



EMPLOYMENT TRIBUNALS

Claimant: Mr A Booth

Respondent: Creative Support Limited

Heard at: Manchester (hybrid hearing) **On:** 11 November 2021

Before: Employment Judge McDonald (sitting alone)

Representatives

For the claimant: In person (unrepresented)

For the respondent: Mr J Gilbert (Lead Litigation Consultant) (by CVP)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was not a disabled person for the purposes of section 6 of the Equality Act 2010 during the relevant period.
2. The claimant's claims of direct disability discrimination and discrimination arising from disability in breach of s.13 and s.15 of the Equality Act 2010 respectively fail and are dismissed.
3. The claimant's claims of direct belief discrimination and unfair dismissal are not affected by this judgment.

REASONS

Introduction

1. By a claim form dated 12 April 2021 following a period of early conciliation from 1 March 2021 until 18 March 2021 the claimant brought complaints of unfair dismissal, disability discrimination, discrimination arising from belief and detriments arising from the making of a protected disclosure.
2. On 29 June 2021 Employment Judge Johnson held a case management hearing in this case. His case management summary and orders ("the Johnson

CMO”) directed that this hearing be held and set out the steps the parties were to take to prepare for it. That included preparing a bundle of documents for the hearing which the parties had done. That bundle (“the Bundle”) had 160 pages, plus a 2 page index. References in this judgment are to page numbers in the Bundle. The Johnson CMO also summarised the case and included the List of Issues in the case (pages 13-17 of the Bundle). At that hearing the claimant withdrew his claim that he had been subjected to detriments for making a protected disclosure. Employment Judge Johnson issued a judgment dismissing that claim on withdrawal.

3. The issues to be decided at this preliminary hearing were

- (i) Whether the claimant is disabled within the meaning of section 6(1) of the Equality Act 2010 (“the disability issue”);
- (ii) Whether the claimant has a belief which is protected by section 10 of the Equality Act 2010.

4. For the reasons explained in my Case Management Order of today’s date, I did not decide issue (ii) at this hearing. That issue will instead be decided at a further preliminary hearing. I also listed a final hearing in the case. That hearing will go ahead even if both the discrimination claims fail at the preliminary stage. That is because the claimant’s unfair dismissal claim will proceed to that final hearing in any event.

5. There was some confusion about whether this hearing was meant to be in person or by CVP. Mr Gilbert, for the respondent, initially came to the Tribunal building for the hearing but was told that it was to take place by CVP so went back to his office. The claimant also came to the Tribunal building for the hearing. The hearing went ahead with the claimant and myself in the hearing room and Mr Gilbert attending by CVP. I offered to adjourn the hearing to allow Mr Gilbert to attend in person but he confirmed he was happy to attend by CVP.

6. I heard oral evidence from the claimant who was cross examined by Mr Gilbert and answered questions from me. The evidence and my findings of fact are dealt with at paras 12-34 below.

7. Mr Gilbert had prepared written submissions and I also heard oral submissions from the claimant. Because of the time spent on preliminary matters at the hearing, there was not enough time for me to deliberate and give my judgment on the disability issue on the day. I therefore reserved my decision.

8. The claimant on 16 November 2021 sent written closing submissions to the Tribunal. He copied them to the respondent. The respondent has not objected to those closing submissions being taken into account. I am satisfied that they reflect and do not add significant new material to the points made by the claimant at the hearing. In those circumstances, particularly given the claimant is in person, I have decided that I can proceed to decide the case without requiring the respondent to formally respond to them.

Issues

9. The relevant disability is identified at order 2.1 of the Johnson CMO (page 7) as “a long history of anxiety which prevented [the claimant] from wearing a mask because he would become distressed and his breathing would be affected]”.

10. The issues relating to disability were set out at section 3 of the List of Issues annexed to the Johnson CMO:

- 3.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about (from March 2020 until the effective date of termination)? The Tribunal will decide:
 - 3.1.1 Did he have a physical or mental impairment: anxiety?
 - 3.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?
 - 3.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
 - 3.1.4 If so, would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?
 - 3.1.5 Were the effects of the impairment long-term? The Tribunal will decide:
 - 3.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
 - 3.1.5.2 if not, were they likely to recur?

11. The effective date of termination in this case was 19 February 2021. There was an appeal against dismissal which was unsuccessful. The outcome of that appeal was communicated to the claimant on 18 March 2021.

Evidence and Findings of Fact

The Evidence

12. The Johnson CMO (order 2.3) ordered the claimant to provide a Disability Impact Statement with the following information about each impairment:

- (a) How long has the claimant had the impairment?
- (b) What are/were the effects of the impairment on the claimant’s ability to do day-to-day activities and in particular since the Covid 19 pandemic started in the UK from March 2020. The claimant should give clear examples from the time of the events the claim is about. The Tribunal

will usually be deciding whether the claimant had a disability at that time.

- (c) Give the dates when the effects of [the impairment] started and stopped. If they have not stopped, say how long they are expected to last.
- (d) If the effects lasted less than 12 months, why does the claimant say they were long-term?
- (f) Has the claimant had medical treatment, including medication, or taken other measures to treat or correct the impairment? If so, what and when?
- (g) What would the effects of the impairment have been without any treatment or other measures? The claimant should give clear day-to-day examples, if possible.
- (h) Any other information the claimant relies on to show that he had a disability.

13. Order 2.5 of the Johnson CMO ordered the claimant to provide

- “(a) copies of the parts of his GP and other medical records that are relevant to whether he had the disability at the time of the events the claim is about. He may blank out anything that is clearly not relevant;
- (b) any other evidence relevant to whether s/he had the disability at that time.”

Disability Impact Statement(s)

14. The Bundle included 2 statements from the claimant which included sections dealing with disability. The first is referred to in the Bundle index as “Impact statement/comments about belief/medical evidence/sicknote” (pp.46-62). I refer to this statement as “the Impact Statement”. It included some evidence relevant to disability (at pp.46-53). The remainder of the Impact Statement was an article by Dr Vernon Coleman critical of the efficacy of masks (pp.53-57) and the claimant’s victim impact statement provided on 21 December 2020 (pp.57-61). At p.62 was a sick note dated 27 November 2020 confirming that the claimant was not fit for work for one month because of anxiety.

15. The second document is referred to in the Bundle index as “Claimant’s statement regarding philosophical belief” (pp.65-79). However, it includes at pp.73-75 a section headed “disability” and limited further information about the claimant’s anxiety. I refer to this document in this as “the Belief Statement”.

16. Neither the Impact Statement nor the Belief Statement provided a significant amount of evidence about the effect of the claimant’s anxiety on his day to day activities (i.e. issues (b) to (g) of order 2.3 in the Johnson CMO).

GP notes/Medical evidence

17. The Impact Statement included some medical evidence, including the sick note referred to above (p.62). It also included a letter from the claimant's GP dated 30 March 2021. The main text is two lines long and confirms that the claimant "has a long history of suffering from anxiety which can be severe and he can have significant anxiety episodes" (p.47). There was also documentary evidence of an ambulance call out to the claimant because he had expressed what the respondent was concerned was "suicidal ideation" (p.52).

18. Despite order 2.5 of the Johnson CMO, what was not included in the Bundle were copies of the claimant's GP notes. I asked the claimant about that before I heard his oral evidence. I explained that the onus is on a claimant to provide enough evidence to satisfy the Tribunal that they meet the definition of a disabled person in s.6 of the Equality Act 2010. I explained that it is usual for the claimant to provide GP notes or medical notes to support their case on that point.

19. In his Impact Statement the claimant said that he had contacted the GP surgery and they had told him there was a 30 day-wait time. The claimant said that had he waited for the GP notes he would not have been able to get the Impact Statement to the Tribunal by the date set out in the Johnson CMO. I accept Mr Gilbert's submission that the claimant was given 56 days from the preliminary hearing to obtain those notes.

20. The claimant told me that his GP's notes would corroborate what he would say in his oral evidence. I explained that unless GP notes were in front of me at the hearing, I could not take them into account. I asked the claimant whether he wanted to postpone the hearing so that he could obtain his GP notes. Having had time to consider during an adjournment of the hearing, the claimant confirmed he did not want to apply for a postponement and was happy to proceed relying on the evidence already in the Bundle and his oral evidence.

Other relevant documents in the Bundle

21. Of the other documents in the Bundle, those relevant to the disability issue were:

- the claimant's supervisions, "1-2-1 Wellbeing check in" and COVID-19 Risk Review Forms (pp.95-109);
- the claimant's sickness record (pp.157-160); and
- the Greater Manchester Police Hate Crime incident reporting form (pp.155-156) included as part of the claimant's appeal against dismissal.

I refer to these where relevant in my findings of fact below.

Oral evidence

22. I find that the claimant attempted to answer the questions put to him honestly even where that might harm his case. He accepted, for example, that he did continue carrying out day to day activities during the relevant period. He did at times appear to

have difficulty in following precisely what was being asked of him and in remembering details, such as the medication he had been offered by his GP. Because of that I re-checked some of his answers when I asked my questions at the end of the cross examination.

Findings of Fact

23. I set out below my findings of fact based on the relevant documents and the claimant's oral evidence.

24. I find that the claimant has suffered from anxiety since 2017. Both the GP letter (p.47) and the sick note (p.62) support that. I find, based on the claimant's oral evidence, that his episodes of anxiety are usually triggered by specific events. It is not, I find, something that constantly affects his ability to carry out normal day to day activities. Neither the claimant's evidence nor the GP letter provided any evidence about the extent of the adverse effect of any of his anxiety-related episodes on the claimant's day to day activities.

25. There was no evidence from the claimant's supervision notes, COVID Risk Review Forms and 1-2-1 Wellbeing check-in (pp.95-109) to indicate that his anxiety was having an impact on the claimant at work in the period covered by them (April 2020 to October 2020). In his 1-2-1 Wellbeing check (pp.103-104) dated 27 July 2020 the claimant says he is "generally very well" and "feels confident and very safe" continuing working during the pandemic.

26. The claimant's sickness record confirms that he had no sickness absence until November 2020 when he was signed off sick due to anxiety. That absence began on 27 November 2020. It had not therefore lasted for 12 months when the claimant was dismissed in February 2021. The sick note does not provide any detail about the effect of his anxiety, the section for "Comments, including functional effects of [the claimant's] condition" being left blank.

27. In terms of the effect of his anxiety on the claimant's day to day activities outside work during the relevant period, the evidence put forward by the claimant was very limited. The Impact Statement relied on the GP's letter as being conclusive on the issue of disability. Neither the Impact Statement nor the Belief Statement includes evidence about the impact of his anxiety on the claimant's day to day activities, Instead, it focussed on the effect of the respondent's conduct on the claimant.

28. I find that there was no evidence of the claimant's anxiety having an effect on his day to day activities during the relevant period (i.e. from March 2020 until the appeal was rejected on 15 March 2021) before the claimant was suspended on 26 November 2020.

29. The respondent suspended the claimant without pay from 26 November 2020 for "refusing to wear a mask in line with Public Health England Guidelines". I find that during the period of his suspension onwards (i.e. from 26 November 2020) the claimant did not experience any impact on his ability to undertake basic self-care such as getting dressed and washed. I accept his evidence that he felt some reduced motivation to do but on his own evidence he was able to and did undertake those activities.

30. I also find that the claimant's ability to go out was not impaired. He could and did go out, though again felt reduced motivation to do so. I find that part of the reason for not going out as much was that he had not money because he had been suspended without pay.

31. I find that the claimant had contacted the respondent's Employee Assistance Programme during the relevant period but, on his own oral evidence, that was to seek legal advice about his employment situation rather than, for example, to seek counselling or support. I accept Mr Gilbert's submission that the claimant's ability to seek legal advice and the claimant's ability to file a hate crime report support a finding that the claimant's ability to concentrate was not impaired during the relevant period.

32. There was documentary evidence that the ambulance service had been called out to review the claimant on one occasion because of safeguarding concerns raised about him by the first respondent (p.52). That document was undated but I find it took place after the claimant's dismissal but before his appeal. The claimant said there had been four such safeguarding incidents in total. Mr Gilbert submitted that there was no documentary evidence of any other incidents.

33. I accept the claimant's evidence that there had been other safeguarding incidents in the relevant period. There was very little evidence about the nature of those "incidents" and the extent to which they showed the claimant's anxiety having an effect on his day to day activities. The documented incident, arose because of the wording of an email sent by the claimant to the respondent which had been interpreted by the respondent as showing "suicidal ideation". It did not include details of adverse impact.

34. I also accept the claimant's evidence that he had been offered medication for his anxiety but had refused it and decided to use other coping strategies instead. The claimant could not remember what medication he had been offered or when.

Relevant Law

The Meaning of "disability" in the 2010 Act

35. Section 6 of the 2010 Act, so far as is relevant, provides:

"(1) A person (P) has a disability if –

(a) P has a physical or mental impairment, and

(b) The impairment has substantial long-term adverse effect on P's ability to carry out normal day-to-day activities.

..."

Adverse Effect

36. Section 212(2) of the 2010 Act provides that an effect is "substantial" if it is more than minor or trivial.

37. Paragraph 2 of Schedule 1 to the 2010 Act defines “long-term” in this context. It provides:

- “(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,**
 - (c) it is likely to last for the rest of the life of the person affected.**
- (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...”**

38. For paragraph 2(1)(a) of Schedule 1 to the 2010 Act to apply, the effect of an impairment must have lasted for at least 12 months at the time when the alleged discriminatory act (or acts) took place (**Tesco Stores v Tennant UKEAT/0167/19**).

39. The likelihood of recurrence within the meaning of paragraph 2(2) of Schedule 1 to the 2010 Act is to be assessed as at the time of the alleged discriminatory act (or acts) took place: see (**McDougall v Richmond Adult Community College [2008] ICR 431, Court of Appeal**). The same applies to the assessment of whether the effect of the impairment is likely to last for 12 months under paragraph 2(1)(b) of Schedule 1 (**Singapore Airlines Ltd v Casado-Guijarro [2013] 9 WLUK 65, EAT**).

40. In cases to which paragraph 2(1)(b) of Schedule 1 of the 2010 Act applies the correct question for the Tribunal is whether viewed at the time and without the benefit of hindsight, the substantial adverse effects of the impairment were likely to last at least 12 months. That is a decision to be reached having regard to all the contemporaneous evidence, not just that before the employer. In reaching that decision the Tribunal is not concerned with the actual or constructive knowledge of the employer (**Lawson v Virgin Atlantic Airways Limited UKEAT/0192/19/VP**). However, it is an error law for an Employment Judge to take into account subsequent events in making that assessment.

41. “Likely” in this context means something that “could well happen” and is not synonymous with an event that is probable: (**SCA Packaging Ltd v Boyle [2009] ICR 1056, Supreme Court**).

42. An impairment is to be treated as having a substantial adverse effect on the ability of an employee to carry out normal day-to-day activities if measures are taken to treat or correct it and, but for such measures, it would be likely to have the prescribed effect: see para 5 of Schedule 1 to the 2010 Act. This is usually referred to as the “deduced effect”.

43. The Secretary of State’s Guidance on Matters to Be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) (“the Guidance”) <http://odi.dwp.gov.uk/docs/wor/new/ea-guide.pdf> gives guidance to help a Tribunal decide whether an impairment has a substantial effect on normal day to day

activities. At paragraph D.2 and D.3 of the Guidance it explains what “normal day to day activities” means:

“D.2. **The Act does not define what is to be regarded as a ‘normal day-to-day activity’.** It is not possible to provide an exhaustive list of day-to-day activities, although guidance on this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.”

44. When assessing whether the effect of the impairment is substantial the Tribunal has to bear in mind the words of section 212(1) of the 2010 Act which confirm that it means more than minor or trivial. The 2010 Act does not create a spectrum running smoothly from those matters that are clearly of substantial effect to those matters that are clearly trivial. Unless a matter can be classed as within the heading "trivial" or "insubstantial" it must be treated as substantial (**Aderemi v London and South-Eastern Railway Ltd [2013] ICR 591**).

45. The Guidance recognises that “Environmental effects” (including stress: see para B11) may have an impact on how an impairment affects a person’s ability to carry out normal day-to-day activities. It says that “Consideration should be given to the level and nature of any environmental effect. Account should be taken of whether it is within such a range and of such a type that most people would be able to carry out an activity without an adverse effect” (para D20).

Impairment

46. “Impairment” is not defined in the Act. The Guidance (para A3) says the term should be given its ordinary meaning, that it is not necessary for the cause of the impairment to be established and that the impairment does not have to be as a result of an illness.

47. Since 2005 when para 1(1) of Schedule 1 of the Disability Discrimination Act 1995 was repealed, there is no longer a requirement for a mental impairment to be a “clinically well-recognised illness”.

48. It will not always be essential for a tribunal to identify a specific ‘impairment’ if the existence of one can be established from the evidence of an adverse effect on the claimant’s abilities (**J v DLA Piper UK LLP 2010 ICR 1052, EAT**).

49. An impairment (certainly a mental impairment) can be something that results from an illness as opposed to itself being the illness. It can thus be cause or effect

and there is no need to identify the cause of the impairment. (**College of Ripon and York St John v Hobbs [2002] EWCA Civ 1074**).

50. The significance of the absence of an apparent cause (e.g. a clinically diagnosed medical illness) for an impairment is evidential, not legal: “Where an individual presents as if disabled, but there is no recognised cause of that disability, it is open to a Tribunal to conclude that he does not genuinely suffer from it. That is a judgment made on the whole of the evidence” (**Walker v Sita Information Networking Computing Ltd EAT 0092/12**).

Relevant evidence and correct approach

51. The burden of proving disability is on the claimant.

52. The definition of disability requires a Tribunal to decide four questions (**Goodwin v Patent Office [1999] ICR 302**):

- Does the claimant have an impairment which is either mental or physical?
- Does the impairment affect the claimant’s ability to carry out normal day-to-day activities?
- Is that adverse effect substantial?
- Is the adverse effect long-term?

53. These four questions should be posed sequentially and not together – (**Wigginton v Cowie and ors t/a Baxter International (A Partnership) EAT 0322/09**).

54. It is good practice for Tribunals to state their conclusions separately on each of the questions. However, in reaching those conclusions, Tribunals should not feel compelled to proceed by rigid consecutive stages. Specifically, in cases where the existence of an impairment is disputed it would make sense for a tribunal to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected on a long-term basis and then to consider the question of impairment in the light of those findings. (**J v DLA Piper UK LLP [2010] ICR 1052, EAT**).

Discussion and conclusions

55. I have set out below my conclusions on each of the questions in section 3.1 of the List of Issues.

3.1.1 Did the claimant have a physical or mental impairment: anxiety?

56. Mr Gilbert did not concede this point but submitted that the focus in this case was on the effect of any impairment on the claimant rather than the existence of an impairment. Although the medical evidence in this case is limited, the GP’s letter (p.47) is unequivocal about this. I find that the claimant did have the mental impairment: anxiety and had done so since 2017.

3.1.2 Did [the impairment] have a substantial adverse effect on his ability to carry out day-to-day activities??

57. As I record in my findings above, the claimant gave very limited evidence about the adverse effect of his anxiety on his ability to carry out normal day to day activities during the relevant period. There was no evidence of any adverse effect before 27 November 2020. At its highest, the claimant's evidence was that he had low mood which meant his motivation to get dressed or to go out was reduced. I have considered whether the fact that the claimant was signed off work from 27 November 2020 because of his anxiety supports a finding that there was a substantial adverse effect. I find that it does not. The fit note (p.62) provides no information about the "functional effects of the condition". Neither does the report from the ambulance crew who attended the safeguarding incident (p.52) provide evidence about the adverse impact on the claimant's day to day activities. The fact that the claimant was offered medication does not seem to me to in itself provide a basis for a finding that the anxiety had a substantial adverse effect on the claimant's normal day to day activities.

58. I find that there is insufficient evidence for me to be able to find that there was a substantial adverse effect on the claimant's normal day to day activities during the relevant period. The burden is on the claimant to prove the existence of such an effect and his evidence fails to do so.

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

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

59. The claimant was offered but did not take medication for his anxiety. He did give evidence that he used other coping strategies. The claimant's evidence did not provide the basis for a finding that the impairment would have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures.

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

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

3.1.5.2 if not, were they likely to recur?

60. I have found that there was no substantial adverse effect in this case. If I am wrong about that, I would have found that any substantial adverse effect started from 27 November 2020. That means that the effect had not, by the end of the relevant period, lasted for 12 months and so was not "long term". There was no evidence of the effect prior to that date.

61. In terms of whether any substantial adverse effect was "likely" to last for at least 12 months (Schedule 1 paragraph 2(1)(b)). I have to assess that based on the information available at that time. That information is extremely limited. There are no GP notes or medical report providing any sort of prognosis. The sick note does not provide any sort of prognosis. I remind myself that "likely" in this case means

“could well happen”. I find that there is no evidence from which I could find that had there been any substantial adverse effect from 27 November 2020 it was “likely” to continue for 12 months. For the same reason, I find that I cannot say that had there been a substantial adverse effect was “likely to recur”.

Conclusion

62. I do not dispute the claimant’s assertion that his GP has diagnosed him as having anxiety. However, I must decide this case applying the legal test set out in the 2010 Act and based on the evidence before me. For the reasons given above, I find that the claimant was not at the relevant period a disabled person for the purposes of the 2010 Act. That is because he has not on the evidence in front of me shown that his anxiety did have a substantial adverse effect on his normal day to day activities in the relevant period.

63. The claimant’s claims of disability discrimination against the respondent therefore fail and I have dismissed them in this judgment. His claims of direct belief discrimination and unfair dismissal are not affected by this judgment.

Employment Judge McDonald
Date 1 December 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
2 December 2021

FOR THE TRIBUNAL OFFICE

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Note

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