EMPLOYMENT TRIBUNALS

Claimant: Mr James Quinn

Respondent: Alderhey Children's NHS Foundation Trust

Heard at: Liverpool **On:** 6 and 7 July 2023

Before: Employment Judge Buzzard

REPRESENTATION:

Claimant: In person
Respondent: Mr Williams, Solicitor

PRELIMINARY HEARING JUDGMENT

The judgment of the Tribunal is that the claimant is not found to have been a disabled person as of the date of the alleged discriminatory acts and accordingly the claimant's claims of discrimination based upon the characteristic of disability are dismissed.

REASONS

The Issues at this hearing

1. The issue to be determined at this hearing was whether the claimant had the protected characteristic of disability at dates of the alleged acts of disability discrimination relied on in his claim.

2. At the outset of the hearing the claimant confirmed that the alleged acts of disability discrimination occurred in early April 2017. Accordingly, the issue at this hearing was whether the claimant met the definition of a disabled person in early April 2017.

The Relevant Law

3. The definition of disability under the Equality Act 2010 has several requirements. These are:

   a. The claimant must have an impairment; and

   b. That impairment must have at least one substantial adverse impact on the claimant's ability to carry out day to day activities; and

   c. That impact must have lasted, or be expected to last, for 12 months at the date of the alleged discrimination. This is the requirement that the condition is long term.

4. There are other elements to the definition of disability, such as in relation to terminal and progressive conditions, which are not relevant to this claimant.

5. It is important to note that the definition of disability does not permit the use of hindsight. The question is not whether an impairment has turned out to be long term, but whether it was long term as at the date of the alleged acts of discrimination.

6. The Equality Act 2010, at schedule 1 (2)(1)(b) states:

   "*2(1) The effect of an impairment is long term if –*

   (b) It is likely to last for at least 12 months…"

7. There are numerous authorities that make it clear that "*likely to last*", should be read as meaning it could well happen that it lasts. It is not an assessment of whether on the balance of probabilities it is more likely to last than not to last.

8. Also of relevance to this hearing, under Schedule 1, paragraph 2(2), it is stated 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."

9. Finally, to amount to a disability the condition has to have a substantial adverse effect on the claimant's ability to carry out at least one normal daily activity. Normal daily activities would generally include things like being able to cook a meal, get dressed, go to the shops, basic personal hygiene, etc.

The Burden of Proof

10. The question of whether a claimant meets the definition of disability is commonly a question of fact determined from evidence. In considering that evidence, it is important to note where the burden of proof lies.

11. The claimant is asserting that he has the protected characteristic of being disabled. The claimant is therefore required to establish that he is disabled. The burden falls on him.

12. The standard of proof is on the balance of probabilities. To be able to discharge this burden the claimant is required to produce evidence upon which the Tribunal can make a finding that he is disabled.

13. The claimant, in his oral submissions, suggested that the statutory guidance relevant to the question of disability status implies that when an individual is taking medication that must mean that any effects of the impairment for which the medication is being taken are substantial. That is not what the guidance states or suggests. The claimant had misread the guidance. The guidance makes it clear that where a person is taking medication the effect that the impairment would have without that medication should be deduced. It is not automatically the case that those effects will therefore be substantial. They may or they may not be.

The Evidence at this Hearing

14. The only oral evidence at this hearing was from the claimant. The claimant had prepared a written witness statement in advance of this hearing and was cross examined in detail by the respondent's representative.

15. In addition to the oral evidence the parties produced an extensive bundle of documents. Only a small part of that bundle was relevant and referred to at this hearing. Those parts of the bundle of particular relevance to the issue at this hearing were the claimant's medical and GP records, occupational health reports and referrals and a number of other contemporaneous documents including emails

16. Both parties made oral submissions.

The Claimant's Evidence

17. In his oral evidence the claimant made clear and repeated assertions that he was dealing with intrusive suicidal thoughts from August 2105 to beyond April 2017 on a daily basis. The claimant described these thoughts in vivid terms, stating that their impact on him was severe and repeatedly confirming that they had occurred every day.

18. A significant part of the cross examination of the claimant focused on these assertions. The claimant in his submissions, and to some extent in his responses under cross examination, appeared to suggest that the respondent's representative was placing too much emphasis on these intrusive suicidal thoughts, and was doing so to seek to imply that the absence of such thoughts would preclude the claimant from having a mental health disability.

19. The respondent's representative was clear that this was not what was being suggested. If it were true that the claimant on a daily basis was having to cope with significant and intrusive suicidal thoughts, that would be very likely to be

enough to persuade a Tribunal that he was disabled. The respondent's position, however, is that the claimant in his statement and oral evidence was substantially exaggerating the effects of his mental health difficulties in an attempt to persuade the Tribunal that they amounted to a disability. The purpose of the respondent's representative's focus on the claimant's evidence about daily suicidal thoughts was primarily to support the respondent's contention that the claimant was not giving an honest or accurate account of his mental health at the relevant time.

20. As noted, the claimant in his oral evidence was clear. He was having to cope on a daily basis with significant intrusive suicidal thoughts from August 2015 to April 2017.

21. The claimant's disability impact statement does not appear to be consistent with that account. In his impact statement the claimant states, referring to the period after 1 April 2017, which is after the relevant time for these claims, that he was *"again feeling suicidal"* and that he was *"returning to feeling the same way I was in late 2015"*. This clearly describes changes over time. Taken as read the claimant would have to have ceased feeling suicidal if he was "*again feeling suicidal*" after 1 April 2017. It is difficult to reconcile this with the claimant's responses during cross examination that from August 2015 to beyond 1 April 2017 he was coping with intrusive suicidal thoughts on a daily basis.

22. In relation to the same issue, the claimant during cross examination was taken at length through his GP records. These show that the claimant saw his GP on numerous occasions in the period leading up to 1 April 2017 regarding a variety of health issues many of which were not related in any way to his mental health. In this period there is on no record made by the claimant's GP that he was having suicidal thoughts. The records appear, in fact, to contradict this. In October 2016 the claimant's GP records that the claimant was "*not feeling low*" and that the claimant was "*sleeping well*". In earlier 2016 the claimant appears to have had a series of GP consultations titled '*Stress at Work (Review)*'. In these consultations, the claimant is not recorded as having referred to suicidal thoughts. The claimant's GP records the claimant at a review in April 2016 as having "*mood swings*", and then later at a consultation in May 2016 as "*patient feeling better*".

23. The first reference to suicidal thoughts which the claimant was able to identify in his GP records appears in the records of a consultation on 14 December 2018. The claimant's GP at that time records "*had fleeting thoughts of overdosing but no plans or real intention.*" This is more than 18 months after the relevant time, and is still not close to the daily and intrusive suicidal thoughts which the claimant described in his oral evidence at this hearing.

24. Shortly after the relevant date, on 13 June 2017, the claimant returned to his GP. The GP entries from that consultation record the claimant describe an incident which had occurred at work. The claimant confirmed at this hearing that he had been informed shortly before his GP appointment that action was going to be taken against him in relation to an earlier incident. There is no reference to suicidal thoughts in the records of this consultation.

25. The claimant was also taken through his occupational health records during his cross examination. These record the following examples of entries that are not consistent with the claimant's responses in oral evidence about daily and intrusive suicidal thoughts:

May 2016	"*Sleep improving*" and "*Mood ↑↓"*
18 July 2016	"*Sleeping well*", "*No DSH thoughts*" and "*Mood OK*"
19 July 2016	"*I understand that James mentioned to a manager in 2015 he had had some fleeting suicidal thoughts. I can confirm that James does not have any such thoughts at present."*

26. These comments come from within notes of meetings with Occupational health, and the subsequent reports. The notes are clearly reflective of a full discussion of the claimant's issues at work and his mental health. Despite this, these notes do not suggest in any way that the claimant was dealing with intrusive suicidal thoughts on a daily basis, or anything close to such a problem.

27. The claimant attended an occupational health referral on 16 June 2017. This was shortly after the relevant time for his claims. The records of that referral state *"… was feeling good before incident and was going to come off medication but seen GP and not now*". The claimant had seen his GP on 13 June 2017.

28. On 16 June 2017 the claimant's occupational health records state that he was "*undertaking all normal activities but no pleasure*". On 29 August 2017 the claimant's occupational health records record him as "*undertaking all normal activities*"

29. The claimant was also taken to an exchange of emails with his employer from April 2017. The claimant's manager, a Mr Weston, summarised a discussion which he had had with the claimant in an email of 20 April 2017, referring to a discussion on 16 February 2017. The summary records that the claimant had sent something referred to as a '*statement of fact'* to Mr Weston in advance of their 16 February 2017 discussion. This document was not in evidence, but relevant parts of it were set out in Mr Weston's email as follows:

> *"I have had two long term periods of illness in the last 3 years, the second phase was caused by allegations of bullying made against me by two managers and strained my mental health to the point that I had suicidal thoughts…"*

30. Mr Weston then goes on to summarise what the claimant said about this at their meeting on 16 February 2017 as follows:

> *"you stated that you had not experienced any suicidal thoughts whatsoever since August 2015.."*

31. When put to the claimant that it was not possible to understand this as being consistent with his oral evidence at this hearing, the claimant stated that he had lied to Mr Weston in their meeting.

32. The above is not intended to recite all relevant entries and evidence that the claimant was referred to. It stands as examples of the entries and evidence the claimant was referred to. The overall picture is clearly demonstrated by these examples. It is simply not possible to find a way to interpret the claimant's oral evidence at this hearing such that it is consistent with any contemporaneous records or documents. At various times the claimant suggested that doctors had failed to record that he told them he was dealing with daily suicidal thoughts, that he had hidden such thoughts from them and others, and that he had told lies at times about his health, including at medical appointments specifically to discuss his mental health and stress.

33. Taking all this into account, the claimant's evidence at this hearing regarding his mental health up to and around early April 2017 does not appear to be reliable or credible. He has consistently and repeatedly added to and/or exaggerated his problems at that time. A generous interpretation of this lack of reliability or credibility may be that the claimant, who does appear to have significant mental health problems now, is struggling to accurately recall the state of his health from back in early 2017, noting it is now in 2023, six years later. A less generous interpretation would be that the claimant is simply seeking to mislead the Tribunal in order to bolster his assertions that he was disabled in April 2017 to enable him to pursue his claim.

34. Regardless of which of these explanations apply, the finding of this Tribunal is that the claimant's oral evidence at this hearing regarding his health in April 2017 cannot be relied on. Accordingly, the decision regarding whether the claimant was a disabled person in April 2017 has been based on the extensive medical records and other documents produced at this hearing.

35. In that relevant period running up to and around April of 2017 it is clear the claimant visited his GP a significant number of times. There are multiple occupational health referrals and, as mentioned, there are contemporaneous emails recording what the claimant told his employer. The Tribunal has considered these carefully and does not find that they come close to establishing that the claimant was a disabled person with anxiety or depression or with any other condition up to and including early April 2017. There is no reference to depression in the relevant periods at all. There is ample reference to stress but, firstly, that is not the disability which the claimant relies upon and, secondly, stress can cause a disability but is not itself a disability. It is an external factor.

Findings Based on Documentary Evidence

36. The medical records and documents do not show that the claimant was suffering from substantial adverse effects on his ability to perform day to day activities up to April 2017. He clearly had mood swings and was struggling with stress, but shortly after that date he is recorded as undertaking all normal activities.

37. Importantly, this was after an event which caused him to visit his GP and which had stopped his plans to cease taking medication. This suggests that prior to the event in question his health and ability to carry out normal daily activities was in fact better than it is recorded as being in June and July 2017 by occupational health.

38. It is correct that throughout the relevant period the claimant was on a low dose of a drug called Citalopram. The claimant's position in submissions appeared to be that he must have been disabled and/or must have been diagnosed with depression to be given that drug, because it is a drug the claimant says is only given to persons who have depression.

39. The claimant did not produce any authority to support this assertion that Citalopram is only given to persons with depression, or to persons who are disabled. It is not possible for this Tribunal to extrapolate any such conclusion from the mere prescription of Citalopram.

40. It is noted that the claimant's own position is that he was initially on a very low dose of Citalopram. This was doubled prior to the relevant time, but was doubled again after the event which caused the claimant to return to his GP in June 2017.

41. The medical records, from around the time that that prescription appears to have begun, only refer to issues of stress and low mood. They do not refer to depression, and they do not describe symptoms which appear to amount to a substantial impact on the claimant's ability to carry out normal daily activities.

42. There was a paucity of evidence regarding the effect of the Citalopram on the claimant's mental health. It is necessary to consider what impacts the claimant's mental health would have had on him without the medication when assessing whether he was disabled. It is noted that the claimant told occupational health, in a consultation shortly after April 2017, that he had been intending to come off his medication, to ask his GP to stop the prescription. It was only because of the events that occurred after April 2017 that he changed this intent. This very strongly suggests that until the events that caused him to change this intention, the claimant's own view was that he did not need to continue to take Citalopram. This is not definitive but is evidence of the claimant's own assessment from around April 2017, the relevant time for these proceedings, that he no longer needed to take Citalopram.

Conclusions

43. The medical and documentary evidence does not support a finding that the claimant was a disabled person at the relevant time. The claimant's evidence is found to be unreliable and inaccurate.

44. Accordingly, the finding is that the claimant has not satisfied the burden of showing that he was a disabled person by way of anxiety and depression, or indeed anything else, as of April 2017.

45. The effect of that is that any claim of discrimination relying upon the characteristic of disability around that time must fail and is dismissed.

_____

Employment Judge Buzzard

31 July 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON

8 August 2023

FOR THE TRIBUNAL OFFICE