

# EMPLOYMENT TRIBUNALS



**Claimant**  
**Ms. C. Brew**

**V**

**Respondent**  
**Fleetway Travel Limited**

**HELD AT: London Central**

**ON: 13 December 2018**

**BEFORE: Employment Judge Mason**

**Representation**

**For the Claimant: No attendance**

**For the Respondent: Ms. Murphy, solicitor.**

## **OPEN PRELIMINARY HEARING JUDGMENT**

1. The Claimant did not have a disability (within the meaning of section 6 and Schedule 1 of the Equality Act 2010) at the Material Time and all her complaints of unlawful disability discrimination contrary to the Equality Act 2010 are dismissed.
2. Her claim for breach of contract (monies in lieu of notice) will proceed.

## **REASONS**

**Background and issues**

1. The Claimant was employed by the Respondent between 27 March 2017 and 20 December 2017 as a sales consultant working from home. The Respondent operates as a provider of holiday packages. The Claimant was dismissed by the Respondent on 20 December 2017 for making “numerous mistakes”; the letter of dismissal advises that she will be paid one month’s money in lieu of notice.
2. On 4 April 2018, the Claimant presented claims of unfair dismissal, disability discrimination and breach of contract (monies in lieu of notice). At a Preliminary Hearing on 3 September 2018, EJ Segal struck out the claim of

unfair dismissal as she does not have sufficient continuity of employment and she had not made out any grounds to support a claim of “automatic” unfair dismissal.

3. Also on 3 September, EJ Segal identified her discrimination claims as follows:
  - 3.1 Discrimination (her dismissal) arising from disability contrary to s.15 Equality Act 2010 (EqA);
  - 3.2 Failure to make reasonable adjustments contrary to ss. 20 and 21 EqA, specifically her claim that she was “*never given an opportunity to complete further training, bolster [her] sales, or discuss health matters*”.
4. EJ Segal listed this case for a final hearing to take place on 12 – 14 December 2018 and made various directions as follows:
  - 4.1 By 1 October 2018, the Claimant was required to:
    - (i) write to the Respondent stating whether she accepts that she had now been paid all notice monies owing to her; and
    - (ii) write to the Tribunal providing medical evidence of her disability and a short statement explaining what impact her disability has on her ability to carry out her normal day-to-day activities.
  - 4.2 By 8 October 2018, the Respondent was required to write to the Tribunal stating whether it accepted disability was accepted and if not whether it wished to request the listing of a one day Open Preliminary Hearing (“OPH) to determine whether the Claimant is disabled.
  - 4.3 By 8 October, the Claimant was required to sent to the Respondent details of her losses.
5. On 8 October 2018 the Respondent wrote to the Tribunal advising that the Claimant had sent one page of her medical records on 4 October 2018 and a short statement.
6. On 19 October 2018, the Respondent wrote to the Tribunal advising that the Claimant had provided further evidence in support of her alleged disability but this consisted of a one page letter stating that she first attended a private mental health clinic on 6 December 2017 – only 2 weeks prior to her dismissal.
7. As the Respondent still disputes that the Claimant is disabled (as defined in s.6 EqA) and this OPH was listed to take place before me on 13 December 2018 and the final hearing dates of 12-14 December 2018 were vacated.

#### **Evidence and procedure at the Hearing**

8. The Respondent was represented by Ms. Murphy, solicitor, who provided a bundle of documents (pages 1- 46).
9. The Claimant did not attend and was not represented. At 07.44 on the morning of the OPH, the Claimant sent an email to the Tribunal asking that today’s hearing be rearranged as she had an (unspecified) family emergency.
10. Ms. Murphy objected to a postponement of the OPH having received no notification of this request from the Claimant. Ms Murphy pointed out that the Claimant has had ample opportunity to provide evidence to show that she is

disabled (as defined in s6 EqA) and the Respondent has incurred the costs of attending today.

11. Having heard Ms. Murphy's objections, and having read the Tribunal file and the documents in the bundle, I refused the postponement and the OPH proceeded in the Claimant's absence. Notably, the Claimant did not explain the nature of the family emergency or how it prevented her from attending today.
12. Ms. Murphy made brief verbal submissions and I then adjourned to consider my decision. I then delivered my decision orally at the OPH but give these written reasons in view of the Claimant's absence. I also made (separate) case management orders with regard to the breach of contract claim.

### **Findings of Fact**

13. Having considered all the evidence in the round and having reminded myself that the burden of proof is on the Claimant and the standard of proof is the balance of probabilities, I make the following findings of fact relevant to the only issue before me, specifically whether or not the Claimant is disabled as defined in s.6 EqA.
14. In her ET1, the Claimant states she suffers from "*severe anxiety and panic attacks*". I place little weight on the letter from Brain Bio Centre dated 10 October 2018 (page 39) as this does not mention a diagnosis and is from a Nutritional Therapist. However, I accept that to some extent the Claimant suffers with intermittent mental health issues as her NHS medical records from Wood Lane Medical Centre [page 34] show the following "problems":
  - 3 May 2011: Depression NOS.
  - 5 December 2012: Psychotic episode NOS; acute and transient.
  - 2 March 2015: Mental health review.
  - 20 October 2015: Acute and transient psychotic disorder, unspecified.
  - 19 June 2018: Anxiety state unspecified.
15. I do not accept that the Claimant has suffered with anxiety which has lasted for at least 12 months, that her anxiety is likely to last for at least 12 months or is likely to last for the rest of her life:
  - 15.1 In her ET1, she does not give any indication how long she has suffered from anxiety and/or panic attacks or how often.
  - 15.2 Her medical records (page 34) do not assist in showing that the mental health issues she has seen her GP about are connected and "anxiety" is only mentioned in her medical records for the first (and only time) on 19 June 2018, more than 6 months after her dismissal.
  - 15.3 Even if the various mental health issues are connected, there is a significant gap in her medical records of almost 3 years (between 20 October 2015 and 19 June 2018) and the episode in 2015 is described as "transient". She says (page 40) that she does not see her GP in relation to her "disability" and relies on the letter from Brain Bio Centre but, again, I place little weight on the letter dated 10 October 2018 (page 39) as this does not mention a diagnosis and is from a Nutritional Therapist. In any event, that letter states that her first visit was on 6 December 2017 and there is still an unexplained gap of more than two years.

16. I am unable to conclude on the evidence that the Claimant's mental health issues significantly adversely affect her day to day activities:
- 16.1. In her ET1, the Claimant says panic attacks are "*characterised by an audible shortness of breath and choking sensation where the sufferer's words can barely come out or be understood*". However, she does not indicate how often she suffered in this way or when and she gives no other examples of how her day to day activities are, or were, affected.
- 16.2 In her email to the Respondent dated 4 October 2018, the purpose of which was to provide details of the effect her anxiety has on her day to day functioning, she again only says that she would have "*at times*" "*have a full panic attack on the phone with a customer or manager*". No other examples are given.
- 16.3 The letter from Brain Bio Centre (page 39) does not mention the effect on her day to day activities.
- 16.4 There is no evidence before me of any medication.

### **Relevant Law**

#### **17. Equality Act 2010 ("EqA):**

17.1 The starting point is the definition of disability in **section 6 EqA**:

"6. *Disability:*

- (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.*

17.2 This definition is supplemented by provisions in **Schedule 1 EqA** including:

"2. *Long-term effects:*

- (1) *The effect of an impairment is long-term if*
- (a) *it has lasted for at least 12 months,*
  - (b) *it is likely to last for at least 12 months, or*
  - (c) *it is likely to last for the rest of the life of the person affected.*
- (2) *If an impairment ceases to have an adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing if that effect is likely to recur*".

18. The Tribunal must take into account any aspect of
- **Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011)** ("the **Guidance**") and
  - **The Equality and Human Rights Commission: Code of Practice on Employment 2011** ("the **Code**")
- which appears to be relevant

19. In **Goodwin v Patent Office** [1999] IRLR 4(EAT): a Tribunal considering the question of disability should ensure that each of the following four steps is considered separately and sequentially:
- (i) does the person have a physical or mental impairment?
  - (ii) does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
  - (iii) is that effect substantial?

(iv) is that effect long-term?

**Conclusions**

20. Applying the relevant law to the findings of fact to determine the issues, I have reached the following conclusions.
21. I accept that the Claimant has a mental impairment, specifically anxiety, but I do not accept that this is long-term for the reasons explained above
22. I also do not accept that her anxiety affects, or at any time in the past has had a *substantial* adverse affect on her day-to-day activities having reminded myself that a substantial adverse effect is something which is more than minor or trivial. The Claimant has been given several opportunities to explain how and the extent to which her day-to-day activities are, and have been, affected by her anxiety and failed to do so. Bearing in mind the burden of proof is on the Claimant and it would be wrong for the Tribunal to make assumptions, I am unable to conclude on the evidence before me that her anxiety had a substantial adverse affect on her day-to-day activities at the relevant time.
23. In conclusion the Claimant does not meet the requirements of the Equality Act 2010 as she did not have a disability at the material time and her disability discrimination claims are dismissed.

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**Employment Judge Mason**

**13 December 2018**

Sent to the parties on:

14 December 2018

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For the Tribunal:  
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