



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

MRS P WALLER

SAINSBURY'S SUPERMARKETS LIMITED

Heard at: London Central **by CVP**

On: 7 September, 2021

Before: Employment Judge O Segal QC

Representations

For the Claimant: In person

For the Respondent: Ms E Wheeler, counsel

JUDGMENT

The Claimant was disabled within the meaning of the Equality Act 2010 between (at least) May 2019 and June 2020 inclusive.

REASONS

Introduction

1. This was an open PH listed to determine whether the Claimant (C) was disabled at the material times within the meaning of the 2010 Act.
2. I am grateful to both the Claimant and to Ms Wheeler for their helpful and clear approach to the issue.
3. It was clarified at the outset of the hearing that the condition relied on by C as constituting her disability is **depression/anxiety disorder** (and, for the avoidance of doubt, as confirmed at the last PH, not any additional separate condition of adjustment disorder or high blood pressure – which were symptoms of the depression/anxiety disorder).

Evidence

4. I had a joint bundle of 175 pages, together with some additional GP records etc provided by C to the Respondent (R) the night before the hearing which rather confirmed than added anything new to the evidence in the agreed bundle.
5. I had an impact statement and heard live oral evidence from the Claimant.

Facts

6. There were no facts in dispute; and in particular Ms Wheeler sensibly took the view that she was not able to challenge C's account of her (escalating) symptoms from November 2018 onwards, there being little or nothing in the documentary evidence and no independent evidence produced by R to support such a challenge.
7. C had a history of mental health issues, including post-natal depression.
8. From November 2018, C was under the care of her GP for anxiety and/or depression (I did not have notes from that date) and was prescribed Sertraline, a well-known SSRI (anti-depressant). At that time her main symptoms were insomnia and panic attacks. Initially, the side-effects of the Sertraline were severe and she did not continue taking it.

9. By January 2019, with the symptoms at least no better, her GP put C on Sertraline again, starting at a relatively low dosage of 50mg per day and this time the side effects were not so bad. C remained on Sertraline continuously until March 2020, when her GP tried an alternative anti-depressant, with the dosage increasing over time until the maximum daily dosage of 200mg was being prescribed by about September 2019.
10. By about March 2019, C's symptoms in her daily life were worsening, such that she often did not understand and could not retain what people said to her in conversation including at work and she had to make notes which she could review later as required.
11. By June 2019, C was having difficulties leaving the house and walking outside, though she continued to work until September 2019.
12. By August 2019, her interactions with other people, including at work, were becoming more and more problematic: it was difficult to have normal conversations, C would ramble or laugh inappropriately. R referred C to a private provider of mental health services, Validium, which offered C sessions of counselling with some CBT over the period roughly September to November 2019.
13. During August and the beginning of September 2019, C's symptoms worsened further, with the panic attacks becoming more frequent and overwhelming and partial loss of control over her legs at time, such that she might fall over and could not trust herself to cross the road unassisted. She began to find that she was not able to understand notes she had made of conversations, when reading them back to herself.
14. C was signed off work suffering from stress/anxiety in September 2019. She returned to work in October 2019.
15. Despite the counselling, the symptoms referred to above did not significantly reduce; and C found herself 'spacing out' (in effect freezing and losing time) at times. Additionally, from about November she had problems with breathing, high blood pressure and swallowing/eating.

16. In December 2019, partly as the result of a level of disorientation, C had an accident whilst driving. By this time, C was having difficulty understanding emails, which her husband had to read and explain to her.
17. In January 2020 C was signed off work (and did not return before the termination of her employment in June 2020) and describes herself as having a mental breakdown, with suicidal thoughts, difficulty leaving her room, agoraphobia, OCD, excessive sensitivity to light and sound and great difficulty in interactions with any other person including even her children.
18. Other than ‘Wellbeing services’ checking on whether C was likely to commit suicide, it did not prove possible to access proper psychiatric care, a situation made much worse once the pandemic affected the NHS from March 2020. There was no material improvement in C’s condition and symptoms between January and June 2020.

The Law

19. The word “*disability*” is defined in s. 6 of the EA 2010, which reads (in relevant parts) 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...

(4)...a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability... (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

20. Para. 12 of Schedule 1 of the EA 2010 provides that when determining whether a person is disabled, the Tribunal “*must take account of such guidance as it thinks is relevant.*” The “*Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability*” (May 2011) (the “**Guidance**”) was issued by the Secretary of State pursuant to s. 6(5) of the EA 2010.

21. In Goodwin v Patent Office [1999] I.C.R. 302, Morison J (President), provided some guidance on the proper approach for the Tribunal to adopt when applying the

provisions of the previous legislation, which remains equally relevant today when applying s.6. Morison J held that the following four questions should be answered, in order:

21.1. Did the claimant have a mental or physical impairment? (the ‘impairment condition’);

21.2. Did the impairment affect the claimant’s ability to carry out normal day-to-day activities? (the ‘adverse effect condition’);

21.3. Was that effect substantial? (the ‘substantial condition’);

21.4. Was that effect long term? (the ‘long-term condition’).

22. Underhill J (President) in J v DLA Piper UK LLP 2010 WL 2131720 suggested (para [40]) that although it was still good practice for the Tribunal to state a conclusion separately on the question of impairment, as recommended in Goodwin, there will generally be no need to actually consider the ‘impairment condition’ in detail:

“In many or most cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected on a long term basis. If it finds that it has been, it will in many or most cases follow as a matter of common sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues.”

23. The relevant point in time to be looked at by the Tribunal when evaluating whether the claimant is disabled under s. 6 is not the date of the hearing, but the time of the alleged discriminatory act, in this case the dismissal: per Judge Altman in Cruickshank v Vaw Motorcast Ltd [2002] I.C.R. 729, para [22, 25, 26].

A “mental impairment”

24. It is no longer necessary to establish that the mental impairment is a clinically well-recognised illness. The Court of Appeal established that the term “*mental impairment*” should be given its “*natural and ordinary meaning*”, and the Tribunal

should use its “*good sense*” to make a decision whether the claimant is suffering from a mental impairment on the facts of each case: per Mummery LJ in McNicol v Balfour Beatty Rail Maintenance Ltd [2002] EWCA Civ 1074, at [17, 19]. This is echoed in the Guidance, at A3.

25. In an early case, Rugamer v Sony Music Entertainment UK Ltd [2001] IRLR 664, the EAT sensibly defined “*impairment*” in the following way (at [34]):

““Impairment” for this purpose and in this context, has in our judgment to mean some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition. The phrase ‘physical or mental impairment’ refers to a person having (in everyday language) something wrong with them physically, or something wrong with them mentally.”

26. The Guidance states, at A5: “*A disability can arise from a wide range of impairments which can be: **mental health conditions with symptoms such as anxiety, low mood...***”

“Normal day-to-day activities”

27. The Guidance provides the following examples of what is meant by “*normal day to day activities*”:

“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.¹

Normal day-to-day activities can also include general work-related activities such as interacting with colleagues.²

In deciding whether an activity is a normal day-to-day activity, account should be taken of how far it is carried out by people on a daily or

¹ D2

² D3

*frequent basis. In this context, ‘normal’ should be given its ordinary, everyday meaning.*³

*Normal day-to-day activities also include activities that are required to maintain personal well-being. Account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating and sleeping.*⁴

*Some impairments may have an adverse impact on the ability of a person to carry out normal day-to-day communication activities.*⁵

28. In the Appendix to the Guidance, an illustrative non-exhaustive list of factors is set out which, if experienced by a person, would be reasonable to regard as having a substantial adverse effect on normal day to day activities. The list includes the following factor:

“persistent general low motivation or loss of interest in everyday activities... persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder; persistent distractibility or difficulty concentrating.”

A “substantial” adverse effect on the normal day-to-day activities

29. S. 212(1) of the EA 2010 defines “*substantial*” as meaning “*more than minor or trivial.*”

30. **Section 212(1) EqA 2010** defines substantial as “*more than minor or trivial*”. The **Equality Act Guidance at B1** states that the meaning reflects “*the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people.*” The words “*minor*” and “*trivial*” are not synonymous; something can be minor while not being trivial.

31. In Rayner v Turning Point [2010] 11 WLUK 156, HHJ McMullen QC held, at [22], that although the question of whether there is a “*substantial*” adverse effect is a

³ D4

⁴ D16

⁵ D17

matter of fact for the Tribunal to determine, in circumstances where a claimant was diagnosed with anxiety by his GP and his GP advises him to refrain from work, that is “*in itself*” evidence of a substantial effect on day-to-day activities, because were it not for the anxiety the claimant would have been at work, and his day-to-day activities include going to work.⁶

32. The following information is set out on the requirement of substantiality in the Guidance:

32.1. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people.⁷

32.2. The **cumulative effects** of an impairment should be taken into account when working out whether it is substantial. An impairment might not have a substantial adverse effect on a person’s ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, taken together, could result in an overall substantial adverse effect.⁸ For example:

“A man with depression experiences a range of symptoms that include a loss of energy and motivation that makes even the simplest of tasks or decisions seem quite difficult. He finds it difficult to get up in the morning, get washed and dressed, and prepare breakfast. He is forgetful and cannot plan ahead. As a result he has often run out of food before he thinks of going shopping again. Household tasks are frequently left undone, or take much longer to complete than normal. Together, the effects amount to the impairment having a substantial adverse effect on carrying out normal day-to-day activities.”

33. Appendix 1 to the EHRC Employment Code also provides guidance on the meaning of “*substantial*”: “*Account should... be taken of where a person avoids doing things which,*

⁶ This was accepted to be correct by His Honour Judge Peter Clark in Lee v HSBC Bank Plc 2016 WL 06476258 at ¶ 9.

⁷ At B1

⁸ At B4

for example, causes pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.”

A “long-term” adverse effect on the normal day-to-day activities

34. Schedule 1, part 1, para. 1 of the EA 2010 defines “long-term” (in relevant parts) as:

“(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.”

35. In the Guidance, at C2 and C3, the following is stated:-

C2.

*The cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect for the purposes of meeting the definition of a disabled person. **The substantial adverse effect of an impairment which has developed from, or is likely to develop from, another impairment should be taken into account when determining whether the effect has lasted, or is likely to last at least twelve months, or for the rest of the life of the person affected.***

'A man experienced an anxiety disorder. This had a substantial adverse effect on his ability to make social contacts and to visit particular places. The disorder lasted for eight months and then developed into depression, which had the effect that he was no longer able to leave his home or go to work. The depression continued for five months. As the total period over which the adverse effects lasted was in excess of 12 months, the long-term element of the definition of disability was met.

C3.

The meaning of 'likely' is relevant when determining: ... whether an impairment has a long-term effect (Sch 1, Para 2(1), see also paragraph C1); ...

In these contexts, 'likely', should be interpreted as meaning that it could well happen.

36. In Nissa [24-26], having emphasised the importance of the forgoing paragraphs of the Guidance, the EAT made the following points:-

36.1. *“The question was, therefore, whether, viewed at that time rather than with the benefit of hindsight, the effects of those impairments (assuming at this stage substantial relevant adverse effects) were likely to last at least 12 months”.*

36.2. *“... viewed at the relevant time and thus projecting forward, when asking whether it could well happen that the Claimant's impairments would last for at least 12 months, there [is] a range of relevant evidence ...”, including any prognosis at the time and “the Claimant's evidence of the impairments .. suffered over this period, corroborated by the medical evidence”.*

36.3. *“... the ET was required to consider whether there was information before it that showed that, viewed at that time, it could well happen that the effects of the Claimant's impairments would last for more than 12 months. ... [It must avoid] viewing the issues with the benefit of hindsight”.*

Discussion

49. It is clear, applying the law set out above, that C had at all material times a mental impairment: depression/anxiety disorder.

50. Although disability was not conceded in respect of any period, Ms Wheeler acknowledged that from at least January 2020, it would not be possible to argue that C was not suffering substantial adverse effects on her day to day activities.

51. The questions thus became:

51.1. When was it first right to conclude that such substantial adverse effects on her day to day activities had arisen?

51.2. From what point in time thereafter would it be right to conclude that it could well happen that such symptoms would last for at least 12 months (without the benefit of hindsight)?

52. My answer to the first question is that C was suffering continual substantial adverse effects on her day to day activities from at the latest March 2019. By then, C had been under the care of her GP for anxiety and/or depression for 4 months, and had been prescribed Sertraline continuously for 2 months. As well as insomnia and

panic attacks, C had problems understanding and retaining what people said to her in conversation including at work.

53. All these problems clearly affected adversely C's normal day to day activities: in particular being able to interact normally with others at work and outside of work.
54. My answer to the second question (which is not by its nature an exact science) is, approximately May 2019. By then, there had been continuous symptoms of anxiety/depression for 6 months, with a clearly worsening trajectory. It would, I believe, be an unduly optimistic physician who took the view at that time that it could not well be the case that C would continue to be substantially adversely affected in her day to day activities – at least to some non-trivial or minor degree – for a further period of at least 6 months.
55. My conclusions above have been reached absent consideration of the effect of the medication C had been prescribed between January and May 2019. I had no expert evidence on the point, and understandably C was herself not able to say what the effects would have been had she not been taking Sertraline during that period. However, it seems reasonable to assume that her symptoms, and thus the effects on her day to day activities, would have been significantly worse without that medication.

Postscript

56. Directions have already been given by the ET to progress this case to a final hearing.
57. I was told that C had intimated that she might want to add claims to those already included by her and listed at para 12 of the Case Summary following the PH on 21/7/21.

58. I explained to C the difference between amending the list of issues and adding new claims, and that she would have to apply to amend her case to add new claims – which might well not be permitted at this stage unless it were a case of simply adding additional ‘labels’ to factual complaints already made.

Oliver Segal QC

Employment Judge

7 September, 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
07/09/2021