although the impact lessened to some degree in early 2019, it remained likely that it would relapse in the near future. Accordingly, I am satisfied that Mr Aldred was disabled by reason of depression and anxiety within the meaning of section 6(1) of the Equality Act 2010 at the material time.

43. This decision of course, does not determine whether or not Openreach were aware of this disability at the material time. This is something which the Tribunal will consider as part of the issues to be determined at the final hearing.

Employment Judge Johnson

Date: 12 May 2021

Sent to the parties on:
17 May 2021

For the Tribunal Office