



EMPLOYMENT TRIBUNALS
BETWEEN

Claimant

Ms S Langan

Respondent

AND Development Pathways Limited

OPEN PRELIMINARY HEARING

HELD BY CVP

ON 29 June and 25 November 2021

EMPLOYMENT JUDGE TRUSCOTT QC

Appearances

For the Claimant: Mr E MacDonald of Counsel

For the Respondent: Ms H McLorinan of Counsel

JUDGMENT on PRELIMINARY HEARING

The claimant has not established that she was disabled on account of depression and/or PTSD at the material time in accordance with section 6(1) of the Equality Act.

REASONS

Preliminary

1. The claimant lodged an ET1 on 4 September 2020 in which she raised a number of claims including disability discrimination, more specifically, failure to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010 (“EqA”), discrimination arising from disability under section 15 EqA and harassment related to disability.

2. She said that she was disabled at the material time by virtue of having depression / PTSD. The claimant said in her draft list of issues for the hearing that this “arose as a result of the events in Haiti in February 2020” [60].

3. This Preliminary Hearing was listed by EJ Mason on 9 April 2021 who identified the issues for this hearing as follows:

Was the Claimant at all relevant times a disabled person in accordance with s6 Equality Act 2010?

This requires consideration of the following:

Did the Claimant have depression and/or PTSD at all relevant times?

If so, did either of these impairments have an adverse effect on the Claimant's ability to carry out normal day to day activities?

If so, was the adverse effect substantial?

If so, was the substantial adverse effect long-term?

4. The claimant was represented by Mr E MacDonald, barrister. She gave evidence on her own behalf and confirmed the contents of her disability impact statement [91-95]. Because of her health, she was unable to continue giving evidence on the first day of the hearing, she was able to complete her evidence on the second day. The respondent was represented by Ms H McLorinan, barrister.

5. There was an updated bundle of documents to which reference will be made where necessary. The references in this judgment are to page numbers in the electronic bundle.

6. The claimant confirmed that she was not making an application under Rule 50.

7. At the conclusion of the hearing, both counsel presented written and made oral submissions to the Tribunal.

The evidence

1. Dr Gibbons examined the claimant on 8 March 2021 and provided a report dated 13 March 2021 [74-90]. She refers, at E1, to an incident in 2004 after which the claimant developed PTSD which she says was in remission until the incident [87]. Dr Gibbons says at B3.1 that the claimant was depressed in 2014 [82]. "She was prescribed antidepressants at this time. Her mental state stabilised..."

2. The claimant told Dr Gibbons at B1.1 [80] "...before the injury she was at the top of her game." She told Dr Gibbons the date of the injury was 29 February 2020 [78]

3. Turning further to the events of February 2020 onwards, the claimant said that she had written to Stephen and Sandra of the respondent regarding her concerns about going to Haiti on "the Friday . . . the Friday before the Saturday" (i.e. 28 February 2020). She explained that

"I was afraid for the first time in 20 years of consulting of going to Haiti . . . when I landed in Haiti I was very concerned . . . at that time I became very afraid for my security . . . it started very badly and I was afraid and it got worse and worse particularly when we were told the next day that a WFP employee had been kidnapped close to the hotel we were staying at . . . I became afraid for my life that night in the hotel . . . I was traumatised and still am and I find it difficult to talk about it even."

4. On 1 March 2020, the claimant arrived in Haiti. On 2 March 2020, she received a security briefing in which she was told that someone from the World Food Programme had been kidnapped and released recently. There were discussions with the acting CEO of the respondent. On 3 March 2020, there were further discussions with the acting CEO about the security situation in Haiti and what to do. On 4 March 2020, she left Haiti and returned to work in the UK.

5. On 9 March, she resigned from her employment. On 10 March, the respondent told her that it did not want her to leave and asked to speak to her. There was a discussion and on 11 March the claimant confirmed that she wished to suspend her decision. She explained that, upon her return to work, she declined to take time off because “there was nobody else able to do the work and I was pressurised to do this”. It was put to the claimant in cross examination that she “didn’t take time off for the rest of March” she replied that:

“I had back to back remote interviews with Haiti, with central banks, ministries, donors, banks, mobile network operators – I worked all day until 9 – 10pm, I found it extremely traumatic to do that and realised that I was really ill at that time...”

6. In paragraph 25 of its ET3, the respondent says that it offered the claimant time off and also offered other members of the team to assist. The claimant said that she was the only one who could do the work [44]. The respondent also says that the Haiti report was not a large project and that the claimant had no confirmed projects for the future.

7. It was put to the claimant that she didn’t attend any medical service in March 2020, her response was

“No I didn’t, the country had been put into COVID lockdown, my GP was not taking appointments, I thought that I had the symptoms of COVID-19 in addition to extreme levels of depression and anxiety . . .”

8. The claimant was emphatic that in March 2020 she was “extremely ill and continue to be so”.

9. She worked until 7 April 2020 when she was absent on grounds of having Covid 19. The Covid Isolation note shows she was told to isolate because she had symptoms of Covid [235]. This absence runs to 17 April 2020. On 15 April 2020, a Covid Isolation note shows she was told to isolate until 21 April because she had symptoms of Covid [69].

10. She returned to work on 20 April 2020. On 7 May, the claimant resigned from her employment with notice. She did no work for the respondent after 13 May 2020.

10. On 15 May, the claimant attended Urgent Care at the Princess Royal Hospital and was discharged the same day. According to her discharge letter, she reported anxiety and stress [139]. Her evidence in re-examination with reference to the entry “3 days ago nausea amd vomintng due to anxiety and stress” in the discharge letter was as follows:

Q: When did you first experience nausea due to anxiety and stress? A: When I was writing the report for Haiti – which dates all the way back to March / April . . . it's a long time ago but it's when I was placed under substantial pressure to deliver the report being ill as I was at the time, having to work over a weekend . . .

Q: [question about when sleep difficulties started]: A: It started shortly after I got back from Haiti – in March – and it got considerably worse in that period due to the situation unravelling in Haiti due to the situation and constant reminders of it – I was asked to conduct remote interviews in Haiti and they were constantly cancelled because of civil unrest and evacuation and police rioting and so on – so very shortly after I returned from Haiti and it was the trauma and stress and lack of recognition of that that led to my first resignation, so I had been very unwell from the beginning of this entire episode.

6. The discharge letter obviously runs to two pages but the second page was not available to the Tribunal as it was not in the bundle. At D1 [85], Dr Gibbons notes “PTSD, Depressive disorder” by reference to the Urgent Care Centre on 15 May 2020. On 18 May, the claimant applied for a sick certificate online [140], she said “I was advised through eConsult system to go to Critical Care ASAP. I went on Friday and consulted with a doctor who diagnosed PTSD (non-corona related) and severe depression”. There is a statutory sick certificate running from 13 May 2020 – 5 June 2020, giving the reason depressive disorder [159]. On 22 May, the claimant had a telephone consultation with her GP, she reported feeling sad, low, crying, unable to focus on activities [106]. There is a referral for CBT to Talk Together Bromley [141]. On 26 May, there is a Patient Boarding Card, under the “Disability” section it states “No perceived disability” [188]. On 29 May, the claimant requested an extension to her sick certificate to 26 June 2020, she said: “I had an assessment with Bromley Health this morning. I cannot go back to work and will need to start therapy. Please can I also have a repeat script for Citalopram” [71]. A sick certificate covering 29 May 2020 – 26 June 2020 is provided giving the reason depressive disorder [160]. There is a further certificate for 19 June to 17 July 2020 [161].

7. On 8 June, there is letter from “Talk together Bromley” following assessment of her psychological needs. It narrates that she is experiencing low mood and anxiety symptoms and recommends CBT [145/168], it narrates “Your PHQQ score was 24, indicating severe symptoms of low mood and your GAD7 score was 16, indicating severe symptoms of anxiety. We also completed a Post traumatic stress inventory, although is not a diagnosis. it highlights trauma symptoms you may be currently experiencing. Your PTSD (IES) score was 70 indicating clinical symptoms”.

8. On 12 June, there is a GP entry referring to the claimant taking citalopram, reporting difficulty sleeping, “brighter in self today though say gets tearful quickly” [105]. On 16 June, she contacted her GP regarding making a personal disability claim to her insurer. She is on the waiting list for CBT [146]. On 19 June, the claimant requested an extension of her sick certificate because she is still very unwell. She requested a repeat of anti-depressants and sleeping pills. She is on the waiting list for CBT.

9. On 2 July 2020, the claimant wrote to her GP asking for a medical certificate to send to her insurer and for a referral letter to private therapy which her employer had

agreed to pay for [170]. On the form to the insurer, she said: Onset of illness 18 April 2020. First day that you were disabled from work 13 May 2020 [172]. Her GP said that the claimant was diagnosed with PTSD on 15 May and is unable to say when the claimant might return to work. On 8 July, she wrote requesting a further sick note narrating: "Unfit for work. On waiting list for therapy. Cannot return" [149]. The medical certificates for 8 July to 9 August refer to PTSD [73]. On 10 July, there was a referral for private therapy [181]. On 13 July, there is a Patient Boarding Card which says "No perceived disability" [183-187].

10. The claimant's employment came to an end on 7 August 2020. On 12 August, there is a GP entry: Feeling v low. Increase citalopram to 40mg [103].

11. On 8 March 2021, the claimant was examined by Dr Gibbons, consultant psychiatrist who produced a report [74-90]. The contents are not set out here for reasons of privacy. Dr Gibbons' diagnosis is that the claimant has been suffering with "moderately severe post traumatic stress disorder (F43.1) since this injury. This continues at this level. In my opinion she is also suffering with moderately severe depression (F32.1) and has been continuing since the start of this injury." [86]

Relevant Legal Framework

12. A person with depression and/or PTSD is not deemed to be disabled under paragraph 6, Part 1 of Schedule 1 to the Equality Act 2010 (EqA) or the Equality Act 2010 (Disability) Regulations 2010, SI 2010/2128 and whether or not such a person has a disability will therefore be determined in accordance with the definition in section 6(1) of the EqA 2010, ie whether there is a physical or mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.

13. The provisions of section 6 of the Equality Act 2010 are not repeated here. These provisions are analysed in great detail in **Igweike v. TSB Bank plc** [2020] IRLR 267 EAT upon which analysis the Tribunal placed considerable reliance. This case was not referred to by counsel but was drawn to their attention by the Tribunal. The case refers to a number of authorities some of which were cited to the Tribunal. These are not repeated here.

14. The essence of the enquiry to be carried out was summarised by Langstaff P in **Aderemi v. London and South Eastern Railway Ltd** [2013] ICR 591 EAT:

'It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are

clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading “trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other’. (paragraph 14, p 591).

15. In **McDougall v. Richmond Adult Community College** CA 2008 ICR 431 CA, the Court of Appeal confirmed that the employment tribunal should have determined whether the impairment existed at the time of the acts of alleged discrimination and in **All Answers Ltd v. W and anor** [2021] EWCA Civ 606 CA, the Court of Appeal held that an employment tribunal erred in failing to consider whether the adverse effect of a disability discrimination claimant’s mental impairment was likely to last for at least 12 months as at the date of the alleged discriminatory acts. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect was likely to last for 12 months. The Court of Appeal allowed the appeal, confirming that following McDougall, the key question is whether, as at the time of the alleged discriminatory acts, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts and the tribunal is not entitled to have regard to events occurring later.

16. If an impairment is being treated or corrected, the impairment is deemed to have the effect it is likely to have had without the measures in question (EqA Sch 1 para 5). Faced with evidence of medical treatment, the Tribunal has to consider how the claimant's abilities had actually been affected at the material time, whilst being treated, and then to decide the effects which they think there would have been but for the treatment. The question is then whether the actual and deduced effects on the claimant's abilities to carry out normal day-to-day activities are clearly more than trivial (see **Goodwin v. The Patent Office** [1999] ICR 302, per Morison J). **Sussex Partnership NHS Foundation Trust v. Norris** UKEAT/0031/12, concerned the correct approach to the proper consideration of ‘deduced effects’ of an impairment disregarding medical treatment. The claimant had a physical impairment of Selective IgA Deficiency, a defect of the immune system rendering her susceptible to recurrent infections, but not in itself having any effect on her ability to carry out normal day to day activities. Medication was prescribed to prevent her from getting infections. Absent medication she would be more susceptible to infection. Slade J stated (at para 40) that the EqA:

'requires a causal link between the impairment and a substantial adverse effect on ability to carry out normal day to day activities. In many cases that link will be direct. However in our judgment the EqA does not require that causal link to be direct. If on the evidence the impairment causes the substantial adverse effect on ability to carry out normal day to day activities it is not material that there is an intermediate step between the impairment and its effects provided there is a causal link between the two'.

In this case, the EAT said that the ET ought to have asked whether the deduced effect of the claimant's impairment, of suffering more frequent infections, would itself have a substantial adverse effect on her ability to carry out normal day to day activities.

17. In **Woodrup v. London Borough of Southwark** [2003] IRLR 111 CA, Miss Woodrup claimed that if her medical treatment for anxiety neurosis were to stop, her

condition would deteriorate and she would be a 'disabled person' for the purposes of the DDA. The Court of Appeal, upholding the decision of the employment tribunal, was of the view that she had not done enough to prove that stopping her treatment would have the relevant adverse effect. The CA made a point of emphasising the 'peculiarly benign doctrine under para 6' and Simon Brown LJ commented 'In any deduced effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this peculiarly benign doctrine under para 6 of the schedule should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary'.

18. The claimant referred to **SCA Packaging Ltd v. Boyle** [2009] ICR 1056 HL which was a case concerning an individual whose disability is controlled by medication. In this context, it was said that for the purposes of section 6, "likely" means "could well happen" [paras 41-42 and 78]. The respondent referred to **Martin v. University of Exeter** UKEAT/0092/18 (unreported) which provides an example of how longevity was considered in the context of PTSD which had not existed for 12 months during the material period.

Discussion and decision

19. There was no dispute that the relevant period for consideration was 4 March 2020 when the claimant left Haiti and 7 August 2020 when her employment ended.

20. The claimant said in evidence that she had not been suffering from depression or PTSD prior to the trip to Haiti. Dr Gibbons says at B1.1 "...before the injury she was at the top of her game." The respondent pointed to this evidence as evidence of an inconsistency in the claimant's evidence but the Tribunal did not see that there was anything inconsistent with this part of the claimant's evidence on the historical issues. However, the Tribunal was concerned about her evidence when she said that she had no history of depression or PTSD since she had suffered from PTSD in 2004 and depression in 2014. The Tribunal considered the evidence of the claimant unreliable in material respects even taking into account her distressed state when giving evidence.

21. The Tribunal had to determine at what point did the claimant's impairments start to have an effect on her ability to carry out normal day to day activities. It was specifically put to the claimant that the document at [139] showed that the nausea had started on or around 12 May, and the claimant's response was "no". She was asked whether the record was wrong, and she replied:

"You need to understand that at this time I had suffered [a] nervous breakdown and was in critical care."

22. As to the question of whether she had suffered a "decline" between March and May 2020, the claimant's evidence was:

"I was very ill and got iller and iller as events unfolded over those dates."

23. She explained that when she completed the insurance claim form [174]:

". . . I didn't know what was wrong with me".

24. It was put to the claimant that she put down the previous time off work as due to COVID symptoms, and she replied:

“Yes, but COVID, PTSD and depression are not mutually exclusive.”

25. The Tribunal did not accept the evidence of the claimant as narrated above.

26. The evidence of the Patient Boarding cards [183] and [188] which say that the claimant was not perceived as disabled was not of assistance as the Tribunal had no evidence about the context in which the Boarding Cards were completed.

27. The Tribunal finds that the date of onset of symptoms of depression at a level that represented a substantial adverse effect on her ability to carry out normal day-to-day activities was 13 May 2020 as stated by the claimant in the form she completed [172]. The Tribunal did not accept her evidence that this referred to Covid. The time off attributable to Covid was 6 -17 April 2020 [174]. The only time she had had off was as a result of experiencing symptoms of Covid 19. She was at work from 20 April 2020 until 13 May 2020.

28. The impact on her normal day to day activities continued until at least the end of her employment. She was taking a dosage of 20mg citalopram. It was planned that the claimant’s dosage of citalopram be increased to 40 mg on 12 August 2020. It is not clear that it actually was and she seems to have remained on 20mg [102].

29. In her oral evidence, the claimant also explained that she had not ticked the “disability” box on the Form ET1 because she thought

“disability”, there, meant “physical disability and your ability to carry through a case such as this . . . at the time I was under the impression that it meant a physical disability . . . I was very ill and had informed my employer of that, way back.”

She said that she had completed the form herself. The narrative appears to have been prepared by her counsel. The Tribunal did not accept her evidence although this is not material to the decision in this case.

30. The much more vexed question was whether the substantial adverse effect was long-term. When judging what would be likely to occur in the future, this must be judged on the basis of information available at the relevant period because ‘whether an employer has committed a wrong ... must be judged on the basis of the evidence available at the time of the decision complained of’: **McDougall** para 24.

31. In **Igweike**, at paragraph 36, the EAT narrates the contents of paragraph 38 in **J v. DLA Piper** EAT, it continues and sets out that (at paragraph 41 of DLA): “We have to rely primarily on the inference that can be drawn from such medical evidence as there is, together with the Guidance and the case law and the general knowledge acquired from our own experience of depressive illness in the field of employment law and practice.”

32. This Tribunal has experience in this area and is not in a position to compare itself with the depth of experience of the Tribunal in DLA but this Tribunal tended to the view that the outcome of a claim should not be dependent on the knowledge a Tribunal brings to the issue of depressive illness, the evidence should be adduced and

be comprehensible by any Tribunal in order to provide a basis upon which to draw an inference.

33. This Tribunal had the evidence of the claimant as to whether the depression was likely to last at least 12 months and the Report from Dr Gibbons. When the claimant was asked in re-examination about the declaration (2 May 2020) that her expected date of return to work was “possibly never” she explained that;

“My particular job required travelling to very dangerous countries . . . I developed a pathological fear of flying at that point in time I couldn’t read anything to do with my chosen profession, in which I had become an internationally recognised expert, and I realised there was no way – every time I tried to engage with my specific subject matter . . . I suffered extreme anxiety, I broke down, I couldn’t do it. I couldn’t even watch the news and I just realised that this very unfortunate event, together with the way that I had been treated by my employer post my return – there was no way I would ever manage emotionally to deal with this again.”

34. The Tribunal did not accept the evidence of the claimant because she seemed to decide at an early stage that she would be unable to work in the future. The Report by Dr Gibbons repeats what happened in the relevant period but does not address this question for the Tribunal. The Tribunal noted that the claimant had suffered from depression in 2014 but the Tribunal could not make out a reference to this in the medical notes [124] and could draw no conclusion about how long that period lasted. In any event, the Tribunal was doubtful that that period would necessarily be an indicator of the current likely period of depression. As the absence so far as related to depression was work related which would ordinarily indicate that it is likely that it will cease upon the claimant not being employed by the respondent, it was not likely that it would last 12 months or longer.

35. The Tribunal considered that what was said at paragraph 50 of **Igweige** was apposite to this case, as it was for the claimant to establish disability, it was her obligation to provide such evidence to establish the disability or disabilities claimed. The Tribunal found that the claimant had not established that she was disabled because of depression because she had not established that it was likely that the depression would last 12 months or longer.

36. The position in relation to PTSD is equally difficult to determine. On the documentary evidence about the likely content of the missing page two of the discharge letter [183], the Tribunal concluded that the claimant was diagnosed with PTSD on 15 May 2020. This is confirmed in her Disability Impact Statement [93] and by Dr Gibbons at B4.2. Talk Together Bromley found clinical symptoms of PTSD on 8 June 2020. The Tribunal found that the symptoms had a substantial adverse effect on the claimant’s ability to carry out day to day activities until the final day of her employment.

37. The issue is whether it was likely that these effects would last 12 months or longer. The claimant suffered from PTSD in 2004 but there was no evidence about how long she took to recover. The Tribunal had available to it what was said by Dr Gibbons. On the same reasoning as for depression, the Tribunal considered that it was likely that her symptoms would improve and would not last 12 months or more.

38. Taking depression and PTSD together, the Tribunal sought to weigh up the overall effect of the interplay between PTSD and depression but found itself in no better placed to determine the duration of period of the substantial adverse effects. In both instances, the claimant had suffered an episode in the past. These instances were separate so would not have assisted the Tribunal even if any evidence had been led. The Tribunal again noted the content of the Report by Dr Gibbons. By parity of reasoning with the findings on depression and PTSD separately, the Tribunal decided that taken together, it was not likely that the effects of PTSD and/or depression would last 12 months or longer

39. In relation to recurrence, the Tribunal noted that this was only foreshadowed in the written submission for the claimant by the reference to **SCA Packaging Ltd v. Boyle** produced shortly before the conclusion of the hearing. It was made orally at the end of the hearing. The report by Dr Gibbons was finalised on 13 March 2021. Dr Gibbons says at page 12: "She will therefore have been predisposed to developing post traumatic stress disorder and depression. However, without this work-related stress she would not have developed these disorders." As this information was available to the claimant from March 2021, if it was to be relied upon, it should have been stated at the case management hearing in April, or at some point thereafter, in order to give fair notice to the respondent.

40. As this is a potentially relevant issue, the Tribunal inserted the passage of law in paragraphs 16 and 17 in order to consider the submission that the claimant was disabled in the light of what had occurred in 2004 and 2014. If an impairment is being treated or corrected, the impairment is deemed to have the effect it is likely to have had without the measures in question (EqA Sch 1 para 5). Faced with evidence of medical treatment, the Tribunal has to consider how the claimant's abilities had actually been affected at the material time, whilst being treated, and then to decide the effects which they think there would have been but for the treatment.

41. None of this means that the issue cannot be considered by the Tribunal but its consideration is hampered by a lack of evidence. The Tribunal did not have evidence of what treatment the claimant had in 2004 and 2014. The Tribunal would have had to have available to it a longer period of GP records at the least. The Tribunal would have expected to hear from the claimant at greater length on the topic. The respondent was not surprisingly unable to respond. For this reason, the Tribunal finds that disability has not been established by reason of recurrence of PTSD/depression as there was no evidence that a recurrence of either could well happen.

42. At the end of the material period, she had been suffering substantial effects on her daily activities for three months (mid-May to mid-August). The Tribunal was unable to conclude that it was likely that the substantial adverse effect of PTSD and/or depression would be long term. Accordingly, the Tribunal find that the claimant does not meet the full definition of disability in the EqA.

EMPLOYMENT JUDGE TRUSCOTT QC

Date: 8 December 2021