



EMPLOYMENT TRIBUNALS

Claimant

Mr V Filipovich

Respondent

v East and North Hertfordshire NHS Trust

Heard at: Bury St Edmunds

On: 12 November 2021

Before: Employment Judge Bloom

Appearances

For the Claimant: In person.

For the Respondent: Mr T Sheppard (Counsel).

PRELIMINARY HEARING RESERVED JUDGMENT

1. The Claimant was a disabled person at the material time of the events of which he complains.
2. The Claims of Disability Discrimination and Unfair Dismissal shall proceed to a full Hearing.
3. The Employment Tribunal shall list the matter for a further Telephone Case Management Preliminary Hearing.

REASONS

1. On 12th November 2021 this matter was heard by me for the third time. The issue to be determined at this stage is whether the Claimant was a disabled person at the time he alleges acts of Discrimination. Two previous Preliminary Hearings took place before me on 21st May 2021 and 15th September 2021. I do not propose setting out further in this Judgment the reasons why the issue could not be dealt with on either of those two previous occasions. My Case Management Summaries are clear in that regard.
2. On 12th November 2021 the Preliminary Hearing took place with the parties attending in person at the Bury St Edmunds Employment Tribunal. The Claimant appeared in person and the Respondents were represented by Mr Sheppard of Counsel. The Claimant gave evidence. In addition

he had provided an Impact Statement which I had ordered on 15th September 2021. There was a Bundle of Documents consisting of some 533 pages which included a further medical report from Dr Bhandari dated 27th October 2021. This report was in addition to other medical reports which were in the Bundle before me on 15th September 2021. Dr Bhandari's latest report is in the Bundle (pages 529 – 533). Dr Bhandari is a Consultant Psychiatrist. As stated, there are other medical reports contained within the Bundle.

3. By a Claim Form presented on 19th December 2019 the Claimant claims Unfair Dismissal and Disability Discrimination including Claims of Direct Discrimination; Discrimination arising out of a disability; an alleged failure by the Respondent to make reasonable adjustments and Harassment. The Claims are denied by the Respondent.
4. The Claimant was employed by the Respondent as an Associate Specialist in Orthopaedics and Trauma at the Lister Hospital in Stevenage between 1st October 1999 and 26th July 2019 on which date he was summarily dismissed on the ground of alleged gross misconduct following an incident at the hospital on 18th January 2017 when the Claimant attended work in a confused and emotional state. According to witnesses at the time he appeared to have been drinking. At a meeting held on 24th January 2017 the Claimant explained he had been suffering from Post Traumatic Stress Disorder (PTSD) which he stated originated from his experiences of undertaking medical practice on the frontline during the Bosnia conflict beginning in July 1991. During the conflict the Claimant witnessed and experienced a number of harrowing and traumatic events. After the conflict he came to the UK in 1995. The Claimant is himself a native of Bosnia.
5. After the meeting on 24th January 2017 a long and protracted internal process took place during which the Claimant was suspended from work. This included various investigation meetings; proceedings before the General Medical Council; and a disciplinary hearing on 17th May 2019 the outcome of which was the Claimant's summary dismissal of which he was informed by a letter dated 26th July 2019. The Claimant appealed the dismissal. An Appeal Hearing took place on 13th November 2019. The Claimant's appeal was rejected. He was informed of this decision by a letter dated 10th February 2020, i.e. after the presentation of his Claim to this Tribunal.
6. In support of his claims the Claimant submits he was a disabled person at the material time which commenced on 18th January 2017 and 10th February 2020, i.e. a period of time beginning with the incident at the hospital and the rejection of the appeal against his dismissal. The Respondent denies that the Claimant was a disabled person during this period.
7. As well as hearing from the Claimant and considering the content of the Bundle of Documents with its many medical reports, I have also taken due

note of written Submissions by the Claimant and from Mr Sheppard which I ordered should be submitted after the Preliminary Hearing on 12th November 2021. Consequently my Judgment was reserved.

The Law

8. The definition of a disabled person is set out in Section 6 Equality Act 2010:-

“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.”

9. “Long term” is defined in Paragraph 2 (1) (b) Schedule 1 to the 2020 Act as follows:-

“Long term effects

- (1) The effect of an impairment is long term if: –
 - (a) It has lasted for at least twelve months;
 - (b) It is likely to last for at least twelve months; or
 - (c) It is likely to last for the rest of the life of the person affected.”

10. “Substantial” means more than minor or trivial – Section 212(1) Equality Act 2020.

11. I have also given due weight and taken into account the Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability.

12. I have also considered a number of authorities on the subject including Tesco Stores Limited v Tennant (2020) IRLR 363; All Answers Limited v W & R (2021) EWCA civ 606; and Rooney v Leicester City Council UKEAT 0064/20 and UKEAT 0104/21.

13. It is for the Claimant to prove disability. The issue of the Respondent’s knowledge or otherwise of the disability is not relevant at this stage of the proceedings.

14. The material time to consider the issue of the Claimant’s disability is, in this case, between 18th January 2017 and 19th December 2019 when his Claim was presented to the Employment Tribunal. Looking at this period I must ask myself whether the Claimant had a mental impairment (in this case he states PTSD) which had a substantial (i.e. more than minor or trivial) and long term adverse effect on his ability to carry out normal day to

day activities. His impairment will be long term if it had lasted for at least twelve months or was likely to last for at least twelve months at that time, or was likely to last for the rest of his life.

15. I have given careful consideration to all the material evidence; the Claimant's Impact Statement and the live evidence he presented on 12th November 2021. I should stress that it is always important in these cases that I focus on what the Claimant is unable to do during the material time as opposed to any day to day activities which he is able to do (I refer to paragraph 40, for example, of the Judgment of His Honour Judge James Taylor in Rooney v Leicester City Council).

The Evidence and Conclusions

16. The Respondent had submitted a number of Impact Statements which are contained within the Joint Bundle (pages 96 – 98, 101 – 126). The most significant and relevant of those is the last of these dated 25th October 2021 (pages 118 – 126). The Claimant sets out the effects of his condition of PTSD which he submits he has been suffering from since his experiences in the Bosnia conflict. His evidence, in that statement, and again confirmed on 12th November 2021 was, in my judgment, compelling and persuasive. The condition of PTSD manifests itself in a series of bouts of depression. The Claimant has suffered from chronic insomnia and nightmares (flashbacks to the Bosnia conflict) for many years. His bouts of depression have worsened over the years and with his episodes of regular insomnia have had a substantial effect on his ability to concentrate and upon his memory. Frequently he cannot recall what he is doing when undertaking any given task. This impacted on his ability to carry out both tasks in his work and domestically. It affected and continues to affect his social life. He cannot function at social events and this goes to the extent that he has not been able to accept invitations to attend social functions and parties. He is no longer able to cook (a pastime which he enjoyed). He avoids, as best he is able, contact with the public due to fears as to how he may react in any given situation. This has manifested itself even to the extent that he avoids having any contact with his wife when she comes home after work. He explained to me he "escapes to nearby woodland" to avoid such contact. He frequently forgets family birthdays and relationships with close members of his family (including his son) have deteriorated to the extent that he has lost contact with them. His lack of ability to concentrate and to function at an appropriate level has resulted in him becoming the victim of scams and frauds. In May 2019 he lost over £33,000.00 in one such incident. In his Impact Statement he describes this as feeling "more like a vegetable than like a human and that was the period of weakness when the scammer pounced". He explained he felt helpless and consequently disclosed confidential financial information to the scammer which resulted in the consequent fraud. He has experienced acute episodes of anxiety. He has regular panic attacks which he describes "when that happens flashbacks start hitting me like bullets and it seems it is a kind of vicious circle". He has and continues to find normal day to day conversations difficult. He

describes this as “losing the intellectual power on the ability to press the button at the right stage of the conversation”. He cannot concentrate sufficiently to be able to read a book. His speech is affected which he describes as “slowing down”. He said, “I feel drained, confused, helpless, alone and deserted”. He has been prescribed medication for depression and has undergone therapy.

17. I have considered all of the medical evidence. Professor Hirsch, a Consultant Psychiatrist, prepared a report dated 8th December 2016. Mr Sheppard submitted that the report found no connection between the Claimant’s PTSD symptoms and the Claimant’s experiences at the time. However, importantly in my judgment, Professor Hirsch does state at paragraph 78 of his report (pages 213 – 214) that the Claimant admitted to suffering from some symptoms of Post Traumatic Stress Disorder as a result of his experiences (i.e. the Bosnia conflict) including nightmares for several months when he came to the UK and during following periods of stress when he has experienced nightmares more recently.
18. An entry in the Claimant’s medical records on 14th February 2017 (page 135) confirms a diagnosis of PTSD. Prior to this an entry on 30th January 2017 (page 136) also confirmed the same diagnosis. Other entries in the Claimant’s medical records on 3rd October 2016 (page 137) and 3rd November 2014 (page 139) refer to “a stress related illness” and medication for depression being prescribed in May 2014 (page 141).
19. On 24th January 2017 the Claimant was visited at his home by another Consultant Psychiatrist Dr Farrow. Her report (pages 307 – 309) noted that the Claimant was intoxicated on that day but significantly noted that the Claimant had symptoms of “ongoing stress”; that the Claimant admitted to “longstanding, low grade, agitation, feelings of guilt and responsibility for his part in wartime events and episodes of low mood”. She went on to comment, “I can see that we have a recorded diagnosis of Recurrent Depressive Disorder in 2014”.
20. Another medical report from Dr Allen dated 31st May 2017 (pages 353 – 369) did make reference to the Claimant’s experiences of a traumatic time in Bosnia, recurrent involuntary and distressing memories, distressing dreams and flashbacks although, at the same time, noting that the Claimant suffered from abuses of alcohol, although Dr Allen went on to conclude “he would appear to meet the criteria for a diagnosis of PTSD” (paragraph 86 at page 364).
21. Dr Bhandari, a Consultant Psychiatrist, produced a detailed report dated 27th October 2021 (pages 529 – 533). He confirmed that in undertaking his report he had reviewed the Claimant’s patient records. He referred to the Claimant’s referral to Psychiatry in August 2014 and a then diagnosis of Recurrent Depressive Disorder. He recorded the Claimant’s history of nightmares starting in December 2016. He makes reference to ongoing insomnia and flashbacks. Significantly he states, “at the time of my first assessment it was my impression that given his history of exposure to

severe traumatic incidents, injuries which are out of the normal experience of any health professional followed by presence of significant nightmares and flashbacks whilst under stress, suggested a diagnosis of PTSD". Dr Bhandari concludes in his report, "it is my opinion that Dr Filipovich has suffered with PTSD as a result of his extremely traumatic experiences as a surgeon on the frontline during the Bosnia war".

22. On the balance of probabilities and taking into account the Claimant's evidence and the medical evidence available to me, I conclude that the Claimant had been suffering from PTSD as well as a Recurrent Depressive Disorder during the period between 18th January 2017 and 19th December 2019 and, in all probability, prior to January 2017. This condition arose as a result of the impact of events on the Claimant in the Bosnia conflict. PTSD and a depressive illness in these circumstances, in my judgment, represents a clear mental impairment. The impairment had, during the material time, a substantial (i.e. more than minor or trivial) effect on the Claimant's ability to undertake normal day to day activities. This included his inability to communicate with his family, friends and the general public; his inability to concentrate on everyday tasks as well as his inability to read; an inability to engage in normal interaction with his wife; an inability to socialise; an inability to manage his financial affairs (I refer to the evidence that he was susceptible to fraud). These effects in my judgment were long term in that they had lasted at least twelve months prior to January 2017 and during the following, almost, two year period up to December 2019 and/or were likely to last for at least twelve months after December 2019.
23. It follows in my judgment that the Claimant was, at the material time, a disabled person. As a result his Disability Discrimination claims as well as his claim of Unfair Dismissal should now proceed to a substantive full Hearing. It will be necessary to have a further Case Management Preliminary Hearing prior to the substantive Hearing and I order that such a Preliminary Hearing should be listed as soon as possible. This can be conducted by telephone with a time estimate given to it of two hours.

Employment Judge Bloom

Date: 15 December 2021

Sent to the parties on: 16/12/2021

N Gotecha

For the Tribunal Office