



EMPLOYMENT TRIBUNALS

Claimant: Miss S Radia

Respondent: University Hospitals of Leicester NHS Trust

Heard at: Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE

On: 9 May 2024

Before: Employment Judge Adkinson sitting alone

Appearances

For Miss Radia: Ms C Trayers, Counsel

For the Respondent: Mr G Price, Counsel

JUDGMENT

UPON hearing from Counsel for the Claimant and Counsel for the Respondent, the Tribunal's judgment is that

1. The claimant was not disabled at the times material to this claim, and therefore,
2. All claims of disability discrimination are dismissed.

REASONS

1. Miss Radia brings claims of disability discrimination (amongst other things which are not relevant to this hearing). She specifically alleges that she was disabled because of stress and anxiety during the relevant period of December 2022 to 2 May 2023 (when her employment ended).
2. The Respondent denies that she was disabled during this relevant period.

Hearing

3. Miss Radia was represented by Ms Charlotte Tryers, Counsel, and the Respondent by Gareth Price, Counsel. I am grateful to both of them for the help that they have given to the Tribunal and for the way that they have focussed on the key issues in this hearing.
4. There was an agreed hearing bundle of 327 pages and the parties have referred me to the relevant documents. I also heard oral evidence from Miss

Radia personally. Each party made closing oral submissions. Miss Radia also relied upon a written skeleton argument. I have those documents to which I was referred, oral evidence and submissions into account in reaching my decision.

5. During the hearing we took a break in the mid-morning. Neither party requested any other reasonable adjustments. The hearing ended at lunchtime. I chose to reserve my decision. This is that decision.
6. Neither party suggested that the hearing had been unfair, and I am satisfied that it is a fair hearing.

Issues

7. At the time Miss Radia did not take medication, and her alleged disabilities had not lasted for 12 months. Therefore, the issues in this case are as follows:
 - 7.1. Did Miss Radia have stress and anxiety?
 - 7.2. Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
 - 7.3. Were the impairments:
 - 7.3.1. likely to last at least 12 months?
 - 7.3.2. if not, likely to recur?

Facts

8. I assess Ms Radia's evidence firstly. I unhesitatingly conclude that Miss Radia was an honest witness who was doing her best to assist the Tribunal to decide the matters before it.
9. However, I am unable to accept the evidence that she has given to the Tribunal in relation to determining whether or not she was disabled during the relevant period. The reasons for that are as follows.
10. As her evidence-in-chief, she adopted her disability impact statement prepared for her by her solicitors. I have no complaint that she did so. Unfortunately, her solicitors have drafted a statement that only really spoke about how things were now, nearly a year after the end of the relevant period. It is well-established that occurrences after the end of the relevant period are not relevant to determining disability (see the law below). Therefore this material is of no real assistance about affairs then.
11. The only references to the past can be found in two paragraphs. In paragraph 8 the statement says:

"my condition still continues to affect me as they did when I was employed with the Respondent".

The statement is wrong. A quick reading of the contemporaneous medical records do not record anything like the symptoms that Miss Radia complains of now. It is no more than an attempt to try to relate affairs as they are now to the past, without making the effort of presenting what would be the relevant evidence about affairs as they were then.

12. In paragraph 10 Miss Radia talks about what things were like when she was working for the Respondent. She told me that she felt under intense pressure because she did not feel comfortable in the workplace, and that she did not receive any requested support. She told me that she began to feel like her mental wellbeing did not matter to the Respondent. The result, she said, was that she became isolated from colleagues, felt fatigued and lacked motivation and concentration, which in turn led her to feel inadequate and incompetent. That paragraph does not give me nearly enough information to understand at the time whether or not the alleged impairments were having a substantial adverse effect on her normal day-to-day activities because they are short of detail and examples.
13. Moreover, this one single paragraph is swamped by information about the present. Its context in the surrounding statement leads me to conclude the limited and vague information is conveyed in the context of how things are now. This is supported by her demeanour before the Tribunal. Her demeanour and the manner she answered questions led me to conclude that Miss Radia was telling me what she believed to be the truth but her recollection of events in the relevant time is coloured by her condition now. I have borne in mind the comments in **Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor [2013] EWHC 3560 (Comm)** where Leggatt J provided useful insights into the issues of memory and evidence about events, and noted:

“Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs.”.

I consider that is what has happened here.
14. Unfortunately, it leads me to conclude that I am unable to accept Miss Radia’s oral evidence or put any weight on her disability impact statement. I can only determine the question of whether or not Miss Radia is disabled by reference to the contemporaneous documentation available to me from the time. This documentation appears to be as complete as reasonable and credible, and so reliable. This position is somewhat supported by Miss Radia’s own approach in submissions in which Ms Trayers did not disown the statement, but quite realistically, reasonably acknowledged its unhelpfulness above and carefully and powerfully focused more on the documentary evidence. For what it is worth, I consider her approach on this was necessary, reasonable and entirely appropriate.
15. I turn then to making these findings of fact on the balance of probabilities.
16. On 2 August 2022 Miss Radia reported to the NHS 111 service, and later that day, to a doctor that that she had headaches and visual disturbances. The doctor suspected that she might have sinusitis. The doctor’s notes recorded that a few days before, Miss Radia reported that she had had flu-like symptoms with pain above the eyes and the bridge of the nose and in the forehead, which eased after paracetamol. There was no suggestion of anxiety of stress.
17. On 12 December 2022 when she contacted NHS 111 and it referred her to her doctor. She reported that in the previous week she had had pain at the

back of her head, on the left side of her head and behind her eye. She told the doctor that there were not obvious triggers and no significant stress.

18. On 15 December 2022 Miss Radia attended a paramedic specialist practitioner. She reported severe pain at the back of the head with electrical shocks happening 5 or 6 times a day lasting between 1 to 5 minutes each time. She said she was getting typical migraine pain around the forehead and the left eye. She reported nausea, no blurred vision and that she used a computer a lot at work. She reported that she had migraine type headaches previously with nausea due to reading a lot. She told the practitioner that she had recent stress with job changes. The practitioner queried in the notes a possible link between the two and diagnosed possible cluster headache syndrome. However beyond that, there is no mention in the notes of Miss Radia complaining of anxiety.
19. On 19 December Miss Radia saw a doctor. She told the doctor that she had had pain about her left eye and sinus pain for the last week, which had been intermittent for 7 out of 10 days with no vision changes. The doctor recorded a previous history of migraines that had been resolved with paracetamol and that the difference this time was it had not been resolved. They said there is a possible diagnosis of cluster headaches and they issued a sick note for a week citing headaches.
20. On 25 December 2022, Miss Radia visited the Accident and Emergency (“A&E”) Department. The A&E consultant noted that Miss Radia was complaining of episodic left-sided headaches (though occasionally also on her right side) starting as a stabbing pain. They were reportedly worse in the morning and when lying flat. There was no nausea or vomiting. The consultant recorded that on examination Miss Radia appeared well, was speaking in complete sentences and was tender over the left cheek and right nose. They opined it was acute viral sinusitis. They prescribed drinking various fluids and taking various sprays and analgesics. There is no mention in the notes of Miss Radia complaining of anxiety.
21. On 28 December her doctor issued a fit note saying Miss Radia was not fit for work because of a headache.
22. The next time that Miss Radia has any medical treatment was on 15 February 2023. Miss Radia had contacted NHS 111. It referred her to the emergency service. She was complaining of a day of left-sided chest pain and pounding heart, tightness radiating into her back and getting worse in the evening, and that it was hurting to breath. She admitted herself to A&E. The A&E notes recorded that Miss Radia had been anxious recently after switching jobs and cities.
23. On 20 February 2023 Miss Radia saw her doctor to report that 3 days prior she had been involved in a car accident as a passenger. She had been left with pain in the right knee and right forearm. The notes recorded she reported that she was anxious following the accident. The notes recorded:
“[she] feels anxious relating to work UHL Pharmacies and her family situation but did not want to discuss in detail. Feels time away from work to enable her to manage the situation no risk was expressed.
Her mental health state examination recorded that she was

“well dressed with normal voice and appropriate behaviour, no low mood, rapport established, reactive effect, no thought disorders, no risk expressed on the generalised anxiety disorder.”

Her generalised anxiety score (called the GAD-7) was 8. This is the lower end of the scores for moderate anxiety.

The doctor issued a sick note valid to 5 March with a diagnosis of anxiety. On 6 March that was renewed until the 12 March. On 14 March that was renewed until 18th.

24. On 13 March 2023 Miss Radia met with the Principal Pharmacist, Ms E Kenhide. Ms Kenhide sent an email on 14 March 2023 to Miss Radia in which she summarised that discussion. Miss Radia told me she does not accept its accuracy. However I have been given no detail about how it is inaccurate. Because of the general difficulty accepting Miss Radia’s evidence and because it is not clear how it is inaccurate, I accept the email as an accurate summary of the conversation. In addition there is no correspondence at the time in which Miss Radia is shown seeking to “correct” Ms Kenhide’s summary.

25. The email recorded that Miss Radia had told her that she was finding it difficult to concentrate and was feeling anxious and worried when doing particular tasks. Miss Radia had told her she had not been sleeping too well and that she had been struggling with anxiety and concentration that day.

26. She noted that Miss Radia stated that she felt drained and had a lot to think about, for example, leaving her job. Miss Radia reported that it had been “hard to speak at home because they are all so stressed.”

27. Ms Kenhide also noted:

“You stated that you have a level of social support when speaking to your friends but only helps to some extent I asked if there is anyway that I/we can support you from a manager work perspective and what you think will be beneficial. You stated that you weren’t sure so I have asked you to think about it and get back to me”.

The note recorded that Miss Radia had chosen to withdraw her acceptance of a place to study for a diploma relevant to her job. The note concluded with a summary of points. These included that there had been an occupational health (“OH”) referral.

28. On 27 March Miss Radia emailed Mr Kehinde:

“I think at the moment because of my current situation all the things happening together at once in addition to this starting a new job and different environment and responsibilities and initially looking forward to starting a new job and the setbacks stress sometimes triggers my mood and emotions thinking about problems outside of work given the nature of my employment and the concentration required of the job I sometimes feel overwhelmed about my duties and responsibilities, I feel at times there has been issues at a given time it will have an impact on my being able to work to my full potential I think this is also based on the fact that I like to be precise and accurate it what I do. In addition to mentally it can also take a

physical toll like headaches, sinus pains and generally feeling out of energy”.

29. On or around 29 March 2023 Miss Radia had a telephone appointment with the OH nurse. It was a short appointment. However I am satisfied that the OH nurse recorded the relevant details in the report and would have known the importance of making an accurate note of what was said. I am satisfied information in the report can only have come from Miss Radia.
30. The report itself is dated 29 March 2023. The advisor recorded:
“Miss Radia reports some ongoing personal stresses due to family illnesses and in February she was involved in a road traffic accident although physical injuries were minor and have now resolved she had struggled with psychological effects since which has led to sleep disturbances and insomnia at times. This combination of stresses has been overwhelming for [Ms Radia] leading to anxiety, poor concentration and headaches, palpitations and lack of motivation. She has spoken to her GP but no medication has been indicated. Shivani is back as work but still feeling overwhelmed and struggling due to fatigue a stress risk assessment has been completed at present which should identify some supportive action”.
“[Miss Radia is] fit for work with support whilst her personal stresses ongoing and further the medical expectation is for recovery and ability to provide a regular and efficient service through addressing the underlying problems and developing more positive coping strategies and support mechanisms although Miss Radia may feel vulnerable to perceived pressures or adverse circumstances in the short term”.
The opinion of the nurse was that the duration of the condition was less than 12 months and was unlikely to last longer.
31. On 4 April 2023 Miss Radia attended at her doctor’s surgery upon a “health professional” The notes recorded that since February 2023 she suffered from palpitations with a possible link to anxiety and stress. It was noted that Miss Radia reported that she had worked at the hospital pharmacy on admissions since November 2022 and that “work very supportive”.
32. The note record that Miss Radia said that she had a
“healthy diet, social life good, lived at home with parents, mother supportive, issues with grandma at current causes stress, car accident potential stress caused has reached out for CBT via work, has trauma assessment, is struggling at work with current impact of anxiety and house stress at home translates following discussions feels torn over making a choice to stay in this position long term at work unsure to accept a Med 3 wants to discuss with Line Manager.”
33. Miss Radia denied telling the health professional that she had a good social life although she does admit to reporting that she had a good diet, lives at home with parents and mother was supportive, the issues with grandparents and so forth. I am satisfied that she did report a good social life. That information can only have come from Miss Radia. It seems far more likely that she said this than the health professional simply wrote something that was not said when it is common ground the rest of what was

recorded is accurate. In addition the context makes this important information. This was a discussion about stress and anxiety the state of her social life would be an important indicator one way or the other. Furthermore, this record tallies with Ms Kenhide's email which reported that Miss Radia had said that she has a level of social support when speaking to friends.

34. On 6 April she was issued with a note saying she was not fit for work until 24 April because of anxiety.
35. On 5 May Miss Radia again attended her doctor and reported difficulty breathing for the past 4 months. After examination the doctor noted
 "Has been queried whether this is stress anxiety related concerns over grandmother's health has made the decision to resign from her work as pharmacist at UHL which is very sad about and feels it is the best option for her for now optimistic about getting herself better at returning to work".
36. On 14 February 2024 Miss Radia attended her medical centre and reported to the Health Care Practitioner that she had a history of anxiety and that it had been triggered by work. It was also recorded that she said that she had been bullied at work and whilst working for the Respondent. This was the first time such allegations had been made.

Law

1. The **Equality Act 2010 section 6(1)** provides:
 "(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."
 "substantial" means "more than minor or trivial": **Equality Act 2010 section 212(1)**.
2. The **Equality Act 2010 schedule 1** provides details of how to determine disabilities. So far as relevant it says in **paragraph 2**:
 "(1)The effect of an impairment is long-term if—
 "(a) ...
 "(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...."
3. "likely" means "could well": **SCA Packaging Ltd v Boyle [2009] ICR 1056 HL(NI) at [42]**. Specifically, **at [42]** Lord Rodger illustrated that "could well" has the same value as "the kind of risk ...that would make it worthwhile for a doctor or other specialist to prescribe a continuing course of treatment to prevent it." His Lordship was referring to the risk of recurrence. The definition applies however to "likely" in **paragraph 2** above: **All Answers Ltd v W [2021] IRLR 612 CA**.
4. I must assess whether an impairment is "likely to last..." by reference to the facts and circumstances existing at the time of the discrimination. I am not entitled to have regard to what occurred afterwards: **All Answers at [26]**

5. The appropriate time to consider disability is at the time of the alleged discriminatory acts: **Cruickshank v VAW Motorcast Ltd [2002] ICR 729 EAT**. The law recognises that effects can vary over time: **Sullivan v Bury Street Capital Ltd [2022] IRLR 159 CA**
6. The Employment Appeal Tribunal provided guidance to Employment Tribunals on approaching disability cases in **Goodwin v Patent Office [1999] ICR 302 EAT**. I have considered all of that guidance and in particular:
 - 6.1. It should construct the legislative protections purposively;
 - 6.2. It should refer expressly to any relevant provisions in the Secretary of State's **Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)** ('the guidance').;
 - 6.3. It should bear in mind that the fact that a person can carry out activities with difficulty does not mean that his ability to carry them out has not been impaired – the focus is not on what Miss Radia can do, but what they cannot do or can do only with difficulty (see also **Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19 EAT**)
 - 6.4. Where a claimant is or has been on medication, the Tribunal should examine how Miss Radia's abilities were affected while on medication and how those activities would have been affected without the medication;
 - 6.5. Each element should be considered in turn.
 - 6.6. It should be careful not to lose sight of the overall picture when considering each element of the statutory definition in turn.
7. While one cannot determine an allegation a person is disabled by reference to what they can do, a Tribunal is entitled to take into account all the evidence to decide if it finds Miss Radia's case credible: **Ahmed v Metroline Travel Ltd [2011] EqLR 464 EAT**.
8. Normal day-to-day activities means those activities relevant to professional or work life where it applies across a range of employment situations. It requires a broad definition but can include irregular but predictable events: **Paterson v Commissioner of Police for the Metropolis [2007] ICR 1522 EAT; Chief Constable of Dumfries and Galloway v Adams [2009] ICR 1034 EAT**. "Normal" has an ordinary everyday meaning: **Guidance D4**.
9. Though I have had regard to the whole guidance, I found the following paragraphs of the guidance particularly helpful in this case: section C especially C2 (and the associated example), C3 and C4.
10. There is a distinction between a mental condition such as anxiety and depression and a reaction to adverse circumstances. The former is a disability whereas the latter is not. This does not mean Miss Radia needs to prove "a clinically well-recognised mental illness". To help the Tribunal might start with the adverse effect issues and that may inform if there is a

relevant physical or mental impairment: **J v DLA Piper LLP [2010] ICR 1052 EAT.**

11. In **J at [42]** the Appeal Tribunal held that in a case like anxiety and depression where it may not be clear if there is a mental impairment, the Tribunal can start with the adverse effects first.
12. I can of course consider the opinions of experts e.g. occupational health even if not prepared for the purpose of these proceedings. However I am not bound to follow them because the issue is one for me to decide: **Sullivan.**

Conclusions

13. I consider that, following **J**, it is best to start with the long-term nature and impact and then work back. This is because I am looking at an issue that, by the end of the relevant period, had not lasted 12 months and because the Respondent relies on any impairments being no more than an ordinary, understandable reaction to adverse circumstances, namely a car crash and her grandmother's illness, rather than to a particular impairment.

Did any alleged impairment have a substantial adverse effect on her ability to carry out day-to-day activities?

14. The evidence in my view does not show that, at the time, the putative impairments had a more than minor or trivial impact on her abilities to carry out normal day-to-day activities.
15. For the reasons given above, I place no weight on her disability impact statement or oral evidence. Therefore I must draw my conclusions from the contemporaneous documents.
16. In favour of Miss Radia, I note she was certified unfit for work by her doctor from time to time, though it is not one continuous period of unfitness.
17. However while these notes says she is not fit for work, neither the sick notes nor the other medical notes disclose what she could not do at that time. They do not disclose whether for example her unfitness to attend work was because there was a more than minor or trivial impact on what would be normal day-to-day activities or on other activities.
18. However they do record what she could do:
 - 18.1. For example on 20 February 2023 (first time anxiety is recorded on a sick note) she was able to dress herself well, spoke normally and behaved appropriately, had no low mood and could build a rapport;
 - 18.2. On 29 March 2023, the OH nurse noted Miss Radia was actually fit for work with adjustment.
 - 18.3. It is shown by the appointment on 4 April 2023 that she could maintain a health diet and had a good social life.
19. I am acutely aware the focus is on what cannot be done, or only done with difficulty. However the lack of evidence about what normal day-to-day activities she could not do, or do only with difficulty hinders that enquiry. The clear evidence of what she could do leads me to conclude it is not

believable that any impairment was having a more than minor or trivial impact on her normal day-to-day activities. Therefore the claim fails at this stage.

20. If that were wrong, I would have to consider whether any impact was because of Miss Radia's alleged impairment of stress and anxiety.
21. I acknowledge that for a period Miss Radia was certified unfit for work by her doctor. However the notes record different reasons for this. The first mention of anxiety on her fit notes is 20 February 2023. Before that there is no such diagnosis. Instead it relates to headaches, sinusitis or migraines.
22. I accept that it is possible that the headaches before then might be consistent with stress and anxiety. However they are equally consistent with other conditions. There is no medical evidence that shows they were on balance linked. Miss Radia invites me to infer they were linked. I am not prepared to do that. I firstly note that the remainder of the notes up to 15 February 2023 (the visit to A&E because of chest pains) do not diagnose anxiety or stress – in fact they are silent about it except for noting a possible link on 15 December 2022 in relation to her change of job and city. There is also a gap in January 2023 that may show there is no link. The result is that I do not have the evidence that is enough to justify me linking the 2 period together as one long period of anxiety and stress. I am not prepared to do it on the basis of "judicial notice" because such matters are well outside the Court's own knowledge and experience. Therefore for this reason the claim would fail at this stage too.

Were they likely to last at least 12 months?

23. If I am wrong about the above, I have considered if it could be shown that the impairments would have been likely to last longer than 12 months.
24. After remembering that likely means "could well", and what that looks like in practice, I conclude the answer is no. I have come to this conclusion for the following reasons.
 - 24.1. Firstly the medical evidence does not support that conclusion. Until about 15 February 2023 there is no evidence that Miss Radia was suffering anxiety or stress. I have set out the facts above and that they diagnose various types of headaches. The only mention of stress is because of a job change, noted on 15 December 2022. That is not in my view enough to suggest there may be a condition that lasts 12 months. Indeed by its very nature, it is far more consistent with the associated stress being expected to be and with being transitory and short.
 - 24.2. When I examine the medical evidence from 15 February 2023 onwards, none of it suggests the doctors had reason to expect it to last longer than 12 months. The doctor's make no such note and do not appear to make any referral or prescription on the basis it could well do so. Job changes, the car accident and her grandmother's illness all suggest the sort of life events whose negative impact is not likely to make someone disabled for 12 months. There is no evidence the culmination of those events

would be expected to make stress and anxiety last 12 months either.

24.3. In addition the medical notes appear rather to suggest transitory effects because Miss Radia reports a low score on the GAD-7, eats and presents well, communicates well and has a good social life. In my view these are far more consistent with a transitory condition than one that could well last 12 months.

24.4. In addition there is the OH report from the nurse. I am not bound by the diagnosis. However her opinion that the condition was not likely to last 12 months is in my view consistent with the other evidence available to me. I have no basis not to agree with her opinion on the matter.

25. Therefore the claim would not have satisfied this test.

if not, were they likely to recur?

26. In my view none of the evidence shows that the conditions could well occur. I accept that they might occur (history shows they did). However there is nothing to disclose in the reliable evidence that this was more than a short-term reaction to adverse life events. Likewise Miss Radia would not have satisfied this test either.

Impairments

27. I therefore conclude that any impairments that might be described as stress and anxiety were in fact no more than reactions to adverse events in life, and were not of the kind that could well have been long term at the relevant time.

Outcome

28. The claims for disability discrimination fail because Miss Radia was not disabled because of stress or anxiety at the time.

Employment Judge Adkinson

Date: 31 May 2024

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes

Public access to employment Tribunal decisions

Judgments (except those under rule 52) and reasons for the judgments are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to Miss Radia(s) and Respondent(s) in a case.

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