



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4110008/2021

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Held via Cloud Video Platform (CVP) on 4 April 2022

Employment Judge S Cowen

10 **Mr C Kilshaw**

**Claimant
In Person**

15 **Santander UK plc**

**Respondent
Represented by:
Ms C Knowles –
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant was not a disabled person within the Equality Act 2010 in November 2020.
2. The claimant's claim for disability discrimination is dismissed.

REASONS

25 **Background**

1. The Claimant was employed by the Respondent from 7 September 2009 to 28 February 2021, ultimately as a Protection Consultant in the Insurance and Protection team. The Respondent terminated the Claimant's contract on grounds of capability on 19 November 2020, giving him notice. ACAS were notified on 9 May 2021 and an EC certificate was issued on 17 May 2021. The ET1 was issued on 16 May 2021.
2. On 26 January 2022 at a Preliminary Hearing, it was set out that this hearing would consider the issue of "Whether the claimant is or was at the material

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time, a disabled person within the meaning of section 6 and Schedule 1 Equality Act 2010”.

3. The only allegation of discrimination is that the claimant’s dismissal amounted to unfavourable treatment arising from his disability. The ‘material time’ of his disability was therefore the date of the decision to dismiss, on 19 November 2020.

The Hearing

4. I was provided with a bundle of productions, an additional GP letter, and some correspondence. I heard evidence from the Claimant.

5. Both sides made closing submissions. Unfortunately, there was not sufficient time to deliberate and deliver a judgment and so this judgment has been reserved.

The Facts

6. The claimant commenced work for the respondent on 9 September 2009. The year before this he had started having problems with his mental health which had been described as an ‘acute anxiety reaction’.

7. The claimant reported his mental health to his GP in March 2013 and was placed on anti- depressant medication by his GP on five occasions between August 2018 and May 2019.

8. In March 2013 the claimant attended his GP with physical complaints, but told the GP of issues with his mental health. He said that his appetite and sleep were ok, the GP noted that he ‘just wanted to speak to somebody re this’. The claimant was given advice on counselling. The claimant thought that these feelings were the same for everyone and acknowledged that they were not impacting on his day to day activities.

9. In March 2014 he returned to the GP with physical complaints, but once again told the GP that he was upset and his relationship was strained and that he was undecided about what to do. The GP suggested counselling. The claimant declined anti-depressants at that time.

10. In April 2014 the claimant told his GP he was feeling better after disclosing his problems to him. He said that he would rather move past it, if he can. The claimant indicated that this was the first time he acknowledged he had a traumatic incident as a child.
- 5 11. In August 2018 the claimant attended his GP once again. He described “worsening low mood” which had been “lingering problems for a few years.” (sic). He also told the GP at that time of loss of appetite, problems with sleep, losing interest in things. He also described feeling helplessness. He was prescribed anti-depressants on this occasion. When reviewed in September
10 2018 he said he had benefitted from a sleep point of view and had attended counselling. He said he was generally feeling slightly better. The claimant was continuing to work at this time, including a secondment to Bradford.
12. In March 2019 the claimant was scored on the HAD depression scale. The claimant’s situation was described by the GP as “multifactorial and similar
15 issues as last year”. He was diagnosed with an “acute stress reaction” and signed off work. This was reviewed and renewed by the GP. The claimant stopped taking antidepressants by the end of June 2019, but continued to be signed off for ‘stress at work’ until March 2020. The details of his reports to the GP were not clear due to extensive redactions in his medical evidence.
20 The claimant underwent CBT treatment but did not attend all the sessions. He missed some due to illness, but others due to childcare problems.
13. The claimant recovered sufficiently to return to work between March 2020 and July 2020, before relapsing in August 2020. During June/July 2020 he was struggling with his concentration. The GP records on 23 July state that his
25 sleep was poor, he was waking up with a racing heart, he refers to wishing he wasn’t here but denies thoughts of suicide. He was again prescribed anti-depressants. The referral to the mental health team also records frequent panic attacks. The claimant also described a lack of self-care and avoiding communication with others. His mental health over this period fluctuated and the claimant attempted to get himself up and out of the house, although
30 sometimes it took two hours to do so. The claimant also missed some of his

shared parental time in the Summer of 2020 as he was not able to see his children.

14. In August 2020 the claimant's GP notes that his sleep initiation was a bit better since starting on medication. He remained off work until his dismissal in December 2020. There were no GP records between 26 October 2020 and 13 January 2021.
15. In November 2020 to February 2021, the claimant considered that his mental health deteriorated further and he felt a more consistent isolation, a lack of motivation for life. He also neglected his daughters and was avoiding doing everything as he did not want to leave his house.
16. In March 2022, the claimant's GP described the claimant as has having a history of mood disturbance which is palindromic, manifesting itself in a variety of ways, such as anxiety, palpitations, poor sleep, low mood and depression.

The law

17. Section 6 of the Equality Act provides a definition of "disability" as follows:
- "(1) A person (P) has a disability if:*
- (a) P has a physical or mental impairment, and*
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."*
18. The burden of proving a disability lies on the claimant, who must show that he falls within the definition at the 'material time'. In this case, the material time is agreed to be the date of the decision to dismiss, which was 19 November 2020.
19. The question of whether the claimant's situation amounts to a 'mental impairment' is for the Tribunal to decide, based upon the evidence provided by the parties. A 'mental impairment' is not defined by the Equality Act. The requirement for a clinically well recognised illness has also been removed by

s.18 Equality Act 2010. Whilst medical evidence may assist the Tribunal, it is not conclusive beyond the decision making of the Tribunal itself.

20. S212(1) of the Equality Act provides that “substantial” means more than minor or trivial. The focus of the Tribunal is on what the claimant cannot do, or can only do with difficulty, see *Paterson v Commissioner of Police for the Metropolis* [2007] IRLR 763. The Tribunal will take into account how long it takes to do something, with or without medication/support. This is not offset by things that the person can do. This is also confirmed in *Aderemi v London and South Eastern Railway Ltd* 2013 ICR 391.
- 10 21. A normal ‘day to day activity’ are the actions that people generally take in normal life, such as shopping, dressing, cooking, cleaning, reading and writing, watching TV. These are actions carried out by people in general and not specific to one individual.
- 15 22. Schedule 1 of the Equality Act gives further details on the determination of a disability. For example, Schedule 1 para 2(1) provides that the effect of an impairment is long term is it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.
- 20 23. Para 2(2) of Schedule 1 provides that if an impairment ceases to have a substantial adverse effect, it is to be treated as continuing to have that effect if that effect is likely to recur. In *SCA Packaging Ltd v Boyle* 2009 UKHL 37, the House of Lords ruled that “likely to” in this context means “could well happen” rather than “more likely than not”.
- 25 24. Para (5) provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if measures are being taken to correct it and but for that, it would be likely to have that effect.
- 30 25. Where the Tribunal considers whether the impairment is likely to last 12 months, it must look at the position at the date of the discrimination and consider it from that point forward. The Tribunal cannot look to see what

actually happened after the date of discrimination in order to determine whether disability occurred at the material time.

Decision

26. It is for the Claimant to prove that his situation at the time of dismissal in November 2020 amounted to a disability within s.6 Equality Act 2010. The claimant provided an impact statement, oral evidence and his GP records, together with a letter from his GP. As the records were redacted, some key parts were not available to consider. However, all the evidence provided by the claimant was considered. I took into account the fact that the claimant was not represented in the preparation or attendance at this preliminary hearing.
27. The claimant provided evidence from those records and his own evidence that he had suffered from mental ill health on a number of occasions since 2013, which required him to contact his GP. However, analysis of the symptoms suffered by the claimant in November 2020 was required to establish whether he was 'disabled' within the meaning of the Equality Act 2010, at the time. I accept that the symptoms of mental ill health may amount to a 'mental impairment' within the meaning of disability in the Equality Act 2010, if the remainder of the test is satisfied.
28. The GP notes showed that in July 2020 the claimant's sleep was poor, he was waking up with a racing heart and referred to wishing he wasn't here but denied thoughts of suicide. In his evidence the claimant described that he had a lack of self-care and avoided communication with others. These symptoms include day to day activities -such as washing and dressing, sleeping and communicating.
29. I therefore considered whether the claimant had proved that his symptoms amounted to an adverse effect on day to day activities which was 'substantial' and 'long term', in order to prove a mental impairment.
30. The claimant did not provide detailed evidence about his sleep pattern, or the effect that problems with sleeping caused him. He did not tell me how long the sleep problems went on for, nor the steps taken to alleviate the problem.

31. Likewise, I did not see or hear of the extent of any problems with self-care. He did not explain to what extent he was unable to bathe, saying that he was not motivated to do so. I was not told for how long this lasted, or whether this meant he stopped bathing at all. I note that he said he was able to get up and out of the house, although he did refer to it taking up to two hours to do so. I could not therefore conclude that this was a substantial effect.
32. Likewise, the claimant said that he did not want to engage with friends or family, but did not specify the extent of this, or the period of it. It was therefore not possible to conclude that this was a substantial effect.
33. When considering the time span of these symptoms, I took into account the fact that the claimant first contacted his GP in 2013 and had returned repeatedly to him/her over a period of years. However, there was no evidence of a persistent symptom which continued for a period of 12 months or more.
34. I took into account the fact that the claimant was prescribed antidepressants between August and September 2018 and again in April and May 2019. However, the providing of a prescription, does not of itself, indicate a substantial adverse effect on day to day activities. In any event, it did not last 12 months, nor is there evidence that it was likely to do so. I considered whether there was evidence to support the fact that the claimant's symptoms would recur, in the sense that it 'could well happen'. I noted that in March 2019 the GP referred to "acute reaction to stress.... same issues as last year". Also in September 2020 the GP advised that "it is impossible to predict the timescale for this illness and similarly on his ability to do his job". This does not amount to sufficient evidence of 12 months, nor of the GP indicating that the same symptoms might recur.
35. I have also looked to consider how the claimant would have behaved had it not been for the prescribed medication, but no medical evidence has been provided to prove this and the claimant's evidence did not assist to identify this either.
36. I note that from July 2020, the claimant's certification as unfit for work referred to 'stress'. Whilst this term may not, of itself, be sufficient to warrant a finding

of disability, the symptoms of stress may be sufficient. Hence the reason I have considered the reported symptoms throughout.

37. I conclude that whilst the claimant has proved that he was suffering from mental ill health from time to time during the period of 2013 to 2020, there was
5 insufficient evidence to support the assertion that he had a recurring disability, nor one which had or was likely to last 12 months. I therefore do not find that in November 2020 he had a 'mental impairment' in the terms required by s.6 of the Equality Act 2010.

38. The claimant has failed to prove that he was disabled at the material time and
10 the disability claim is therefore dismissed.

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Employment Judge: S Cowen
Date of Judgment: 08 July 2022
Entered in register: 13 July 2022
and copied to parties

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