



EMPLOYMENT TRIBUNALS

Claimant

Ms S Husain

Respondent

Jet2holidays Limited

v

AT A PRELIMINARY HEARING

Heard at: Leeds by CVP video link On: 29th January 2021

Before: Employment Judge Lancaster

Appearance:

For the Claimant: In person assisted by Mr I Rehman (trade unionist)

For the Respondent: Ms C Ashiru, counsel

JUDGMENT

1. The Claimant was a disabled person within the meaning of the Equality Act 2010 at all material times after 11th June 2019.
2. Claim number 1804633/2019 is accordingly dismissed because at the date of any alleged act of disability discrimination the Claimant was not in fact disabled.

REASONS

1. The Claimant was first diagnosed with anxiety and depression on 14th August 2018.
2. She had previously attended her GP reporting symptoms of stress, but I discount those periods because there is no evidence of any underlying condition. They are clearly in my view short-term reactions to adverse life events: cf. *J v DLA Piper UK LLP* [2010] IRLR 936 EAT per Underhill P at paragraph 42.
3. In particular there is an observable pattern of the Claimant suffering from exam stress. The Claimant has been registered as a student at Leeds University since September 2010. She did, however, take a year out from her studies in 2014 because of family responsibilities, and subsequently transferred to another course. Although she says that she receives good assessment marks she evidently has difficulty with exams and has still not yet completed a degree.

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4. On 18th January 2014 the Claimant attended her doctor reporting “poor sleep” and “stresses with exams and home life”. She was “well otherwise”.
5. On 2nd March 2017 she was reported as having a “stress related problem”. The GP administered the standard PHQ-9 test: the Claimant scored 6, but the doctor has not made any diagnosis of mild depression. Shortly afterwards on 2nd May 2017 the problem is again specifically recorded as “stress currently with exams for law degree”.
6. When the Claimant attended on 14th August 2018, the date of the relevant diagnosis, it was once more in the specific context of exam stress: The doctor records that “she didn’t attend an exam as was so anxious”. The doctor subsequently also, at the Claimants behest, wrote a letter dated 19th September 2018 which she submitted to her tutor. That letter apparently failed in its purpose because on 21st January 2019 the Claimant reported back to her GP that “she missed an exam so Uni have stopped her studying”. She was eventually readmitted to her course, but not until about August 2019, at which time the GP records that she was “feeling a little better”.
7. Applying Section C6 of the Guidance on the definition of disability (2011) I conclude that the situation up to August 2018 is therefore analogous to the woman in the example given who has “two discrete episodes of depression within a ten month period”, but is not thereby covered under the Act.
8. Although the Claimant told the doctor in August 2018 that she had been “feeling low” for the past nine months, there is nothing to corroborate this. The Claimant had not in fact attended her doctor at all since the 2nd May 2017. Whilst this may well in part have been due to a delay in registering a change in GP practice over this period from Parklands to Horton Park, it does very strongly indicate that, despite her later assertions, the Claimant was not in fact substantially adversely affected. The Claimant’s oral evidence at this hearing was that prior to attending in August 2018 “it wasn’t impacting me on a level where I wasn’t functioning.”
9. It was of course within this period when she was not attending her doctor at all that the Claimant began working weekends for the Respondent on 11th November 2017. The Claimant is not a reliable narrator, so that it is unclear what else she was in fact doing or not doing in her life at this time. In her “impact statement” prepared for this hearing the Claimant says clearly that she was attending university until she took a year off from 2018 to 2019. In her evidence before me she has said that she took leave of absence from her course from 2017 to 2019, but was studying from home to complete a single module. That statement is not reflected in the note from her tutor dated 26th November 2020, and nor does it accord with the reality that she was in fact excluded from the university in the academic year 2018/2019. On balance therefore I conclude that, apart from the exam stresses, the Claimant was indeed able to function relatively normally at this time.
10. Having started work for the Respondent the Claimant very soon, however, demonstrated poor punctuality. She also has a documented history of persistent late or non-attendance at her doctor’s appointments from 2006 onwards. This led to a fact-find meeting on 5th August 2018 and a first written warning issued on 26th August 2018. On 14th August 2018 the GP notes that she “works part time as a travel agent – has had a disciplinary for turning up late. Significantly, in my view, there is no

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indication that the doctor made any connection between any reported low mood in the period prior to her attendance at the surgery and her punctuality issues at work. It is not ever suggested that the Claimant had been late because she was suffering from any mental impairment, rather this disciplinary sanction is now recorded as another "adverse life event" which is a factor in her newly diagnosed anxiety and depression.

11. From 14th August 2018 onwards the Claimant was continuously prescribed one form of medication or another. This was principally mirtazapine, although she did not start taking it immediately for fear of the side effects, and she variously over time records it as "helping" or "not working". She was also prescribed propranolol for anxiety as well as medication for migraines/tension headaches. The fact that her doctor considered it necessary to administer drugs is a very strong indication that the Claimant was indeed suffering from a mental impairment which had a substantial adverse effect upon her ability to carry out normal day-to-day activities. The Claimant was also referred for counselling sessions.
12. I do not accept that the Claimant's situation was uniformly as bad as she seeks to present it in her impact statement. For instance the Claimant fails to refer in her impact statement to the fact that she was able to take on a second job over Christmas 2018. The doctor records on 13th December 2018 that she was "working two jobs so very busy" and that at that stage she was "feeling a little better mood wise". She was therefore able to motivate herself to take on extra tasks at this stage. Nor do I accept that, as alleged in paragraph 12, the smallest of tasks, such as writing her "impact statement" in March 2020, would be overwhelming, and that is entirely at odds with her oral evidence on this specific point.
13. Although I do consider there to be a significant element of exaggeration in the Claimant's account, and as I have said she is not an entirely reliable narrator, there is ample evidence of interruption in sleep patterns and intermittent but repeated distress/panic attacks. These episodes include the admitted experiencing a panic attack at the meeting on 31st March 2019 (paragraph 13 of the ET3) and the evident upset observed by the doctor at an occupational health appointment on 2nd July 2019. That is sufficient to constitute a substantial adverse effect, meaning one that is more than merely trivial. Whilst it does appear to be the case that specific attendances at the doctor are correlated in time to particular events, including stages of the disciplinary processes, they are by now of sufficient frequency to support the Claimant's contention that they are to be seen as exacerbating an underlying propensity to stress, rather than as discrete and unconnected episodes.
14. However, there is no medical evidence to say at what point after 14th August 2018 it may have become likely (in the sense that it "could well happen") that the adverse effects of the Claimant's anxiety, depression and ensuing insomnia would go on to last for more than twelve months.
15. Notwithstanding the lack of direct medical evidence on the point I consider that 11th June 2019 (and not earlier) is the significant date. By this stage the Claimant had already been diagnosed as suffering from anxiety and depression for ten months. At this time the Claimant is signed off as unfit to work except with adjustments to her working hours so as to accommodate flexible working. That is enough to enable me to conclude that by this stage it was likely that, in the absence of any expected

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improvement to her perception of her circumstances and the removal of any of the continuing stressors that had exacerbated her condition over the preceding ten months, the adverse effects would be long-term.

16. I am conscious that the issue of these fit-notes is to a degree self-serving as the Claimant went to her doctor specifically “wanting a fit for work note for amended duties as she is having to attend a disciplinary meeting” and was quite prepared both to take on a different job immediately and to commence applying for a new job to start in September. I do not, however, therefore consider that this necessarily falls into the class of case envisaged in *Herry v Dudley Metropolitan Council* [2017] ICR 610 EAT where the Claimant was simply exhibiting an entrenched refusal to work for this employer rather than being substantially adversely affected in her normal day-to-day activities. I have to trust the GP’s professional judgment in being prepared to issue the relevant fit-notes, and he does record earlier on 30th April 2019 that the Claimant had declared that she was really keen to stay working but worried she can’t cope”, which strongly suggests that she was not merely unreasonably resisting a return. The fit-notes all refer to “depression” and “anxiety”, and whilst I accept that these terms are not always used with exact precision the doctor’s terminology is consistent from August 2018 onwards.
17. Shortly afterwards on 13th August 2019 the substantial adverse effects (as I find them to be) of the Claimant’s mental impairment had in fact lasted for a year and were therefore long-term.
18. Applying the definition of disability in section 6 and Schedule 1 of the Equality Act 2010 I find that from 11th June 2019 the Claimant had a mental impairment, namely depression and anxiety, which by reason of her resultant insomnia, stress and panic attacks had a substantial adverse effect her ability to carry out normal day-to-day activities, and which was then long-term in that it was likely to last for at least 12 months commencing from 14th August 2018.
19. Because all the claims in case number 1804633/2019 are dependent upon the Claimant being found to have been disabled prior to 11th June 2019, that claim must be dismissed. A genuine complaint of discrimination, even if it is not in fact well-founded, may still be a protected act for the purposes of a victimisation complaint. Allegations of direct disability discrimination in respect of the dismissal (30th September 2019) or the rejection of the appeal (10th December 2019) and which post-date 11th June 2019 may also continue. Claim number 1801065/2020 will therefore proceed in accordance with the case management directions given separately.

EMPLOYMENT JU DGE LANCASTER
DATE 4th February 2021

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