



EMPLOYMENT TRIBUNALS

Claimant: Mr Mark Lawson

Respondent: Virgin Atlantic Airways

Heard at: London South **On:** 18 December 2018

Before: Employment Judge Martin

Representation

Claimant: Mr O Segal QC - Counsel

Respondent: Ms A Beale – Counsel

RESERVED JUDGMENT PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The Claimant was not a disabled person as defined by s6 Equality Act 2010 as at 9-10 April 2016, 3 May 2016 or 20 May 2017.
2. The Claimant's claim for disability discrimination is therefore dismissed.

RESERVED REASONS

The issues

1. This was a preliminary hearing held in public to determine whether at the relevant times, the Claimant was a disabled person as defined in s6 Equality Act 2010. The relevant times are 9-10 April / 3 May 2016 and 20 May 2017.

The hearing

2. The Tribunal heard evidence from the Claimant and had an agreed bundle of documents numbered to 309. The Tribunal also had written submissions from both parties which were presented orally.

The law

3. The law as relevant to the issues and considered by the Tribunal is as follows:

Section 6 of the 2010 Act which insofar as material is as follows:

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.

4. S 212(1) of the Equality Act 2010 sets out that a “substantial” adverse effect is one that is “more than minor or trivial”.

5. EHRC Guidance states as relevant:

a. In determining whether an effect of normal day to day activities is substantial, a Tribunal should have regard to the time taken to carry out the activity [B2] and the way the activity is carried out [B3].

b. “Normal day to day activities” are things that people do on a regular or daily basis such as shopping, reading, writing, having a conversation, 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. They do not include activities which are only normal for a particular person or small group of people [D4]. They do not include highly specialised work activities which are not normal day-to-day activities for most people.

6. Schedule 1 to the Equality Act 2010 gives guidance:

6.1 Paragraph 2(1) of Schedule 1:

The effect of an impairment will be “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.

7. Both parties referred to case law in their submissions. I have not set out each case relied on, but all cases were reviewed and considered when coming to my decision. As required and relevant they are referred to in my conclusions.

8. In summary the Respondent's position is that the Claimant was not disabled at the relevant times and that he has exaggerated matters in his impact statement which are not corroborated by the medical evidence in the bundles.

9. In summary the Claimant's position is that he met the definition set out in s6 Equality Act 2010 sometime after October 2016 following incidents on a flight from Hong Kong which were investigated by the Respondent.
10. The Tribunal came to the following findings of fact on the balance of probabilities having heard the evidence and considered the documents. Only matters relevant to the issue and necessary to explain the decision are set out below. All matters were however considered.
11. There was a dispute between the parties as to the extent of the Claimant's pleaded case. It was agreed that I need not resolve that dispute but that I would make findings as to whether the Claimant was a disabled person as defined by the Equality Act 2010 as at the dates referred to above.
12. I have not considered the issues in the claim in any detail. It is enough for the purposes of this hearing to set out the following matters.
13. Mr Lawson was employed as a Pilot by the Respondent from 22 June 1998 until 20 May 2017. On 25 September 2015 an issue arose on a flight to Hong Kong following which there were rumours and gossip (which the Claimant says were untrue) amongst his colleagues. The Claimant says that colleagues were reluctant to work with him as a result of the rumours.
14. The Respondent started an investigation into the issues surrounding this flight on 12 October 2015, and the Claimant was 'stood down' from flying from 12 October 2015 to 3 November 2015. He was not told that he had done anything wrong and was not placed under any restrictions however the Respondent did not publish a final report about the investigation which the Claimant says to be their normal practice.
15. Sometime after 12 October 2015, as a result of the matters outlined above, Mr Lawson suffered from stress and anxiety, which was later diagnosed as an adjustment disorder.
16. As part of their ongoing assessments, pilots have simulation tests (sims) and the Claimant passed a sim on 7 October 2017. On 9 and 10 April 2016 the Claimant undertook a further sim which he failed. He was re-tested on 3 May 2016 and failed again. His case is that he should not have failed, that the assessor was unnecessarily aggressive, and the Respondent was out to get him and rigged the sim.
17. The Respondent wrote to the Claimant on 12 May 2016, asking him to attend a 'Formal Training Review Meeting' on 19 May 2016. The letter warned that dismissal was a possibility. The Claimant did not attend the meeting, on the advice of his union representative. The Claimant says that his stress and anxiety worsened at this time.

18. On 26 May 2016, the Claimant had an annual medical with Dr Tallent, his Airline Medical Examiner during which Dr Tallent provisionally suspended the Claimant's medical certificate which enables him to fly because *"it became apparent during the consultation that he was suffering from significant stress"*. Mr Lawson was not certified as fit to fly again until 25 October 2017. On 1 June 2016, Dr Tallent referred the Claimant to a Civil Aviation Authority approved Consultant Psychiatrist, Dr Rowlands, who in turn referred the Claimant to a Chartered Counselling Psychologist, Mr White for CBT.
19. The Claimant was dismissed by the Respondent by letter dated 19 May 2017. The effective date of termination was 20 May 2017. The reason cited was capability, because Mr Lawson had failed the April 2016 and May 2016 sim tests.
20. I had before me the Claimant's disability impact statement which I considered together with the medical evidence in the bundle and the EHRC guidance.
21. This statement describes how the Claimant was following the Hong Kong flight in September 2015. He says he was anxious, and he felt he could not defend himself against the rumours as there was no final report. Although the Claimant was able to fly at this time, he says he felt stressed and anxious when he heard of the rumours which were frequently brought up, especially in a meeting on 13 October 2015 when he was asked if he had taken "40 winks while the FO's [flight officers] were out of the flight deck?". He describes feeling physically sick and that he was withdrawn and uncommunicative that evening. He describes feeling ostracised by his colleagues and becoming increasingly isolated feeling his colleagues were avoiding speaking to him fearing any association with him.
22. He felt that in conversations with his flight crew he was being criticised which made him doubt his he was making the right decisions. He said he dreaded going to work knowing the Hong Kong flight would be brought up by colleagues.
23. Some of his colleagues lived in the same small village as him and the Claimant said he did not go out fearing he would bump into them, specifically avoiding the local pub and shop.
24. He described his psychological symptoms as worsening when he heard more rumours in the period leading to the sim check in April 2016 saying he became more and more withdrawn which was a contrast to how he had been before the Hong Kong flight when he had been a social outgoing person.
25. His statement sets out that between October 2015 to April 2016 his sleep was severely affected and when he could get to sleep, he had nightmares. He said he would at times drink heavily to try to forget about issues and get to sleep but that this proved to be counterproductive. Whilst he says he never reported to work when he was unfit, he says he did not feel completely fresh and rested and struggled with work.

26. The Claimant says he was unable to socialise in or outside work and was withdrawn from friends and family save for his brother who he could talk to. He says he felt unmotivated and lost his appetite and did not care for himself. He described forcing himself to go to the gym, but once there not being able to exercise.
27. At the April sim the Claimant described being very anxious and nauseous. When he failed the May sim he says he felt much more anxious and it was at this time he was referred to the various medical practitioners as set out above. He was upset that he was referred to a psychiatrist as things had got so bad and there is a stigma in the industry around mental health issues.
28. Dr Rowland diagnosed the Claimant with Adjustment Disorder on 14 June 2016. The Claimant had 9 sessions of CTB with Mr White from 29 June 2016 to 23 January 2017 which he found helpful together with regular reviews with Dr Rowlands.

Medical evidence

29. I considered the medical evidence available in the bundle in relation to the relevant periods. The medical evidence shows that the Claimant did not seek any medical help from 25 September 2015 until 24 May 2016 which is after he failed the sims. The Claimant carried on working at this time and told the Tribunal that he would never report to work when unfit.
30. The GP notes for 24 May 2016 record that the Claimant told his GP (amongst other things) that he was not sleeping well, had lost 10kg, was anxious about his job as he feels he might be scapegoated. The notes say that *"Feels that the stress has got to the point that he would not be comfortable flying a plane right now in any case. Not sleep well, losing weight, not enjoying himself out of work much, feeling low and anxious"*. The notes record *"Alcohol only socially"*. The entry for 1 June 2016 records him saying he drank alcohol 2 – 3 times per week drinking 5-6 units on a typical day when drinking. The Claimant was given a fit note by his GP signing him off work for stress on 27 May 2016 for one month which was later extended.
31. The medical notes show that, perhaps not surprisingly, the Claimant's symptoms became worse after failing the sims in April and May 2016 resulting in his medical clearance to fly being revoked and being referred to other medical practitioners as described above and having the threat of dismissal hanging over him.
32. The Respondent submitted that there was a contradiction between his medical records and his disability impact statement in relation to alcohol. Whilst recognising that many people under report alcohol intake to their medical practitioners I do note the contradictions. From reading the medical notes, the Claimant's intake of alcohol was modest, and he only drank socially. Given he said he drank 2 – 3 times per week the conclusion is that he socialised 2-3 times per week. This contradicts his evidence that he did not socialise except

with his brother who lived some distance away. I am mindful however of under-reporting of alcohol and reluctance to admit drinking alone. However, this is the only evidence I have before me. I do not have evidence from, for example, the Claimant's brother who he said was the only person he socialised with and was someone he could talk to.

33. The Claimant was referred to Occupational Health and was seen on 20 July 2007. Whilst the Claimant was unable to fly at that time it is recorded that the Claimant was able to undertake office-based duties. While the nature of these duties is not spelt out, I conclude that this would include travelling to the office, communicating with colleagues, being able to concentrate and organise thoughts.
34. This report says "*These events [namely the flight from Hong Kong, the investigation by the Respondent, failing his sims etc] and the inevitable rumour mill amongst his colleagues have caused Mike considerable stress and affected his confidence. Assessment with me revealed a mild to moderate degree of psychological stress and Mike reports that he has not been sleeping well, has a lack of energy and has lost a significant amount of weight*".

The Claimant's disability impact statement

35. I have considered the Claimant's disability impact statement in some detail. His statement sets out matters first in relation to the period from October 2015 to May 2016 and then in the period from May 2016 to May 2017.

October 2015 – May 2016

36. The first time the Claimant reports any adverse matter was on 13 October 2015 as set out above when he says, "*That evening I was withdrawn and uncommunicative*". My finding is that this was a natural reaction to the events of that day and does not indicate anything ongoing.
37. There is no specific time attributed to matters set out in this part of his statement save for being in the period from October 2015 to May 2016. The Claimant's witness statement (paragraph 2) sets out how he felt on 13 October 2015. That is a specific date. The next paragraph refers to the period in the run up to the April sims. I conclude, on balance, that the matters referred in his witness statement from then on, are examples of what the Claimant meant when he wrote: "*My psychological symptoms worsened as I heard more rumours in the run up to the sim check in April 2016*". I find this to mean in the weeks leading to the April sim and not before.
38. On balance I find that the Claimant's first description of feeling ostracised by colleagues, isolated and being unable to socialise as he felt colleagues were avoiding him, is something that happened as a reaction to specific events and was not because of any underlying mental impairment. His description of how he avoided going out for fear of bumping into colleagues in his village is similar in that the reason he did not go out was not because of any mental impairment, but simply because he may bump into colleagues which he would find difficult

in the circumstances. The suggestion is that had his colleagues not lived in the village he would have gone out and socialised with his neighbours.

39. Later in his statement the Claimant describes not being able to socialise in or out of work and being withdrawn from friends and family. He says he was unmotivated, and this effected his appetite and self-care including taking exercise which he used to do daily.
40. I have considered the Claimant's statement that from October 2015 to April 2016 his sleep was severely affected and that this had not been a problem previously. This is recorded in his medical notes. His evidence is that he drank heavily at times to try to forget about the issues and help his sleep. In his statement he says this was counterproductive as we woke up feeling worse and the hangover would exacerbate his depression. There is no diagnosis of depression - his GP notes record stress. His GP notes as set out above are at variance with this evidence on alcohol intake. On balance I accept that the Claimant's sleep was affected by the events that occurred. Unpleasant events often result in disrupted sleep.
41. I have considered the Respondent's submission that the medical evidence refers to mild or medium stress and I note that this is not only in the report from Dr Rowland but also in the Occupational Health report referred to above. The Claimant's position was that in the context of the serious mental health issues Dr Rowland deals with, the Claimant's stress was mild but that does not mean that it was mild in the ordinary sense of the word. I may have accepted this if the only reference to it being mild was in Dr Roland's report, however this was also something said by Occupational Health.
42. The Respondent submitted that the Tribunal should consider the EAT decision in **Henry v Dudley Metropolitan Council [2017] ICR**, which followed **J v DLA [2010] ICR 1052** and held that when considering the question of impairment in cases of alleged depression, tribunals should be aware of the distinction between clinical depression and a reaction to adverse circumstances. While both can produce symptoms of low mood and anxiety, only the first condition should be recognised by the DDA.
43. My finding is as at 9-10 April and 3 May 2016 the Claimant was not a disabled person. At that time, I find on balance that the symptoms the Claimant describes were a reaction to adverse circumstances, namely the incident on the Hong Kong flight and its ramifications. I have considered that the Claimant was at work flying during this period. I accept that the technical aspects of flying an aircraft are not normal day to day activities, however activities associated with flying an aircraft are, such as communication with colleagues, the ability to concentrate, organise and understand and the perception of risk. The Claimant said that he would not have reported to work if he was unfit. I must balance this against what the Claimant says about the weeks prior to the sim. On balance this reinforces my decision that the Claimant did not have a mental impairment at that time.

44. Even if I had found that the Claimant did have a mental impairment at that time, I would not have found that impairment to be long term as I have found that the symptoms the Claimant described were in the weeks leading up to the sim in April 2016 and at that time there was no indication that those matters would continue for a year as required by the legislation.

May 2016 to 20 May 2017

45. I also must find whether the Claimant was disabled as at May 2017 when his employment was terminated.

46. By this time the Claimant had failed the April and May sims and had been notified that his employment was at risk. He was diagnosed with Adjustment Disorder and received treatment as set out above.

47. The Claimant's witness statement describes how he was in this period. He describes being upset that he was referred to a Psychiatrist as *'things had got so bad'* and the stigma in the industry towards mental health issues. The Claimant describes feeling paranoid and anxious about his career and how his whole identity was tightly linked with being a Pilot for the Respondent. He describes his sleep worsening, not being able to get up in the morning, it took him most of the day to get washed and dressed and it being difficult to leave the house. He moved back with his parents who could assist with washing, cooking and so on. He describes only talking to his brother about matters and having difficulty concentrating on anything and dealing with even simple emails which he sent to his brother to check before sending. This was exacerbated by his father passing away in February 2017 and his feeling that he could not support his mother as he would have liked to. He describes heavy drinking.

48. The Claimant was signed off as being able to work in October 2017 and gained alternative employment as a pilot on 30 November 2017.

49. Inevitably the failing of the sim in April/May 2016 and the threat of dismissal had a profound impact on the Claimant and his symptoms worsened. The Claimant had been diagnosed with Adjustment Disorder and I am satisfied that in this period the Claimant had a mental impairment.

50. I am satisfied that sometime in this period the Claimant's mental impairment had a substantial effect on his ability to carry out his normal day to day activities. What he describes in his witness statement shows that his ability to undertake things that most people do on a regular or daily basis was affected. He did not socialise, he did not care for himself in washing or eating, he found it hard to exercise which is something he did regularly in the past. By this time his ability to concentrate and do simple tasks was affected to a substantial extent.

51. I need to decide when the Claimant's mental impairment had a substantial adverse impact on his ability to carry out normal day to day activities in order to decide whether this was long term as at 20 May 2017. I have already referred to the two medical reports which say that the Claimant's stress symptoms were mild or mild to moderate. I accept the Claimant's argument that the comment

by Dr Rowland in isolation should be disregarded as he deals regularly with mental illness of a much more serious kind and his definition of mild may be different to other medical practitioners. However, the Occupational Health report of July 2016 also describes the Claimant's condition as being mild to moderate and says he could do office-based work. The conclusion is that at that time, July 2016, the Claimant's mental impairment was not such that he was unable to undertake normal day to day activities.

52. I am satisfied that at some point after this date, the Claimant's impairment had a substantial impact on his ability to carry out normal day to day activities. It is not possible for me to pinpoint that date. However, whatever date it was, it means that as at 20 May 2019 the Claimant did not meet the requirement that the impairment had a substantial and long-term effect on his ability to carry out normal day to day activities.
53. I considered whether the Respondent should reasonably have thought that the impairment would last for a year or longer. There is no evidence before me that the Respondent was or reasonably could be aware of this. The Occupational Health report of 20 July 2016 states he should be able to return to work following the successful completion of the CBT. There is no indication of any long-term prognosis. This document was in the Respondent's possession. Apart from this document there is no evidence that the Respondent were in receipt of any other medical information indicating a long-term issue.
54. I therefore find that the Claimant was not a disabled person at the relevant times and that his claim for discrimination on the protected characteristic of disability is dismissed. His claim for unfair dismissal is unaffected by this judgment.

Employment Judge Martin
Date: 30 January 2019