



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr S Mehmi

v

LHR Airports Ltd

Heard at: Cambridge Employment Tribunal

On: 15th March 2022

Before: Employment Judge King

Appearances

For the Claimant: Mr Harris (counsel)

For the Respondent: Ms Ahmad (counsel)

This has been a remote hearing which has been conducted by CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The claimant was disabled within the meaning of s6 Equality Act 2010 at the relevant time.

REASONS

1. This is the reserved judgment of the Tribunal in the above matter. The case was listed for a preliminary hearing on 15th March 2022 to deal with the preliminary matter of whether the claimant was disabled within the meaning of the Equality Act 2010 but the Tribunal reserved its judgment due to time constraints on the day of the hearing.
2. The claimant was represented by Mr Harris (Counsel). The respondent was represented by Ms Ahmad (Counsel). I heard evidence from the claimant and two further witnesses on his behalf Mrs Sharma-Bansal and the claimant's sister Miss Mehmi, all having provided witness statements in advance. As one would expect, I heard no witness evidence from the respondent. The claimant and respondent exchanged documents in

advance and prepared an agreed bundle of documents which ran from pages to 1 to 365 to which I have had regard.

3. The matter was heard via CVP. The case had been listed for a preliminary hearing at the preliminary hearing on 10th December 2021 to decide whether the claimant was disabled at the relevant time being April 2018 to November 2020.
4. The claimant brought claims for unfair dismissal, direct and indirect disability discrimination, failure to make reasonable adjustments, discrimination arising from a disability and other payments.

The issues

5. The issues to be determined at the preliminary hearing had been set out in the notice of hearing of 10th December 2021 as follows:
 - 5.1 Whether the claimant was disabled within the meaning of section 6 of the Equality Act 2010 for the period April 2018 to November 2020.
6. In this regard the claimant relies on his mental impairment of depression and anxiety.

The law

Discrimination

7. The provisions concerning disability in respect of discrimination claims are set out in s6 Equality Act 2010 as follows:

6 Disability

- (1) A person (P) has a disability if—
 - (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
- (2) A reference to a disabled person is a reference to a person who has a disability.
- (3) In relation to the protected characteristic of disability—
 - (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
 - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

- (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—
 - (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
 - (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
 - (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
 - (6) Schedule 1 (disability: supplementary provision) has effect.
8. Section 212 of the Equality Act 2010, clarifies that:
- (1) In this Act- ...
'Substantial' means more than minor or trivial.
9. There are supplementary provisions in relation to disability in Schedule 1 of the 2010 Act. Guidance has been issued by the Secretary of State regarding matters to be taken into account by Employment Tribunals in determining questions relating to the definition of disability.
10. I am required to take into account any aspect of the Guidance which appears to be relevant. Paragraph A2 of the Guidance contains a helpful analysis of Section 6 of the Equality Act 2010:
- Main elements of the definition of disability
A1 ...
A2 This means that, in general:
- the person must have an impairment that is either physical or mental;
 - the impairment must have adverse effects which are substantial;
 - the substantial adverse effects must be long term; and
 - the long term substantial adverse effects must be effects on normal day to day activities.
- All of the factors above must be considered when determining whether a person is disabled.
12. Paragraph 2 of Part 1 of Schedule 1 to the Equality Act 2010, clarifies:
- Long term effects-
- (1) 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.

13. Under Paragraph 5 of Part 1 of Schedule 1 to the Equality Act 2010 medical or other treatment is considered:

"an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it, and but for that, it would be likely to have that effect"

14. It is well established that the onus of proving a disability is on the Claimant, on the balance of probabilities (Morgan v Staffordshire University [2002] IRLR 190).

15. In coming to this Judgment, I have regard to the Employment Appeal Tribunal's decision in J v DLA Piper UK LLP UKEAT0263/09/RN in which Underhill J, as he then was, drew a distinction between the symptoms of low mood and anxiety caused by clinical depression, which was a situation likely to meet the definition of disability, and those derived from a reaction to adverse circumstances such as problems at work, or adverse life events, which was not.

16. The Employment Appeal Tribunal in the J v DLA Piper case acknowledged there is a line between those two states of affairs which might be blurred, but Underhill J gave guidance as follows:

"We accept that it may be a difficult distinction to apply in a particular case and the difficulty can be exacerbated by the looseness with which some medical professionals and some lay people use such terms as depression, clinical or otherwise, anxiety and stress. Fortunately, however, we would not expect those difficulties often to cause a real problem in context of a claim under the Act. This is because of the long term effect requirement. If as we recommend at paragraph 42 above, the Tribunal starts by considering the adverse effects issue and finds that the Claimant's ability to carry out normal day to day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering clinical depression, rather than simply a reaction to adverse circumstances. It is a common sense observation that such reactions are not normally long lived."

17. The Statutory Guidance at paragraph B5 recognises that depression is typically an impairment with fluctuating or recurring effects.

18. Paragraph 2(2) of Part 1 of Schedule 1 to the Equality Act 2010, says:

(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.

19. I have had regard to the EHRC Code of Practice on Employment and Appendix 1 in particular and the Equality Act 2010 Guidance.

20. During submissions we discussed the case of:

J v DLA Piper UK LLP [2010] ICR 1052

20. The claimant's representative also referred to a number of cases in his written submissions to which I have had regard:

Paterson v Commissioner of the Police for the Metropolis [2007] IRLR 763
SCA Packaging Ltd v Boyle [2009] IRLR 746
All Answers Ltd v W [2021] IRLR 612

Findings of fact

21. The claimant was officially diagnosed with Depression and/or anxiety in October 2015. A 'Safety Plan' was drawn up dated 4 November 2015 setting out what to do when the Claimant felt at risk. The claimant was at that time feeling withdrawn and spending too much time on his own. Coping strategies were implemented and a plan for services he could call if he felt unsafe or needed help and support.
22. The claimant's triage assessment from this time refers to low mood, feeling hopeless and negative thoughts. He had a score of 10 on PHQ9 and 13 on GAD-7. This referred to this affecting his work as he was worried how people would think of him. There is also a reference to mental health issues within the family and caring responsibilities and that he had trigger points of work. Anger was referenced as well as shouting and aggression and issues over road rage and problems with family and shop assistants.
23. The triage assessment letter dated 5 November 2015 referred to the claimant's low mood and anger management being his main difficulties and that he scores 16 on PHQ9, meaning moderate-severe symptoms of depression, and 15 on GAD7 meaning severe symptoms of anxiety. As a result of the assessment the claimant was referred for cognitive behavioural therapy (CBT).
24. An OH report prepared on behalf of the respondent dated 8 January 2016 refers to the claimant recently being off work with depression and the claimant was having therapy as set out above.
25. An updated safety plan was compiled for the claimant on 16 May 2016 referring to difficulties as being thoughts of being better off dead, withdrawing self, feeling hopeless and helpless, anxious about the future and not getting things done particularly in relation to his family caring responsibilities.
26. Following completion of 6 sessions of CBT, the claimant was referred by the NHS for counselling in 2016. A further triage assessment took place which refers to anxiety and fighting with his landlord, as well as issues at

work and the burden of his family caring responsibilities and that the claimant had a period off work as a result. This reports that the claimant has stopped talking to his friends and has a limited social life.

27. A summary of the claimant's counselling was provided for 2016. It outlines the cause of his stress and anxiety initially was the overwhelming sense of duty and responsibility for his mother and sisters as his mother was unwell.
28. There is a gap in the medical evidence for 2017. In April 2018 the claimant made contact with the Employee Assistance Programme (EAP).
29. On 2 September 2018 the claimant emailed his manager referring to ongoing personal challenges and that his depression has contributed to his lack of confidence and anxiety. The email requests reasonable adjustments and asks that he not conduct high level tours. These were discussed at the preliminary hearing as being airport tours where the claimant would be required to show dignitaries and VIP's around the airport and these were a particular trigger point for the claimant.
30. The respondent's records show a conversation with his manager in July 2018 about his mental health and also in August 2018 about depression. There is a further entry for 21 May 2019 which refers to the Claimant not being able to cope under pressure during a recent incident and concerns regarding the claimant's 'state of mind to continue at work' coming from a colleague. On 24 May 2019 the Claimant was requested not to return to work until he had contacted the EAP team and sought help for his mental wellbeing and in June 2019 told that an OH referral would be made before he could return to work.
31. On 28 November 2018 an email between managers refers to advice on company policies and concerns about the claimant's welfare. The development plan sent with the email refers to areas of improvement that include: displaying positive behaviours; calm and rational when under pressure and during difficult conversations; no inappropriate outbursts or frustrations.
32. In the claimant's end of year review 2018, the Claimant describes having struggled with the job and being afraid to seek help or support. The managers comments refer to the Claimant having displayed some negative behaviours.
33. The claimant has a number of medical records from 2015 onwards. These refer to suicidal thoughts, low mood and anger giving the claimant's GAD 7 score for several dates of between 14 and 16, meaning moderate to severe anxiety. In June 2019 the claimant had a GAD7 score of 16.

34. During 2017 and 2019 the claimant was in a battle with social services to get his mother into a nursing home which happened in 2019 and she sadly passed away subsequently. The claimant was the oldest son and felt a great deal of responsibility for care and family matters. A particularly difficult period was 2017-2019 largely within the relevant period and the claimant's friend described how he would breakdown on the phone which was something she had not witnessed since she knew him in 2007.
35. On 5 June 2019 the claimant was referred to Hounslow talking therapies for people experiencing depression and / or anxiety. The triage letter dated 7 June 2019 refers to problems of stress, anxiety and low confidence as well as the claimant feeling as though life would be better off if he wasn't there and having had thoughts about how he could end his life. It refers to the claimant scoring 12 on PHQ9 (moderate depression) and 16 on GAD7 (severe anxiety).
36. The claimant's OH report of 7 June 2019 requested by the respondent says the claimant has a reactive disorder with symptoms of anxiety and depression. It described the difficulties the claimant had experienced lately over family matters in particular and his caring burdens. The OH practitioner felt given the impact on his mental health and activities, where treatment has started that it would be prudent to proceed on the basis that the claimant is disabled.
37. There was a further OH report of 31 July 2019 which refers to the claimant still experiencing psychological symptoms and looking for ways to deal with them. Further, if personal pressures continue they may affect his mental health and provoke anxiety/depression.
38. A further OH report was prepared on 9 October 2019 which referred to a GP report and that in summary it appeared that the claimant had been experiencing stress and anger, on a background of anxiety and depressive symptoms and that he continued to seek advice from the psychology services.
39. The claimant's evidence and that of his witnesses was credible particularly as this came from his friend as well as family. The claimant set out the impact of the impairments on his life. The claimant and his sister became emotional during their evidence and the impacts on his life and the personal challenges within the family.
40. The claimant would lose his temper and become angry with friends and family and others. The claimant's witnesses both described incidences where he would act out of character and irrationally with anger issues. The claimant could become angry and frustrated and explosive. This is confirmed by Ms Sharma Bansal and Ms Mehmi. I accept their evidence that this volatile behaviour was out of character for the claimant.

41. The claimant would become withdrawn and would often remain at home not communicate with others. His social withdrawal was described by the witnesses and confirmed by Ms Sharma-Bansal. It would be her and her husband left to make contact and she would hear less and less from him. The claimant had difficulty communicating on the telephone with Ms Sharma-Bansal and withdraw from contact and the claimant had difficulty in engaging in conversation and remembering things. She described that during the COVID restrictions (which were more recent than the majority of the relevant period) they had not seen each other and also rarely had video calls and that he found it difficult to hold a normal conversation.
42. The claimant would lack motivation to carry out housework, personal care or shopping and would rely on others to do that for him. The claimant's sister described how his flat changed and he no longer took pride in his surroundings. His sister would assist him and the claimant's appetite was impacted either not eating or binging on unhealthy food. The Claimant would lack motivation to carry out administrative tasks, e.g. leave letters unopened on not dealing with legal matters concerning his mother, booking leave or opening payslips and the claimant needed help checking emails. Whilst the witness statements were light on dates in determining the time frame it was clear from the witness evidence that this was from 2017-2020.
43. The claimant would spend a lot of time reading and re-reading emails to make sure he understood them or he had drafted them correctly sometimes seeking input from Ms Sharma-Bansal as he was anxious as to whether what he was saying was the right thing. This was before the pandemic. Again, this was not characteristic of the claimant's behaviour before he was ill.
44. The claimant initially refused anti-depressants and instead tried alternative therapies including St Johns wort and spent a disproportionate amount of money on private therapies such as hypnotherapy without real benefit.
45. The claimant described during the relevant period of incidents of rage directed towards others. He described the impact on his sleep and feeling emotionally, physically and mentally exhausted. Sometimes he would have little or no sleep and other times he slept for long periods. His sister confirmed there were times when she would visit from 2017 onwards and he would be asleep during the day and he had not showered. He would be forgetful and not remember things.
46. Whilst the claimant's witness statements were surprisingly short of dates given the issues, I was able to establish from the respondent's cross-examination and my clarification of the time periods that much of what he described was in the relevant period for the purposes of the claim. Mental

health illnesses in particular are difficult to assess as no two claimant's are impacted in the same way but the evidence I heard orally on the day was full and credible filling gaps in medical records for example.

Conclusions

Does the claimant have a physical or mental impairment?

47. The claimant has diagnosed mental health impairments in the form of both anxiety and depression.
48. It is clear that the claimant had had a difficult period of his life in particular between 2017 and 2019 but I do not consider his symptoms and diagnosis to be a reaction to adverse life events as identified in J v DLA Piper. The claimant was first diagnosed before this time in 2015 and continued to suffer even after the battle with social services ended and his mother was in a care home. The effects were not short term as a reaction but over a long period as set out below.
49. I am satisfied that he had a mental impairment.

Does that impairment have a substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities?

50. It is for the claimant to establish he is disabled within the meaning of the Equality Act 2010. The focus should be on what the claimant cannot do or can only do with difficulty not what he can do. The effect should be more than minor or trivial.
51. Here the claimant gave compelling evidence as to the adverse effects on his personal life. There was evidence of the impact in his communications in writing and verbally. It impacted on his ability to carry out day to day tasks such as sleeping, washing, shopping and socialising. It would take him longer to complete tasks when he did them. Emails and managing affairs are everyday matters people have to contend with. This compelling evidence was mirrored in the witnesses evidence on his side from his friend and sister.
52. There is medical evidence to support the impact on his life and as set out above in the findings of fact contemporaneous reports of symptoms which mirrored that witness evidence such as the aggression, impact on social activities and wanting to end his life.
53. I have disregarded the high level tours from my consideration as to normal day to day activities as in line with the Equality Act Guidance normal day to day activities does not include "activities which are normal only for a particular person or small group of people." I recognise the tours will have elements of activities considered normal day to day matters such as

speaking to strangers or VIPs. However, there are other compelling matters which evidence the impact on day to day activities as set out in my findings of fact above.

54. Turning now to whether the impact on day to day activities is substantial s212 Equality Act 2010 defines substantial as more than trivial or minor. I have taken account of the guidance in Paterson v Commissioner of the Police for the Metropolis [2007]. Having heard the evidence it is clear that the impacts on the claimant were substantial. They were noticeable to family and friends, they changed his behaviour and turned the claimant into someone neither he nor those close to him recognised. They changed his appearance and that of his flat due to his inability to wash, eat sensibly and cook, shop and leave the house socially. He was unable to communicate effectively flying off the handle with road rage and shop assistants. He was unable to communicate effectively with those around him as evidenced by his witnesses.
55. I have considered the claimant's coping strategies but these were working following his diagnosis in 2015 for a period and less so during the relevant period. He tried therapies in 2016 and implemented some strategies but they were not entirely effective. Indeed, the claimant's evidence was he spent large sums on private hypnotherapy. I have considered the guidance as to whether coping or avoidance strategies might alter the effects of an impairment to the extent that they are no longer substantial and no longer meets the definition of disability. However, this case is more akin to the Guidance of whether the claimant avoids doing things because of a loss of energy and motivation and it is not reasonable to conclude that a person who employed such an avoidance strategy was not a disabled person.
56. Turning now to whether as at April 2018 onwards the claimant's impairment had a substantial adverse effect on his ability to carry out normal day to day activities which was long-term.
57. There is medical evidence to support that the impact was between 2015 and September 2016 which is a period of longer than 12 months. I have in mind Paragraph 2 of Part 1 of Schedule 1 to the Equality Act 2010, and the guidance within that paragraph. Further the case law that the time for assessing whether the substantial adverse effect was long term is as at the time of the discriminatory acts as per All Answers Ltd v W [2021]. The relevant period in this case has been identified as April 2018 to November 2020. There is a gap in the medical evidence in 2017 but the claimant's compelling evidence was that his mental health deteriorated during this difficult period assisting with his mother which I have accepted.
58. The claimant sought assistance from EAP in April 2018 as matters had reached a crunch point. Given the claimant had by that time been suffering from depression and anxiety since 2015 it had by 2018 lasted longer than twelve months. I have set out above my conclusions on whether the coping mechanisms meant that the impact during 2017-2018

was no longer substantial and concluded that it was not. Avoiding doing things does not mean that the claimant should not be classed as disabled. I further accept the claimant's submission that without the treatment of the CBT the impact would have been greater.

59. There is no evidence to suggest that the claimant stopped suffering with his mental health and indeed I prefer his evidence that from 2017 it worsened. I therefore conclude that as at April 2018 the claimant's depression and anxiety had lasted longer than 12 months and it had a substantial adverse effect on his normal day to day activities.
60. If I had not so concluded, then in any event I would have concluded that by April 2018 it has lasted or was likely to last longer than 12 months. Certainly by April 2018 given his history it is likely that the effect of the impairment is to last longer than 12 month meeting the definition of disability. It was only some months later (September 2018) that on the claimant's untested case he is no longer coping and asks for reasonable adjustments. It is clear that it was continuing to have a substantial adverse effect in 2018. It was not a new condition and the previous period had been prolonged lasting more than 12 months.
61. As set out above this is not a reaction to a one off life event which is anticipated to be short in nature. Indeed, the evidence that I heard made it clear that the claimant did not recover when his battle with social services ended and his mother went to a care home within the relevant period. I am satisfied that the claimant has established that he was disabled within the relevant period identified for this claim April 2018 - November 2020. There is no evidence that he ceased to be disabled within the relevant period and I am satisfied on the evidence that the claimant met all the elements of the legal definition of disability within this relevant period.
62. It therefore follows that my conclusion is that the claimant is disabled within the meaning of s6 Equality Act 2010.

Employment Judge King

Date:23.05.2022.....

Sent to the parties on: 24 May 2022

For the Tribunal Office