



EMPLOYMENT TRIBUNALS

Claimant: Mr Brackstone

Respondent: Beck Interiors Limited

Heard at: London South **On:** 3 February 2020

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: Ms Meredith, Counsel

For the respondent: Mr Quinn, Counsel

RESERVED JUDGMENT ON A PRELIMINARY ISSUE

Decision

The claimant was a disabled person at the material time within the meaning of the Equality Act 2010.

Reasons

The claim, issues and appearances

1. The case was listed as an open preliminary hearing to determine the question of whether the claimant was disabled at the material time.
2. The Claimant appeared by Counsel Ms Meredith, the respondent also by Counsel, Mr Quinn.
3. The Tribunal heard from the claimant, his daughter Ms Brackstone, Dr Kimber-Rogal expert medical witness for the Claimant and Dr Dhar expert medical witness for the Respondent. Ms Brackstone's statement was only served on the morning of the hearing but was unchallenged by the respondent.
4. The Tribunal had one Bundle of documents up to 282 pages.

5. The Tribunal was directed to read the claim form (pages 12-22), the response (pages 31-37), both medical reports of the Claimant and respondent (pages 44-56 & 63-87), the letters of instruction (pages 234-235 & 241-252) , Dr Anthony's letters in the bundle (claimant's psychiatrist) (pages 57-62) and the GP visit dates/summary records (pages 275-282) at the outset of the hearing.
6. The claimant also had produced a disability impact statement ('DIS') which was at pages 30-34.
7. The issue to determine regarding disability was a narrow one within S.6 of The Equality Act 2020 ('EQA'): did the claimant's general anxiety disorder ('GAD') have a substantial effect on his ability to carry out normal day to day activities. It was accepted that the claimant had a diagnosis of GAD and which was long term.

Relevant Findings of Fact

8. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.
9. Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken too in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.
10. The claimant was employed as a Project Commercial Director from 25 May 2016 until the termination of his employment on, putatively, 1 August 2018.
11. The effective date of termination and the reason for it i.e. was there an actual or constructive dismissal by the respondent or whether the claimant resigned (without that being a dismissal) was not being determined at this hearing. However, for the purposes of the open preliminary hearing, the material/relevant date was agreed to be 1 August 2018, alternatively a date not earlier than 13 July 2018.
12. The claimant had a difficult upbringing as he was subject to bullying in his school years. He also had a difficult relationship at home, his father had previously been married, and he had a complicated relationship with his step-siblings.

13. The claimant was diagnosed with GAD following a referral to his psychiatrist, Dr Anthony, on 22 December 2017.
14. He has been on anti-anxiety medication since (Duloxetine). His dosage initially was 30 mg per day which increased to 120 mg per day. The claimant was also referred for Cognitive Analytic Therapy ('CAT').
15. The claimant undertook counselling sessions with Dr Kimber-Rogal (psychologist) from February 2018 weekly.
16. The claimant saw Dr Anthony on 22 December 2017, 10 April 2018, 8 May 2018, 3 July 2018 & 20 December 2018.
17. The Claimant was seen by Dr Dhar on 27 September 2019. His report was produced on 6 November 2019.
18. The claimant did not see Dr Kimber -Rogal specifically in relation to her report of 27 February 2019 but he said in evidence (confirmed by Dr Kimber-Rogal) that he had seen her 42 times. The Tribunal accepts that the claimant was seeing Dr Kimber-Rogal on a regular and ongoing basis since February 2018.
19. The claimant challenged the extent to which Dr Dhar enquired of the claimant's circumstances during his appointment and the lack of cross reference or cross discussion of other documents. The appointment lasted for 2 hours.
20. The claimant explained there was no discussion about his DIS, or in relation to his physical symptoms. It was not disputed that the claimant also suffers with IBS and stomach cramps, exacerbated by his GAD. The claimant said this was also not discussed.
21. The claimant's evidence on the substantial impact on his ability to carry out day to day activities was set out in his DIS, his daughter's witness statement (Ms Brackstone) and Dr Kimble-Rogal's medical report of 26 February 2019.
22. In his DIS, he referred to the impact on his self-worth and his vulnerability to criticism and becoming withdrawn and insular. He referred to his checking things at work repeatedly. He referred to his constant level of worrying, he described this as always being there, never going away and drew an analogy with tinnitus. He described worrying excessively about day to day issues such as his health, fearing ill health, getting older and the future. He referred to his brain never being at rest. He mentioned his OCD tendencies would mean he researches endlessly before purchasing and said his symptoms were physical too as he experienced tension in his neck, shoulders and back and his stomach conditions (IBS & diverticulitis) being caused or aggravated by his GAD. As a result, he saw an osteopath on a weekly or fortnightly basis. He also described that the constant worry could lead to low mood, that he lives with constant

tension, and suffers unpredictable anxiety attacks causing nausea, heat and feeling shaky.

23. In evidence, he said he visited Dr Kimber-Rogal 42 times for his therapy sessions. In relation to the impact on his daily life, he added that when he had physical symptoms such as sweating, nausea, heat, feelings of frailty, he would not leave the house and if he happened to be out he would go somewhere more comfortable, shut the door and be alone. The Tribunal accepts his evidence in this regard, it was not challenged and it was consistent with what he had previously explained regarding his symptoms.
24. In evidence, the claimant explained he saw Dr Dhar for about 2 hours, he didn't get taken to his DIS and felt the appointment glossed over his situation with a lot of focus on his medication and blood pressure. He did not however have any real criticism of the report contents save for the use of some terminology. He said he did not say 'living the dream' but 'chasing the dream' and he did not say he was 'back on track' The Tribunal finds in broad terms the report was an accurate record of Dr Dhar's consultation with the claimant.
25. There was reference in Dr Dhar's report to sleep apnoea and not wanting to go to sleep, although the claimant said in evidence that what he said was he had significant problems *trying to go to bed*. The Tribunal finds that it does not matter to its conclusion which was the more likely statement as it was common ground that the claimant was not sleeping properly.
26. Ms Brackstone's evidence on the impact of GAD on the claimant was that the claimant (her father) became withdrawn and would miss meal times; that he began to go to bed straight after returning home from work; that he began staying indoors and not going out; that he began experiencing hot flushes and stooped wanting to drive. She cited an example of her birthday in July 2018 when the claimant 'hid' himself away from the guests as an example of being insular and withdrawn. She also referred, to his IBS/stomach problems sometimes causing knots on other occasions preventing him from leaving the house for short periods. In addition, she referred to the claimant's compulsiveness whereby he would repeatedly ask the same questions around packing, travel plans, tickets, passports etc up to 6 to 8 times before and after holidays and then check himself repeatedly thereafter. This also manifested itself on more regular outings with family and friends too when he would need to enquire about every aspect of a trip from beginning to end. Purchasing items for the house could take until the early hours of the morning as he was unable to do a quick search online and make a purchase.
27. This evidence was accepted and unchallenged by the respondent. The statement was only served on the morning of the hearing but no issue was taken with that. Although she is not independent, the Tribunal accepts Ms Brackstone's evidence and had no reason or evidence before it to suggest it was untrue or exaggerated.

28. The claimant did not provide some of the specific examples contained in Ms Brackstone's statement. The claimant explained he found that period very difficult to re-visit. The Tribunal accepts the claimant's explanation, noting that there was a lot of overlap and consistency in broad terms between the claimant's description and that of Ms Brackstone.
29. Dr Kimble-Rogal evidence on substantial impact was contained in her report as follows. She said he had a very low sense of self-worth, and a heightened sensitivity to criticism. She also commented on the claimant becoming withdrawn and insular. She referred to his obsessive compulsive disorder tendencies especially with regard to his work and at home she referenced the same obsessiveness regarding making purchases and about when he will eat and where and if he has to travel he likes to know all the arrangements sometimes leading to family conflict. She also referred to his need to know where people are going, how they are getting there and back, timings etc. She confirmed he suffered from physical symptoms too including nausea, excessive sweating, hot flushes and low mood. A specific example was referred to regarding the claimant's anxiety before seeing his solicitor whereby he felt hot, lightheaded and nauseous. He had to delay leaving home by 10-15 minutes and the symptoms moderated after an hour or so. This type of experience she said the claimant had told her had been experienced on a number of occasions. Finally, she referred to the claimant's unrelenting worrying, his mind never being at rest.
30. The Tribunal finds that Dr Kimber-Rogal's report corroborated the claimant's own evidence and that of Ms Brackstone in broad and specific terms particularly with regard to his worrying and obsessive tendencies and becoming withdrawn and insular. The Tribunal finds that her report was based on matters that she had been informed about by the claimant and although no notes of her consultations were available in evidence, that did not make her report less credible.
31. Under cross examination, Dr Kimber-Rogal accepted she had not met the claimant specifically before writing her report. She had no instructions prior to preparing her report and had not seen the claimant's DIS. She did not agree that the lack of any sick leave was inconsistent with no substantial impact. She said the claimant had worked under pressure but his home life had been compromised, her opinion was he was very obsessive and his sleep diminished. He was not, she said, functioning normally and was impacted significantly. She had accepted Dr Anthony's (the claimant's psychiatrist) diagnosis of the claimant's GAD and was treating him accordingly through therapy. She explained that she was aware of the Statutory test for disability under the Equality Act and the definition of 'substantial'. She further explained under questioning that going home and going straight to bed, not attending every meal, working on the computer until the early hours, sometimes 4.00am were all examples of substantial impact. In contrast, indecision, social functions,

not being a good leader/family man were lesser examples i.e. slight impact. She illustrated how she felt the claimant to be substantially impacted as follows, against the back- drop of the claimant's childhood too:

- Catastrophising – worrying about the future
- Insomnia
- Inordinate fear of criticism
- Inordinate attempt to placate others

32. Dr Kimber-Rogal accepted that whilst impact in the above categories could be experienced by others without GAD, she said not to the degree/effect on the claimant, particularly the frequency and severity.
33. Dr Kimber-Rogal maintained that she would be best placed, because of her relationship with the claimant, to comment on his condition and understand it. She said without the medication and his therapy his condition would deteriorate and he would be 'utterly mystified'.
34. The Tribunal found Dr Kimber-Rogal's evidence to be professional and honestly given and cognisant of her duty to the Tribunal. The Tribunal accepts her medical opinion on the substantial impact on the claimant were genuinely held.
35. Dr Dhar's evidence on substantial impact was contained in his report dated 6 November 2019 following a consultation with the claimant on 27 September 2019. He agreed in evidence it was about a 2- hour appointment.
36. In contrast to the instruction of Dr Kimber-Rogal, he did see the claimant and he did receive a comprehensive instruction letter with a lot of relevant documentation which included work related documents but also the DIS and Dr Kimber-Rogal's report.
37. His report did refer to the claimant worrying every day throughout 2017, feeling restless, tension and sleep apnoea. Dr Dhar wrote that the claimant had not taken any sick leave, and carried on with his day to day activities, shopping, washing and looking after his family as he had always done. His report referred to Dr Kimber-Rogal's report and mentioned he had not seen her therapy notes but his report did not mention in his concluding pages/paragraphs the claimant's DIS.
38. Whilst the Tribunal accepts Dr Dhars's evidence as professionally and honestly given and that he too, like Dr Kimber-Rogal, held a genuine medical opinion that the impact of GAD on the claimant's day to day activities was not (in his case) substantial, the Tribunal did note and observe that the letter of instruction was far from neutrally written. It was the respondent's viewpoint, not just a factual summary and was 'loaded' in many respects. It referred for example, to the claimant acting in 'breach of contract', 'concealing' his GAD and it did not give the claimant's/total or competing viewpoints. The Tribunal also noted that

Dr Dhar said his opinion in any case was independent and as a clinical expert and the only relevance of the instruction letter as written was *“because I have to read it”*.

39. Dr Dhar was not able to confirm which material/relevant date he had been asked to comment on with regard to the effect of the claimant’s GAD on his ability to carry out normal day to day activities. Upon the Tribunal providing the two possible date periods (July 2018 and September 2019) although Dr Dhar thought he was looking at the period up to the end of the claimant’s employment, he was still unsure/not certain in this regard.
40. It was uncontested that the claimant had a GAD diagnosis, Dr Dhar accepted his symptoms were consistent with that condition. In relation to IBS he did not consider this was connected to GAD but agreed it could be exacerbated by it. In relation to the claimant’s obsessive- compulsive tendencies, Dr Dhar considered this could occur in isolation (to GAD) and was not specific to GAD but accepted that it could be the case. Further, in relation to paragraph 10 of Ms Brackstone’s statement, he agreed that obsessiveness could worsen because of a mental disorder. Dr Dhar maintained that he was well able to assess and provide an opinion after a 2- hour appointment without having been the treating person.
41. Dr Dhar was questioned about his report having a larger focus on the claimant’s work in comparison to his life at home. The Tribunal finds that this was a fair impression from his report. Indeed, Dr Dhar confirmed in evidence that the claimant’s narrative was very much about his work.
42. In relation to the effect on the claimant without his medication, Dr Dhar said the claimant might revert back to his previous position but that this was a multi-factorial position. He also explained that some patients on a high dosage could be free of symptoms after 3 months.

43. Applicable law

44. The definition of disability is contained in S.6 of the EQA which says:

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.*

45. In S. 5 of Schedule 1 of EQA, guidance is provided in relation to the effect of medical treatment as follows:

*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—
(a) measures are being taken to treat or correct it, and
(b) but for that, it would be likely to have that effect*

46. By S.212 EQA 'substantial' is defined as meaning '*more than minor or trivial*'

47. Pursuant to S. 6 (5) of the EQA, guidance has been produced concerning the definition of disability in the EQA: *Guidance on matters to be taken into account in determining questions relating to the definition of disability* ('the guidance')

Conclusions and analysis

48. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

49. The Tribunal concludes that the claimant's GAD did impact on his ability to carry out normal day to day activities to a substantial degree at the material time. In particular, the Tribunal has used and referred to the guidance. ***Goodwin v Patent Office 1999 ICR 302.***

50. The Tribunal did not see a long list of examples or activities that are referred to in Appendix 1 of the guidance which deals with a non-exhaustive list of factors which it would be reasonable to regard as having a substantial effect on normal day to day activities. Many of the examples given in that list were not present in this case or given in evidence. The focus however, is not on what the claimant could do, rather, what the claimant could not do or could only do with difficulty and the degree of that (B9) & ***Goodwin.***

51. Accordingly, there was evidence before the Tribunal that the claimant: had general low motivation or loss of interest in every-day activities (page 54); persistently wanted to avoid people or would have significant difficulty taking part in normal social interaction because of his GAD (page 55); had compulsive activities or behaviour (page 55). The claimant was affected in each of these respects.

52. Paragraph D16 also refers to impact on sleep in relation to adverse effects on a person's ability to carry out normal day to day activities. The claimant's sleep was impacted as he was experiencing sleep apnoea.

53. The claimant relied on GAD and it was not said that OCD was a separate stand-alone mental impairment relied upon. It was said it was a subset of GAD. The Tribunal, in any case, concludes that the claimant's GAD was causative of the claimant's OCD tendencies. It was also causative of and/or exasperating the claimant's physical symptoms such as sweating, hot flushes nausea and his

stomach issues, such that the cumulative impact on the claimant was substantial (B4 to B6). The Tribunal also noted that the guidance refers to mental impairments which can have physical manifestations (D15).

54. The medical experts did not disagree that removal of the claimant's medication and his therapy treatment might or could have worsened his condition. The Tribunal concludes, having regard to that evidence and that the claimant, even with the medication at its highest dosage and a number of therapy sessions up to July/August 2018, was still affected to the extent he was, was more likely to have been worse without it and it would have (more) substantially affected his ability to carry out normal day to day activities at the material time.
55. The Tribunal considered the argument that the effect on the claimant of his GAD did not make him behave very differently to someone without GAD such that the impact was not substantial. The Tribunal considered that many people might spend a lot of time researching online purchases before committing to them. Dr Dhar had commented that obsessiveness was very common in the corporate sector and that it could be a trait or a style. Dr Dhar also referred to the absence of the taking of sick leave (twice) in his report.
56. The Tribunal concludes however that the degree of impact on the claimant was more than minor or trivial. That is relevant statutory test for determining substantial rather than it being synonymous with, for example 'significant' or 'major' in an everyday use of the word. Checking or asking the same question up to 8 times, worrying constantly in a way which never goes away compared with tinnitus, the brain never being able to rest all of which was making the claimant become withdrawn/insular socially, to have low mood and not be able to sleep surpass the test under S.212 EQA. On the issue of the non- taking of any sick leave, in the circumstances of this case, that may in fact have been an example of the claimant's obsessiveness to be at work to get things done.
57. The Tribunal, in reaching its conclusion, also found the medical evidence of Dr Kimber-Rogal as providing more compelling support, on a comparative basis, to determine the issue given her long standing and closer connection with the claimant and the likelihood that she was offering an opinion in relation to the material/relevant time. The Tribunal was not satisfied that Dr Dhar had the right reference period in mind when he saw the claimant. The claimant had left the employment of the respondent about 14 months before Dr Dhar saw him, by which time he may have appeared to be better. The material time is the date of the alleged discriminatory act. ***Cruickshank v VAW Motorcast Ltd 2002 ICR 729 EAT***
58. Mr Quinn, in submissions for the respondent, referred to authorities wherein 'GAD' had been considered as not amounting to a qualifying disability. He referred in particular to ***Morgan v Staffordshire University 2002 IRLR 190 and Woodrup v London Borough of Southwark 2003 IRLR 111***. The Tribunal considered these authorities but did not conclude that either supported

the conclusion the Tribunal was being invited to draw. **Morgan** was decided pre-EQA. In addition, the reference to mental impairments being 'clinically well recognised' in that case and which was a key area of dispute in that case, was subsequently removed under the previous Disability Discrimination Act 1995. The claimant in that case was also prescribed medication on one occasion only. Moreover, in this case, the clinical diagnosis of GAD was not in dispute, neither were the symptoms. In **Woodrup**, which was essentially about the deduced effects provisions, the claimant had not called a medical expert to explain the impact on her without her psychotherapy treatment. In this case, the claimant had called her medical expert; he had given his own evidence; his daughter had given evidence and there was some common ground with the respondent's medical expert (see paragraph 42 & 54 above). Also, this is a case in which at the material time, even with medication and therapy, the claimant was having symptoms and was affected in a substantial way (see paragraph 54 above).

59. The claimant was thus a disabled person within the meaning of S.6 EQA and his disability discrimination claim (s) may proceed.

60. A further preliminary hearing will be listed for case management. The full hearing remains as listed.

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Employment Judge Khalil

18 February 2020