



EMPLOYMENT TRIBUNALS

Claimant: Mr. Astley

Respondent: Genome Research Ltd

PUBLIC PRELIMINARY HEARING

Heard at: Bury St Edmunds Employment Tribunal (in person)

On: 8 December 2023

Before: Employment Judge H. Mason

Appearances

For the Claimant: In person

For the Respondent: Mr. Gordon, counsel

RESERVED JUDGMENT

The Claimant did not have a disability (within the meaning of section 6 and Schedule 1 of the Equality Act 2010) during the relevant period (1 December 2020 to 31 March 2023) and his complaints of unlawful disability discrimination contrary to the Equality Act 2010 are dismissed.

REASONS

Background

1. This hearing was listed by EJ Moore who conducted a case management hearing on 9 October 2023 which both parties attended.
2. EJ Moore listed this Public Preliminary hearing (para 2 of her orders):
 - a. *To decide whether the Claimant is or was at any material time a disabled person within the meaning of s6 Equality Act 201 by reason of the condition of experiencing “emotional flashbacks” and/or Complex Post Traumatic Stress Disorder (“CPTSD”)*
 - b. *To decide pursuant to rule 37 of the Employment Tribunals Rules of Procedure 2013 whether any of the complaints should be struck out on the grounds they have no reasonable prospect of success; and or;*
 - c. *To decide pursuant to rule 39 of the Employment Tribunal Rules of Procedure 2013 whether the Claimant should be required to pay a deposit*

as a condition of continuing to advance any of the complaints on the grounds that have little reasonable prospect of success.”

3. The Respondent does not accept the Claimant was disabled (as defined in s6 Equality Act 2010 (“EqA”) during the relevant period. The relevant period of alleged discrimination is 1 December 2020 to 31 March 2023 (“the relevant period”); this ties in with the three allegations of disability discrimination identified in the issues by EJ Moore.
4. EJ Moore also ordered the Claimant to provide to the Respondent by 24 November 2023 “... a statement in which he should describe the adverse effects that the conditions of “Emotional Flashbacks” and/or CPTSD have on his ability to carry out normal day-to-day activities, the date upon which his condition started, the nature and extent of any treatment and any prognosis, if known”. By the same date, the Claimant was ordered to provide any medical evidence upon which he intends to rely.
5. I was provided with a bundle of documents, 51 pages, to include the pleadings, EJ Moore’s orders, the Claimant’s disability impact witness statement and medical evidence. Any reference to a page number in this Judgment is to the corresponding page number in the bundle. Mr. Gordon also provided a Written Skeleton Argument; the Claimant was provided with a copy and given time to read it,
6. After a brief adjournment for reading time, I heard evidence from the Claimant who confirmed his disability impact statement was accurate and truthful and was cross-examined by Mr. Gordon; I also asked questions by way of clarification.
7. Both the Claimant and Mr. Gordon made brief verbal submissions. Mr. Gordon agreed to make submissions first and the Claimant was then given time to prepare before making his own submissions.
8. Due to lack of time, I reserved my decision with regard to the issue of whether or not the Claimant was disabled and relisted a further Public preliminary Hearing to consider the Respondent’s application for a strike-out order (alternatively a deposit order). I have made separate case management orders regarding this.

Relevant Law

9. **S6 Equality Act 2010 (EqA)**
*“(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”*
10. A Tribunal must take into account any relevant aspect of :
 - 10.1 **Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011)** (“the Guidance”); and
 - 10.2 **The Equality and Human Rights Commission: Code of Practice on Employment 2011** (“the Code”)

11. The question of whether a person meets the definition of disability is matter for the Tribunal and not medical experts: **Paterson v The Commissioner of Police of the Metropolis [2007] ICR 1522**. While the view of doctors on the nature and extent of claimed disability is relevant, the crucial issue is one for the tribunal itself to decide on all the evidence.
12. **Does the impairment have an adverse effect on their ability to carry out normal day-to-day activities?**
 - 12.1 EqA 2010

“5(1) 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—
(a) measures are being taken to treat or correct it, and
(b) but for that, it would be likely to have that effect.
(2) “measures” includes, in particular, medical treatment ...”
 - 12.2 The Guidance:

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 day-to-day activities.
It is the effects of the impairment(s) that need to be considered, rather
 - 12.3 The Code: Appendix 1:
 7. There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause.
 14. Normal day-to-day activities are activities “*carried out by most men or women on a fairly regular and frequent basis*”.
 15. Day-to day activities thus include – but are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing, going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one’s self. Normal day-to-day activities also encompasses the activities which are relevant to working life.
13. **Is that effect substantial?**
 - 13.1 EqA: S212(1) defines “substantial” as “more than minor or trivial”.
 - 13.2 The Guidance:
 - B2 & B3: The time taken to carry out an activity and the way in which an activity is carried out are factors to be considered when assessing whether the effect of an impairment is substantial.
 - B4 An impairment might not have a substantial adverse effect on a person’s ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.
 - B7. Account should be taken of how far a person can **reasonably** be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities.

13.3 The Code: Appendix 1:

8. A substantial adverse effect is something which is more than minor or trivial.
9. Account should be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.
10. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities.

14. **Is that effect long-term?**

14.1 EqA Schedule 1, Part 1

- (i) *“2(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.”*
- (ii) *2 (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 it is likely to recur”*

14.2 The Guidance:

- A16. Someone who is no longer disabled, but who met the requirements of the definition in the past, will still be covered by the Act.
- C2. The cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect.
- C3 “Likely” should be interpreted as meaning that it could well happen.
- C4 “In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age)”.
- C5. Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of “long-term”.
- C6. If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term.
- C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the ‘long-term’ element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.
- C9. Likelihood of recurrence should be considered taking all the circumstances of the case into account.

14.3 The Code:

2.9 In most circumstances a person will have the protected characteristic of disability if they have had a disability in the past, even if they no longer have the disability.

Appendix:

13. If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur; that is, if it might well recur.

Findings of Fact

15. The Claimant was employed by the Respondent as a Senior Software developer since 4 February 2004. He presented this claim on 28 April 2023. His employment was subsequently terminated by the Respondent and the Claimant has very recently lodged a second claim which I have not seen.

16. My findings are limited to the issue of whether the Claimant was disabled during the relevant period (1 December 2020 to 31 March 2023). The impairment relied on is “Emotional Flashbacks” and/or PTSD. I make no findings with regard to the potential causes(s) of the Claimant’s Emotional Flashbacks and/or CPTSD as it is not necessary for me to do so for the purposes of deciding whether the definition of disability in s6 EqA is met: *“There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause.”* (The Code: Appendix 1).

17. I found the Claimant to be a credible witness and believe he did his best to honestly answer any questions put to him and to explain his case.

18. I have considered all the medical evidence provided by the Claimant, being as follows:

18.1 A letter from Dr. Karen Stanley (BSc (Hons), MBChB, MRCPsych, MSc, DLM) dated 22 May 2023 [pages 34-36];

18.2 A letter from Ms. Kate Perry, Systemic Psychotherapist BA, BSC, MSC, UKCP dated October 2023 [pages 41-42];

18.3 A letter from Mr. Gary Richardson, Cognitive Behavioural Psychotherapist (Onebright Mental Health) dated 30 November 2023 [page 51].

19. The Claimant did not provide any evidence from his GP or his GP medical notes.

20. Having considered the medical evidence and the Claimant’s written statement and verbal evidence, I find he sought and received medical help as follows:

20.1 In September/October 2017, the Claimant had a session of Talking Therapy with Evolve (a facility paid for by the Respondent and made available to all employees). He had a second session in early 2019 but concluded that Evolve were unable to help. (Dr. Stanley refers to this in her letter [page 35]).

20.2 From March 2018 until early 2019 he was on antidepressants prescribed by his GP. He stopped taking antidepressants in early 2019 because he considered he no longer needed them. Whilst the GP records have not been provided, Dr. Stanley refers to this in her letter [page 35] and I have no reason to disbelieve the Claimant.

- 20.3 He received a course of systemic counselling/CBT from August 2019 with the NHS scheme Improving Access to Psychological Therapies (IAPT) (Dr. Stanley's letter refers [page 35]). The Claimant says [page 46] (and I accept) that this was "*a form of textual CBT*" and probably helped with some issues, but he found it too short to make any difference to the emotional flashbacks. The counsellor acknowledged the Claimant had emotional flashbacks but not full blown PTSD. I accept that the NHS IAPT does not write letters or reports; in any event the Claimant felt it was not material to his case and they were unable to help.
- 20.4 From May 2019 until February 2020, he had a number of sessions (about 40 hours) with Ms. Kate Perry. Ms. Perry was recommended to him by his solicitor and he paid privately. I accept his evidence that Ms. Perry helped him to understand the emotional flashbacks and then in February 2020 she terminated the sessions because she could not help him any further.
- 20.5 After the end of sessions with Ms. Perry in February 2020, the Claimant did not seek help again until 2023 despite having the opportunity to access private health care provided by the Respondent (AXA scheme) (which in fact he accessed for other reasons during this period). I accept his evidence that he did not do so because by 2020, he "*knew what life was like and made adjustments*"; he had by this time learned to live with the flashbacks and learned to avoid the triggers
- 20.6. Then on 22 May 2023, through the AXA scheme, he met with Dr. Stanley (remotely); in evidence the Claimant acknowledged that it was "*fair to say*" he did so because "*pending unemployment*" focussed his mind on getting benefit from his employer's health insurance whilst he could. Dr. Stanley diagnosed "*Post Traumatic Stress Disorder and comorbid depressive symptomatology*" [page 36]. The Claimant did not meet with Dr. Stanley again.
- 20.7 Dr. Stanley referred the Claimant to Mr. Gary Richardson. The Claimant had four sessions with Mr. Richardson via video call for four sessions starting in June 2023. Mr. Richardson states in a letter dated 30 November 2023 [page 51]:
- (i). "*As a Cognitive Behavioural Therapist, I am unable to diagnose. However, I wanted to write to you to disclose Mr. Astley's presenting difficulties from his perspective.*
Mr. Astley describes his main presenting problem as symptoms consistent with emotional flashbacks from the trauma he had suffered and memory problems"
 - (ii) Mr. Richardson states that the Claimant's initial scores on questionnaires indicated "*... moderate symptoms of depression,,, and moderate symptoms of anxiety*" and "*symptoms of PTSD*".
 - (iii) Mr. Richardson states that the Work and social adjustment scale (WASA) "*indicated significant impact in all areas of his life*" but does not give any specific examples or illustrations. He refers to "*a number of external stressors occurring simultaneously, both currently and historically*" but the only stressor he mention is the Claimant "*losing his job*".
The Claimant says Mr Richardson advised that a course of around 20 weekly sessions would significantly improve his emotional flashbacks but the Claimant did not pursue this as his employment was terminated.
- 20.8 With regard to medication, there is no evidence that the Claimant was on medication at the relevant time although it was discussed with Dr. Stanley.
21. I accept the Claimant's evidence that since mid-2019 he has experienced emotional flashbacks and accept his description of an emotional flashback in his witness statement as "*involuntary memory recall which is very vivid*" and "*bring the*

feelings that come with some events from the past” and that in his case the emotions are almost always grief and sadness (Claimant’s witness statement [pages 43-44]). I also accept that these flashbacks vary in terms of the level of distress they cause him depending on his vulnerability at the time and the context. In his words: *“It can be as slight as my dropping out of conversation for a moment to regain my composure through an unsteady voice or tears welling up that might be successfully hidden, to a more severe and debilitating attack which might look like the result of being punched in the solar plexus”* (Claimant’s witness statement [page 45]).

22. I have taken the start date of mid-2019 date from his ET1 (page 7). The Respondent acknowledges in the Grounds of Resistance (ET3) that:
“13. In or around 2020, an arrangement was put in place to encourage the Claimant to speak to Mr Teague [his Line Manager] when he was feeling triggered by any emotional flashbacks
23. In general terms the triggers relate to family (such as conversations, emails, images) and reported news/discussions of traumatic/sad events or anything the Claimant finds distressing. In his witness statement [page 45] the Claimant states: *“In the workplace when doing the actual work of a software developer, there are almost never any triggers ...”* and that he has *“learned to “step over””* any triggers relating to databases and code describing patients and their illnesses. However, I accept his evidence that incidents at work could still be triggering such as receiving occasional emails from the Respondent (addressed to all employees) on family related topics particularly at Christmas time and seeing colleagues family pictures in photograph frames or on computer “screen savers.
24. I asked the Claimant how often the flashbacks occurred. He told me that he had about 12 flashbacks in the last 12 months and during the relevant period (1 December 2020 to 31 March 2023), they tended to come in “clusters” every few weeks. He said 2021 was *“more peaceful”* as he was working from home and therefore exposed to less potential triggers.
25. I accept his evidence that he experienced flashbacks on the following specific occasions:
 - 25.1 On one occasion in 2109 when driving but not since;
 - 25.2 12.2020: in response to an all-staff email advertising a children’s Christmas card design competition (referred to in his ET1 [page7]);
 - 25.3 25.11.2022: in response to an all-staff email regarding Domestic Abuse (referred to in his ET1 [page 7] and Dr. Stanley’s letter dated 22 May 2023, page 34).
 - 25.4 In February 2023 when visiting a friend and discussing liberation of the jews from Nazi concentration camps;
 - 25.5 31.03.23: in response to an all-staff email about summer childcare (referred to in his ET1 [page 7]);
 - 25.6 About 3 weeks ago (November 2023) when having a drink with a neighbour as a result of alcohol;
 - 25.7 Being asked about his family situation after a church service on an unspecified date (Claimant’s witness statement [page 45]).

26. I accept his evidence [page 47] that since his employment ended he is “*less troubled by emotional flashbacks*” because he is better placed to avoid the triggers.
27. The Claimant has learnt to avoid potential triggers and I accept his evidence that:
- 27.1 he avoids the news channels on TV and in fact avoids terrestrial TV and watches Youtube although he can still sometimes be caught unawares by advertisements such as for the Red Cross;
- 27.2 he does not have the news on when driving;
- 27.3 he avoids eating in one of three diners at work (Pebbles) as there is a running news screen;
- 27.4 he avoids drinking more than one beer if out socially;
- 27.5 he turns his chair around if children go past outside at work;
- 27.6 he avoids walking outside at work in his breaks in places where he may see children;
- 27.7 he avoids situations with small children;
- 27.8 he avoids seeing colleagues family pictures in photograph frames or on computer screen savers by altering the angle of his workstation and reminding himself photos may be triggering when entering colleagues’ offices.

Submissions

Respondent

28. Mr. Gordon submits as follows:
- 28.1 The burden of proof is on the Claimant to establish disability status and he has failed to do so.
- 28.2 The supporting medical evidence the Claimant has submitted is very limited (the letters from Dr. Stanley, Ms. Perry and Mr. Richardson). Dr. Richardson is advising after the relevant period and Ms. Perry does not address the symptoms. These letters do not specifically address the material period nor do they address the impact on his day-today activities.
- 28.3 EJ Moore made clear orders that the Claimant should explain in his witness statement how his day to day activities are affected but he has failed to do so. His statement is very short in the “adverse effects” on him section and the examples given by the Claimant in verbal evidence are insufficient. In any event, some of the examples given are outside the relevant period
- 28.4 The Respondent accepts that avoidance can be part of the consideration but in this case the Claimant has made minor adjustments and has then been able then to carry out normal day-to-day activities.
- 28.5 The Respondent avers the evidence is also insufficient to establish the Claimant had a mental impairment that had a substantial and *long term* effect on him at the material time. Whilst the Respondent accepts impairments may have an intermittent effect, it is clear from the Guidance that there must be evidence to linking them to an underlying condition.

Claimant

29. The Claimant submits as follows:
- 29.1 He accepts that whilst carrying out his normal work duties, there were hardly any triggers but the social aspects at work - emails, photographs on peoples desks – were potential triggers.

- 29.2 He submits that his condition is long term. Since 2019 - possibly earlier - he has had a predisposition to be triggered by things and he kept being triggered again and again. The flashbacks started in 2019 and continue to this day. They are intermittent in nature and depend on his vulnerability at that time, which comes and goes.
- 29.3 He stresses that the effect of the flashback is more than merely being upset – it is a distressing physical experience which “*grabs*” him in a “*visceral way*”.
- 29.4 He has learnt to navigate the triggers where he can and has learned to look after himself so he is not so vulnerable. But many times within a 12 month period, something will crush the life out of him and it will be a while before he can re-engage.

Conclusions

30. Applying the relevant law to the findings of fact to determine the issues, I have reached the following conclusions having reminded myself of the definition of disability in s6 EqA (and the Guidance and the Code) and that the relevant period of time is 1 December 2020 to 31 March 2023.
31. “Long-term”
- 31.1 I have found (para. 21 above) that in or about mid-2019, the Claimant started experiencing emotional flashbacks. Whilst there is reference to therapy in 2017 and 2018, he stopped taking antidepressants of his own initiative in early 2019. The starting point was therefore mid-2019.
- 31.2 I accept that he then sought and received help (Kate Perry) from May 2019 until February 2020 but then he did not seek further help (despite the availability of free health insurance through the Respondent’s scheme) until 2023. I must therefore consider whether, despite not seeking help during this period the Claimant was experiencing emotional flashbacks/PTSD during this period and I have concluded as follows:
- (i) I find that he was still having emotional flashbacks in 2020 based on the Respondent’s own acknowledgement in the Grounds of Resistance (ET3) (para 22 above).
 - (iii) Having considered all the evidence I accept that the vulnerability to flashbacks continued during the relevant period. The flashbacks were likely to recur; he had learned to avoid whenever possible the triggers but this does not mean that the impairment had ceased. Whilst in 2021, there were less triggers because he was working from home, simply because there were less triggers during this period (and therefore less or no flashbacks) this does not mean the impairment ceased.
 - (iv) As the effects were likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. I have therefore concluded that he had the impairment during the relevant period and that it was long-term.
32. Substantial adverse effect of day to day activities
- 32.1 The Claimant has only given limited examples of things he says are affected and of these I accept that watching television, listening to the radio, taking part in social activities and having conversation are day-to-day activities (Guidance (D3)) as they are activities carried out by most men and women on a fairly regular and frequent

basis. So I accept that his day-to-day activities were affected by the impairment of emotional flashbacks.

32.2 However, on the particular facts of this case and having considered carefully what the Claimant cannot do or can only do with difficulty, I am unable to conclude that the emotional flashbacks had a *substantial adverse* effect on his day-to-day activities whether considered individually or collectively. The Claimant avoids certain images or situations because they may trigger flashbacks and I am mindful that the fact that an employee is able to mitigate the effects of an impairment does not prevent there being a disability. However, the ways in which the Claimant modified his behaviour are those which he can reasonably be expected to make to reduce the effects of his vulnerability to emotional flashbacks.

33. Overall conclusion

I accept the Claimant had the impairment of emotional flashbacks during the relevant period and that that impairment was “long-term”. However, whilst this adversely affected his day-to-day activities it did not do so substantially. Therefore the definition of “disabled” in s6 Eqa is not met and the disability discrimination claims are therefore struck out.

Employment Judge H. Mason
12 December 2023

Judgment sent to the parties on:
18 January 2024

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For the Tribunal Office:

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