



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Miss F Fagade

Respondent: Amazon UK Services Limited

Heard at: Southampton (remotely by VHS) **On:** 12 January 2023

Before: Employment Judge Halliday

Representation:

Claimant: In person

Respondent: Mr Daniel Isenberg, of counsel

RESERVED JUDGMENT

1. The judgment of the tribunal is that the claimant was not a disabled person at the material times under the Equality Act 2010 and the claimant's claim for disability discrimination cannot proceed and is therefore dismissed.
2. The claimant's application for an anonymity order fails

REASONS

Background, Issues and Proceedings to date

1. The respondent is a UK subsidiary of a global on-line commerce business that sells a range of goods and services to consumers. The claimant was employed by the respondent from 3 November 2021 as a Warehouse

Associate. The claimant says she was dismissed on 6 December 2021. The respondent says she was sent an absent without leave letter on 6 December 2021 and either resigned with effect from 23 December 2021 or in the alternative was dismissed with effect from 31 January 2022.

2. By a claim form dated 31 January 2022, the claimant brought a complaint of discrimination on the grounds of disability and a claim for notice pay.
3. A case management hearing was held on 18 October 2022. At this hearing it was agreed that the claimant's claims for disability discrimination were a claim for discrimination arising from disability under s15 Equality Act 2010 (EqA) and a failure to make reasonable adjustments under section 21 (EqA). The claimant agreed at the hearing that her notice pay had been paid and the claim was subsequently dismissed by Judgment dated 7 November 2022.
4. The claim was listed for an open preliminary hearing to determine whether or not the claimant was disabled at the relevant time subject to section 6 of the Equality Act 2010 by reason of her anxiety disorder.
5. The issues to be determined at this preliminary hearing were agreed as follows:
 - 5.1. Did the claimant have a physical or mental impairment at the material time, namely anxiety disorder?
 - 5.2. If so, did the impairment have a substantial adverse effect on her ability to carry out day to day activities?
 - 5.3. If so, was that effect long term? In particular, when did it start and, at the relevant time:
 - a) Had it lasted for at least 12 months, or
 - b) Was it likely to last at least 12 months?

Note: in assessing the likelihood of an effect lasting 12 months, account should only be taken of the circumstances at the time of the alleged discrimination.
 - 5.4. Were any measures taken to treat or correct the impairment? But for these measures would the impairment have been likely to have had a substantial adverse effect on the claimant's ability to carry out normal day to day activities?
6. By e-mail dated 27 November 2022, the claimant made an application for an anonymity order under Rule 50(3)(b) of Schedule 1 of Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and it was directed that the application would also be heard at this preliminary hearing. The

claimant clarified during the hearing that her application related to publication of the judgement in this matter.

7. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Video Hearing Service. A face to face hearing was not held because all issues could be determined in a remote hearing.
8. The documents that I was referred to by the parties are in a bundle of 106 pages. At the start of the hearing the parties were informed that I would only look at those documents to which I was referred although I had reviewed the pleadings, the impact statement prepared by the claimant and the medical evidence provided by the claimant prior to the commencement of the hearing. I was not provided with a witness statement by the claimant, but she relied on her disability impact statement as her evidence on disability, and a written statement setting out the grounds of her application for the anonymity order. I also heard oral evidence from the claimant. I heard from and reviewed written submissions by counsel for the respondent, Mr Isenberg, and heard submissions from the claimant. The claimant's evidence was not always consistent with the documentary evidence, and she contradicted herself on a number of occasions when giving evidence under cross-examination.
9. Having heard oral evidence from the claimant and reviewed the relevant documents to which I was referred by the parties, I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the submissions made by and on behalf of the respective parties.

Facts

Chronology

10. The claimant started work with the respondent on 3 November 2021 as a Warehouse Associate.
11. The claimant was unwell with flu-like symptoms from on or around 22 November 2021. The claimant was absent from work from 25 November 2021 to 29 November 2021 and followed the respondent's sickness absence reporting procedures.
12. The claimant was still absent from 2 December 2021 to 5 December 2021 and the respondent asserts that the claimant did not follow the correct absence procedures. A letter was sent by the respondent to the claimant on 6 December 2021 which the respondent's say was "an absence without leave" letter and did not operate to terminate the claimant's employment. I make no findings on the effect of this letter which is not relevant to the issues to be decided at this hearing.

13. The claimant submitted a sick note on 6 December 2021 for the period from 29 November 2021 to 6 December 2021 for absence due to an upper respiratory tract infection, (copy included in the bundle). There was no mention of anxiety disorder on the sick note.
14. The respondent asserts that the claimant worked her scheduled night shifts on 12 and 13 December 2021.
15. The claimant did not attend for work again, she says because she had been dismissed by the respondent. The respondent asserts that she either resigned with effect from 23 December 2021 or was dismissed with effect from 31 January 2022.
16. On 20 December 2021, the claimant lodged her early conciliation notification, and the certificate was issued on 30 January 2021. The claimant presented her claim on 31 January 2022.

Medical History

17. The claimant's disability impact statement states that she was referred by her GP to Westminster Talking Therapies Service on 10 August 2020 and that at the time she was unable to leave her house or complete normal household tasks. The claimant states this was due to anxiety disorder which is the disability relied on.
18. The impact statement also refers to historic depression which the claimant says has been going on for over 9 years. She does not say that she was suffering from anxiety disorder at any point during this period and no medical evidence has been submitted in relation to the period prior to August 2020 for either depression or anxiety disorder.
19. The claimant has provided a copy of a letter dated 21 August 2020 from Westminster Talking Therapies Services relating to an assessment undertaken on 10 August 2020. This refers to "*Low Mood*" and shows the claimant had a PHQ-9 score of 11 (moderately severe depression) and a GAD-7 score of 1 (non-clinical anxiety). The claimant was offered individual sessions of Low Intensity Cognitive Behavioural Therapy (CBT).
20. The respondent's submitted that these tests are standard tests and they demonstrate that the claimant was not suffering from clinical anxiety and only low moderate depression. The claimant stated in her evidence firstly that the test she took were different and subsequently that she undertook different tests because the examples included in the bundle were incomplete/did not include all the questions she was asked and/or she recognised only some of the questions. She also referred to having taken the tests repetitively but did not provide an explanation as to why she had not provided copies of the other

tests to the Tribunal. I did not find her evidence credible on this point and I am satisfied that the tests that are referred to in the letter of 10 August 2020 are standard tests and demonstrate that she was not suffering from an anxiety disorder at that time.

21. The claimant gave oral evidence which I accept, that she attended the offered CBT counselling which stopped in October 2022. She stated in cross-examination and I accept that she had begun to feel better after week 4 of the counselling.
22. The claimant confirmed she took no medication, nor did she have any further or on-going treatment.
23. The claimant provided no details as to how she says her anxiety disorder affected her from October 2020 until she was unwell in November 2021. Her general assertions that her condition was on-going during this period were not supported by details of any specific incidents or effects and was contradicted by her evidence that she had begun to feel better after week 4 of her counselling.
24. The claimant did refer in her oral evidence to going for days without sleeping, but when asked under cross-examination why she had not sought medical assistance which would have been recorded on her notes, she confirmed that this was when she was in Nigeria and therefore find that this was not relevant to the period from 20 August 2020 to January 2022 when she was in the UK. When questioned about her ability to undertake her role at the respondent's fulfilment centre, she stated that she was able to carry out all of her job role when she was not sick.
25. The claimant has also provided copies of extracts of her GP notes dated 22 August 2022. The extract start from 23 November 2021 and the last entry is 27 July 2022. The notes confirm that the claimant was not suffering from any Active Major Problems as at that time, (which I note is not during the relevant period of her employment). There is a reference in the general notes to Anxiety Disorder (E200) from 23 October 2020 – Ongoing. There are no notes of any specific discussions with a doctor about anxiety or anxiety disorder. There is one reference to depression on 14 January 2022.
26. The claimant has not disclosed her GP notes, any further information from Westminster Talking Therapies Services or any further medical information for the period between August 2020 and November 2021. She referred in her evidence to having inspected the on-line system for Westminster Talking Therapies, and there being other evidence available on-line but did not provide a convincing explanation as to why these had not been produced. She also referred in her oral evidence to letters which she asserts had been sent to her GP, however these documents were not disclosed, and as the GP

notes for the relevant period have not been disclosed, there was no corroborating evidence before the Tribunal that these existed.

27. The entry in the GP notes on 22 July 2022 records that the claimant could request a medical summary from reception, refers to the diagnosis of Anxiety Disorder as at October 2020 and indicates that a bespoke letter would incur a charge. The claimant says she did not ask how much the charge was as she could not have afforded to pay anything. Counsel submits that this is an unreasonable approach and I find the claimant's responses to this line of questioning to be inconsistent and unpersuasive. For example, she asserted she was unable to recall if she received any state benefits at any time during the period when she was seeking to obtain copies of her medical records and having said she had no resources to pay even a very modest charge, she then referred to working under a zero hour contract, living off her savings, using credit cards and receiving support from other people.
28. I note that the claimant was originally ordered by the Tribunal to provide a disability impact statement and relevant medical evidence to the respondent by 11 July 2022. The disability impact statement and limited medical evidence was sent by the claimant on 31 July 2022. The Case Management Order made on 18 October 2022 required the claimant to provide copies of her GP and other medical records relevant to her claim on or before 18 November 2022 and any other evidence relevant to whether she had a disability at the time of the events in question, with anything not relevant blanked out. I am satisfied that the claimant had every opportunity to submit any supporting medical evidence in advance of this hearing, redacted if required. I am not persuaded that she made every effort to do so and whether or not she could have paid for a bespoke letter, I find that she could have submitted the complete (redacted) medical records to cover the period from August 2020 until 23 November had she chosen to do so. I conclude that these records do not show that there were any on-going issues in relation to the Anxiety Disorder.
29. I accept the claimant's evidence, supported by her GP records, that she suffered first from flu-like symptoms and then a respiratory tract infection in November 2021, whilst she was employed by the respondent and that her symptoms lingered into December 2021. I further accept her evidence that this made her feel very ill and resulted in her feeling depressed.

Grounds for application for anonymity order

30. The claimant's application for an anonymity order, made on 27 November 2022, asked the Tribunal to exclude all information that could be used to identify the claimant on the following grounds:

- 30.1. It would have a permanent impact on the claimant's mental health;

- 30.2. It would impact on the claimant's family who will be upset to see this published;
- 30.3. The claimant's career moving forward would foreseeably be impacted when background searches are carried out on Google.
31. On 11 January 2022 the claimant submitted further grounds in support of her application which related to the confidential nature of the medical information disclosed and her right (and that of her family) to a private life under Article 8 of the Human Rights Act.
32. The claimant did not expand on these grounds when offered the chance to give oral evidence in support of her application but under cross examination confirmed:
 - 32.1. She was aware that Tribunal hearings were generally public hearings when she brought her claim;
 - 32.2. That there was no medical evidence that her medical health would be impacted by any judgment being published;
 - 32.3. That the case management order did state that she could blank out details of her medical records which were not relevant and she had not done so;
 - 32.4. She felt there would be prejudice to her in applying for future employment, particularly in certain sectors due to the stigma associated with mental health issues and notwithstanding that she was likely to have to fill in medical questionnaires on which she would need to declare any medical conditions.
33. On re-examination she confirmed she was only asking for her name to be removed from the published judgment so she could not be identified.
34. In the absence of any evidence, medical or otherwise, that the claimant's mental health would be permanently impacted by the disclosure of her name in the judgement, I conclude that it would not be so affected.
35. Likewise, there is no evidence that the claimant's family would be upset by the disclosure of her name in the judgment.

Relevant Law

36. Having established the above facts, I now apply the law.

Disability

37. Section 6 and schedule 1 of the EqA provides that a person P has a disability if she has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial (section 212 EqA), and a long-term effect is one that has lasted or is likely to last for at least 12 months or is likely to last the rest of the life of the person.
38. Schedule 1 par 2(2) EqA provides that "*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*".
39. Likely should be interpreted as meaning "it could well happen" rather than it is more probable than not that it will happen (*SCA Packaging Limited v Boyle (2009) ICR 1056*).
40. The burden of proof is on the claimant to show that she is a disabled person in accordance with that definition. Counsel has referred me to the cases of: *RBS v Morris (UKEAT/0436/10/MAA* and *Morgan v Staffordshire University [2002] ICR 475* in relation to the circumstances where a tribunal will need medical evidence whether from a medical practitioner (*Morris*) or from medical records (*Morgan*) in order to reach a conclusion on whether the claimant has discharged that burden. He has further referred me to the case of *Igweike v TSB Bank Plc [2020] IRLR 267* as an example of case where the claimant failed to discharge that burden by failing to provide relevant medical evidence and the case of *Royal Mail Group Limited v Efobi ICR 1263* on the inferences that can be drawn by a failure to adduce obviously relevant evidence.
41. I am also mindful of the "*Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) (Guidance) and the Equality and Human Rights Commission (EHRC) Code of Practice on Employment (2015) and specifically Appendix 1(Code)*".
42. The meaning of "*normal Day-to-day activities*" is not set out in statute but helpful guidance is included in both the Guidance and the Code. Paragraph D3 of the Guidance states that: 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. Counsel for the respondent has also referred me to the case of *Paterson v Commissioner of Police of the Metropolis [2007] ICR [67]* which states "*Normal day to day activities are those which are*

carried out on a daily and regular basis. Those activities include those which are relevant to participation on professional life”.

43. The Code states that day to day activities include – but are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), 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 encompass the activities which are relevant to working life.
44. On the question of what constitutes “*substantial*”, counsel for the respondent has referred me to the case of *Kay v University of Aberdeen (UKEATS/0018/13/BI, 20 June 2013)*, in support of the principle that simply because a claimant has a recognised medical condition or impairment that this does not necessarily mean that the impact of that condition will be “substantial”.
45. The material time for considering whether the impairment had (or was likely to have) a long term effect is the date of the alleged discriminatory act (*All Answers Ltd v W [2021] EWCA Civ 606, CA*) and events occurring after the date of the alleged discriminatory act should not be taken into account in considering if the effect of the impairment was long term.

Anonymity Orders

46. Rule 50 of Schedule 1 of Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:
 - (1) *A Tribunal may at any stage of the proceedings, on its own initiative or on application make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers it necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.*
 - (2) *In considering whether to make an order under this rule the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.*
 - (3) *Such orders may include*
 - (b) *an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public by use of anonymisation or otherwise, whether in the course of the*

hearing or in its listing or in any document that is on the Register or otherwise forming part of the public record”

(6) “Convention rights” has the meaning given to it in section 1 of the Human Rights Act 1998

47. The European Convention on Human Rights (Convention) provides as follows:

47.1. *Article 6: (Right to a Fair Trial)*

“everyone is entitled to a fair and public hearing [....] Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial [....] where [....] the protection of the private life of the parties so require or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice;

47.2. *Article 8: (Right to Privacy)*

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

47.3. *Article 10 (Right to Freedom of Expression)*

(1) Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and receive and impart information and ideas without interference by public authorities and regardless of frontiers.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society [....] for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of the rights of

others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

48. These rights were introduced into UK law by the Human Rights Act 1998.
49. Counsel for the respondent has referred me to the well-known principles set out in the case of *Broadcasting Corporation v Roden* [2015] ICR 985 and *A v Burke and Hare* [2022] IRLR 139 which can be summarised as follows:
 - 49.1. The principle of open justice means that generally cases are held in public and that decisions are published including the names of the parties;
 - 49.2. An order under Rule 50 interferes with both the principle of open justice and the right to freedom of expression and should only be made to protect the Right to Privacy or in the interests of justice;
 - 49.3. Article 6 sets out the entitlement to a fair hearing in public and to a public judgment unless this is not in the interests of justice;
 - 49.4. The burden of proof is on the claimant to establish whether an anonymity order should be made, and this requires clear and cogent evidence;
 - 49.5. If a claimant brings a claim it is not unreasonable to expect them to accept that hearings and judgments will be public and in general a party to litigation has to accept any embarrassment or reputational damage inherent in being involved in litigation. (*R v Legal Aid Board ex parte Kaim Todner* [1999] QB 966);
50. The Tribunal should therefore balance whether granting an anonymity order to protect the claimant's Convention Rights or in the interests of justice outweighs the principle of open justice and the right to freedom of expression.
51. Counsel has also referred me to the case of *Olukanni v John Lewis Plc* (UKEAT/0327) and I note the recent Court of Appeal decision in *Clifford v Millicom Services UK Ltd* [2023] EWCA Civ 50.
52. I take the cases referred to above as guidance and not in substitution for the provisions of the relevant statutes.

Decision

Disability

53. Applying the above principles, I consider whether the claimant's anxiety disorder satisfies the statutory test of a disability at the relevant time.
54. The respondent submits that the claimant did not have anxiety disorder at the time she was employed, and in reliance on the score of 1 on the GAD-7 test provided by the claimant that neither did she have anxiety disorder in August 2020, They submit that the claimant therefore does not satisfy the statutory test as she does not have long-term impairment which impacts to a more than trivial or minor extent on her ability to undertake day to day activities. The claimant submits that her anxiety disorder is an on-going and underlying condition that continues with the intensity of her symptoms varying and that it satisfies the statutory test.
55. I am mindful of the fact that the burden of proof is on the claimant to show that she is disabled in accordance with the statutory definition. I note the limited medical evidence submitted and the inconsistencies in the claimant's oral evidence. I also note that the claimant confirmed in her evidence that she had not taken anti-depressants either prior to or during her employment with the respondent and the only treatment she had been given was the course of CBT.
56. I conclude that the claimant did not have a mental impairment by reason of anxiety disorder at the time of her employment with the respondent (the material time). There is no corroboration of the claimant's assertion that she did, either in the claimant's medical records or in any contemporaneous documents and the claimant's evidence on this point was not consistent or credible.
57. I further find that the claimant has not provided sufficient evidence that her depression in August 2020 (as diagnosed by Westminster Talking Therapies) was the result of an anxiety disorder and conclude that the claimant did not have anxiety disorder at this time. I rely on the GAD-7 score of 1 (non-clinical depression) referred to in the letter of 21 August 2020.
58. I also note the lack of any medical or oral evidence that the claimant had an anxiety disorder prior to August 2020; the lack of any medical or oral evidence that the claimant displayed any on-going symptoms between October 2020 and November 2021; and the claimant's evidence that she felt better after week 4 of her CBT. I weigh this against the note on the GP records dated October 2020 of "*Anxiety Disorder E200 – ongoing*", but this one reference without any explanation or further medical notes is not sufficient in my view to establish that the condition was on-going or was likely to recur (applying the test in *SCA Packaging v Boyle*).
59. I therefore conclude that even if the claimant had suffered from a mental impairment as at October 2020, that her condition did not satisfy the statutory

test of disability as it did not continue during 2021 and therefore had not lasted for at least 12 months at the time of her employment with the respondent, nor was it likely to recur.

60. Further and in any event, the claimant submitted no evidence that her anxiety disorder affected her ability to undertake day to day activities to a more than minor or trivial extent either in work or out of it whilst employed by the respondent. She gave evidence that she was able to perform all her work duties other than when she was sick, and I have found that the only sickness which occurred whilst she was working was the physical illness which started with flu-like symptom and developed into a respiratory tract infection as recorded on her GP notes. The claimant gave no detail about how her anxiety disorder affected her more generally outside of work although did refer to how ill she was due to the flu-like symptoms and respiratory tract infection and how this had made her feel depressed.
61. I therefore conclude that the claimant did not satisfy the statutory definition of disability at the material time and her claim for disability discrimination is dismissed.

Anonymity Order

62. To depart from the principle of open justice, there must be clear and cogent evidence from the claimant in support of her application for an anonymisation order (Roden).
63. The claimant has based on her application on four grounds, and I consider each in turn. Firstly, she says that publishing her name would have a permanent impact on her mental health. This is bare assertion made with no supporting evidence and I have concluded that it would not be so affected and therefore does not provide any grounds for an order to be made.
64. Secondly, she states that it would impact on her family who will be upset to see this published. Again, this is a bare assertion with no supporting evidence which I have not accepted and it does not therefore provide any grounds for an order to be made.
65. Thirdly, the claimant says that her career moving forward would foreseeably be impacted when background searches are carried out on Google. Her evidence on the alleged impact was inconsistent and I am not persuaded that there were any exceptional circumstances that applied to the claimant that would not apply to many claimants who have brought a tribunal claim and raise health issues in the course of that claim. I accept the respondent's argument that to the extent that the claimant has health issues, these would need to be disclosed on a pre-employment health questionnaire if there were specific health requirements for a particular role. I therefore conclude that this

is not grounds for making an anonymity order, either to protect the claimant's privacy or in the interests of justice.

66. Lastly in the further grounds submitted on 11 January 2022 the claimant referred to the confidential nature of the medical information disclosed and her right (and that of her family) to a private life under Article 8 of the Human Rights Act.
67. I conclude that the claimant's family's Right to Privacy is not in any way affected by this claim.
68. In relation to the claimant's Right to Privacy, I take into account that the claimant has brought this claim (it has not been forced on her) and she has confirmed that she was aware when she did so that tribunal proceedings were public. The claimant should therefore have accepted the natural consequences of bringing a claim, namely that the details she discloses in the course of the litigation would be in the public domain.
69. I further accept the respondent's submission that this is not a case that concerns deeply private or confidential matters and note that when offered the opportunity to redact her medical information to remove irrelevant information before including it in the bundle, the claimant did not do this.
70. I therefore conclude that Article 8, the Right to Privacy, is not engaged in relation to this ground.
71. The claimant has not provided clear, cogent and persuasive evidence to allow me to derogate from the fundamental principle of open justice. Accordingly, her application is refused.

Employment Judge K Halliday
Date: 8 February 2023

Judgment sent to Parties: 22 February 2023

FOR THE TRIBUNAL OFFICE