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EMPLOYMENT TRIBUNALS

Claimant: Miss S Kijak

Respondent: Commoscope Connectivity UK Limited

Heard at: East London Hearing Centre

On: 6 March 2017

Before: Employment Judge Brown

Representation

Claimant: In person

Respondent: Mr Caspar Glyn QC (Counsel)

JUDGMENT

The judgment of the Tribunal is that the Claimant was not a disabled person between May 2015 and 20 November 2016.

REASONS

1 The Claimant brings complaints of disability discrimination against the Respondent, her former employer. This Preliminary Hearing was listed to decide, amongst other things, whether the Claimant was a disabled person at the times relevant to the Tribunal claim. The parties agreed, at today's hearing, that the relevant times were between May 2015 and 20 November 2016.

2 The Claimant relied on the following impairment: Stress and anxiety since May 2015; described as follows, "The Claimant suffers panic attack, eating disorder, rapid heartbeat, difficulty in concentration, insomnia, irritability, extreme unwanted fear of particular situations, social withdrawal, low motivation".

3 The Claimant gave evidence to the Tribunal today. There was a bundle of documents, which included the Claimant's GP records, GP sick notes, GP letters, Occupational Health letters and Return to Work records from the Respondent

4 The Respondent disputed that the Claimant had an impairment at all. It also disputed, if the Claimant had one, that the impairment had any substantial adverse effect on her ability to carry out normal day-to-day activities, or that such substantial effects, if there were any, were long term.

5 At today's hearing the Claimant also said that she had a heart condition.

Relevant Law

6 One of the protected characteristics under the *Equality Act 2010* is disability, s4 *EqA 2010*.

7 By s6 *Equality Act 2010*, a person (P) has a disability if

7.1 P has a physical or mental impairment, and

7.2 The impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

8 The burden of proof is on the Claimant to show that he or she satisfies this definition.

9 *Sch 1 para 12 EqA 2010* provides that, in determining whether a person has a disability, an adjudicating body (which includes an Employment Tribunal) must take into account such Guidance as it thinks is relevant. The relevant Guidance to be taken into account in this case is Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011), brought into effect until 1 May 2011.

10 Whether there is an impairment which has a substantial effect on normal day to day activities is to be assessed at the date of the alleged discriminatory act, *Cruickshanks v VAW Motorcrest Limited* [2002] ICR 729, EAT.

11 *Goodwin v Post Office* [1999] ICR 302 established that the words of the s1 *DDA 1995*, which reflect the words of s6 *EqA*, require the ET to look at the evidence regarding disability by reference to 4 different conditions:

11.1 Did the Claimant have a mental or physical impairment (the impairment condition)?

11.2 Did the impairment affect the Claimant's ability to carry out normal day to day activities? (the adverse effect condition)

11.3 Was the adverse effect substantial? (the substantial condition)

11.4 Was the adverse effect long term? (the long term condition).

Impairment

12 Paragraph A6 of the 2011 Guidance states, “It may not always be possible, nor is it necessary to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa. A7 continues, “It is not necessary to consider how an impairment is caused..”.

13 In *J v DLA Piper UK LLP* [2010] IRLR 936 the EAT stated that there are sometimes cases where identifying the nature of the impairment from which a claimant may be suffering involves difficult medical questions. In many or most such cases it will be easier (and is entirely legitimate) for the Tribunal to ask, first, whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected on a long-term basis. If it finds that it has been, it will in many or most cases follow, as a matter of commonsense inference, that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the Tribunal to try to resolve the difficult medical issues.

14 However, it does not follow that the impairment issue can simply be ignored. The distinction between impairment and effect is built into the structure of the DDA. Both the EAT and the Court of Appeal have repeatedly enjoined on Tribunals the importance of following a systematic analysis based closely on the statutory words, and when this injunction is not followed the result is all too often confusion and error.

15 According to the EAT in *J v DLA Piper*, the correct approach is as follows:

15.1 It remains good practice for a Tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it).

15.2 However, in reaching those conclusions, the Tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense to start by making findings about whether the Claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.

15.3 Those observations do not conflict with the terms of the guidance and existing case law. In particular, *Rippon College* and *McNicol* have not been undermined by the repeal of para. 1(1) of Schedule 1 to the DDA, and they remain authoritative, save insofar as they specifically refer to the repealed provisions.

16 In *Henry & Dudley Metropolitan Borough Council* EAT/0100/16/LA HHJ Richardson observed at [71] and [72],

“As we have explained above, when commenting on *J v DLA Piper*, there can be cases where a reaction to circumstances becomes entrenched without amounting to a mental impairment; a long period of work is not conclusive of the existence of a mental impairment.

In this case the Employment Judge found that the Claimant's "stress" was "very largely a result of his unhappiness about what he perceives to have been unfair treatment of him"; and he also found that there was, "little or no evidence that his stress had any effect on his ability to carry out normal day-to-day activities". The Employment Judge considered two aspects together. We do not think he committed any error of law in doing so; and we do not think he was bound to find that the Claimant had a disability because he had been certified unfit for work by reason of stress for a long period. The Claimant failed to establish that he was under a disability for the linked reasons that he did not establish a mental impairment and he did not establish a requisite substantial long term adverse effect."

Adverse Effect on Normal Day to Day Activities

17 There is no list of capacities in respect of which normal day to day activities are to be judged under *EA 2012*, in contrast with *para 4(1) Sch 1 DDA*.

18 *Paragraph 5, Sch 1 EA 2012* provides that 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 measures are being taken to correct the effect and, but for the measures, the impairment would have a substantial adverse effect. This is so even where the measures taken result in the effects of the impairment being completely under control or not at all apparent - para B13 Guidance.

19 Section D of the *2011 Guidance* gives guidance on adverse effects on normal day to day activities.

20 D3 states that day-to-day activities are things people do on a regular basis, examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food..., travelling by various forms of transport.

21 Normal day to day activities encompass activities both at home and activities relevant to participation in work, *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706; *Paterson v Metropolitan Police Commissioner* [2007] IRLR 763.

22 D22 states that an impairment may not directly **prevent** someone from carrying out one or more normal day to day activities, but it may still have a substantial adverse long term effect on how he carries out those activities, for example because of the pain or fatigue suffered.

23 The Tribunal should focus on what an individual *cannot do, or can only do with difficulty*, rather than on the things that he or she is able to do – Guidance para B9. *Goodwin v Patent Office* 1999 ICR 302, EAT, stated that, even though the Claimant may be able to perform many activities, the impairment may still have a substantial adverse effect on other activities, so that the Claimant is properly to be regarded as a disabled person.

Substantial

24 A substantial effect is one which is more than minor or trivial, s 212(1) EqA 2010. Section B of the Guidance addresses “substantial” adverse effect.

Long Term

25 The effect of an impairment is long term if, inter alia, it has lasted for at least 12 months, or at the relevant time, is likely to last for at least 12 months.

26 Where an impairment ceases to have an effect, but that effect is likely to recur, it is to be treated as continuing, *Sch 1 para 2, EqA 2010*. “Likely” means, “could well happen”.

27 In assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything occurring after that time is not relevant in assessing likelihood, Guidance para C4 and *Richmond Adult Community College v McDougall* [2008] ICR 431, CA.

Findings of Fact

28 The Claimant visited her General Practitioner on 13 May 2015 and was diagnosed, on that date, with a stress related illness. She reported stress due to looking after her disabled mother and brother and stressful work circumstances. Also on that date the Claimant submitted a grievance against her supervisor in work, saying that the supervisor had behaved angrily and aggressively. The Claimant complained about the effect that this had on her working environment.

29 The Claimant was signed off work from 13 May 2015 to 23 May 2015. She returned to work on 23 May that year. The Claimant did not visit her GP again until 22 October 2015, when she reported abdominal pain, which was worse if she was stressed. She also said that she had palpitations and was tired all the time.

30 On 26 and 28 October 2015 the Claimant asked her GP to write a letter saying that two periods of absence on 31 July and 17 August 2015 were due to a tummy upset and were stress related. The Claimant had not visited her GP regarding those absences at the time that they occurred.

31 In the Claimant’s Return to Work notes, which she completed and signed at the time of the absences on 31 July and 17 August, she had said that they were due to stomach complaints. On 31 July 2015, in particular, the Claimant set out in some detail that she had had food poisoning, headache, vomiting and severe abdominal pain, page 58A.

32 On 17 August 2015 the Claimant had said that she had severe stomach pain, page 58B.

33 In September and October 2015 the Claimant was going through absence management procedures at work. She appealed against a Stage 1 formal warning about her absence. The letter from the GP was intended to assist with that appeal.

34 On 25 November 2015 the Claimant's GP signed the Claimant not fit to work due to work related stress until January 2016. In December 2015 the Claimant asked her GP to write her a letter saying that she was fit to go to Poland for Christmas to see her family. The GP advised her that she was fit to go to Poland. The Claimant continued to be signed off work for stress related illness until 4 March 2016. She attended stress counselling at this time.

35 On 10 December 2015 the Claimant was prescribed propranolol - a type of beta blocker - for her anxiety and stress. She was given 84 tablets, to be taken three times a day; that was 20 day supply. The Claimant did not seek another prescription of propranolol until September 2016.

36 In February 2016 the Claimant was recorded by her GP as having a grievance against her employer and needing propranolol for her anxiety. The GP sent a brief letter dated 1 March 2016 confirming this, page 64.

37 On 3 February 2016 an Occupational Health report, prepared by an Occupational Health Physician, advised the Respondent about the Claimant's health, arising out of consultation with the Claimant on 28 January that year. The report recorded that the Claimant said that she had had anxiety symptoms since May 2015, triggered by her workplace. The report said that the Claimant came across as extremely stressed and having difficulty concentrating. It said that the Claimant reported sleep disturbance and appetite changes and that the Claimant was taking medication daily. The Occupational Health Physician said that, if the Claimant work concerns were dealt with, the Claimant could immediately return to work, page 62 – 63.

38 The Claimant returned to work in March 2016. She obtained a second job at Stanstead airport in about mid of March 2016. This job involved selling perfume to travellers. It required approaching members of the public, interesting them in perfume products, discussing the products with them and persuading them to buy them. The Claimant continued to do this second job until September 2016. She did not visit her GP at all between April 2016 and September 2016 and she was not, according to the GP records, prescribed any continuing medication during that time.

39 The Claimant was suspended from work in September 2016. She visited her GP on 22 September 2016, reporting low mood. She sought, at that time, a further prescription of beta blockers. She was signed off work for two weeks with work related stress and then continued to be signed off work thereafter during 2016; at all times she was signed off for work related stress. She sought further prescriptions of beta blockers during this continuing absence.

40 The Claimant told the Employment Tribunal that she suffered from a heart condition. She said her heart was weak and that she was prone to collapse. There was no record of this in her GP records. The GP records note the Claimant's "significant past history" as comprising, "ovarian cyst," "acute appendicitis 10 October 2016" and "syncope/vasovagal faint 13 October 2010". They describe the Claimant's "minor past history" as including "stress related problem" in October 2016 and in February 2016. On the evidence before me I cannot conclude that the Claimant has a heart condition which is a physical impairment. Her medical records do not provide any medical evidence to support the existence of a heart condition.

41 The Claimant also told the Tribunal that throughout the period between May 2015 and November 2016 she suffered from panic attacks, eating disorders, rapid heart beat, difficulty in concentrating, insomnia, irritability, extreme unwarranted fear of particular circumstances, social withdrawal and low motivation.

42 I did not find the Claimant to be a reliable witness. I noted that the Claimant had sought a GP letter to state that her absences from work in July and August 2015 had been stress related, when she had stated about one of them, in some detail at the time, that it was attributable to food poisoning. I did not accept her explanation about this: that she had been intimidated by her supervisor. I noted that the same counter signatory appeared on another return to work note, when the Claimant had not felt the need to give such a detailed explanation.

43 I did not accept that the Claimant suffered from the symptoms she described throughout the period May 2015 to November 2016. I found that the Claimant was clearly a regular attender at her GP surgery, for a number of different conditions. Her GP records illustrate this.

44 I did accept that the Claimant was signed off work with stress and anxiety - and was prescribed medication to deal with that - from 25 November 2015 to 4 March 2016; and from 22 September 2016 to at least the end of 2016. I also accepted that she had been signed off work from 13 – 23 2015 May with a stress related illness, although it appears that no medication was prescribed at that time.

45 The GP notes, including the histories taken from the Claimant's throughout 2015, do not support the Claimant's assertion that she suffered from the alleged symptoms throughout the period May 2015 to November 2016. The GP notes support the Claimant having symptoms in the periods when she was signed off work sick. I note that, in March 2016, when the Claimant returned to work at the Respondent, she obtained another job at Stanstead airport, which she held until the end of September 2016, and which involved approaching members of the public and selling products to them. That does fact not support the Claimant's evidence that she suffered from social withdrawal or lack of motivation at that time.

46 I accept, as the Occupational Health doctor described in February 2016, that between November 2015 and March 2016 the Claimant was unable to work and did have sleep disturbance, difficulty in concentrating and appetite changes. I accept that she had those symptoms at the times when she was signed off sick. I do not find that they were considered likely to be recur at those times. I note that the Occupational Health Adviser advised, in February 2016, that, if the work situation was resolved, the Claimant would be able to return to work immediately. That indicates to me that there was no longer term condition which would affect the Claimant's ability to return to work successfully.

47 The GP notes, including some detailed history taken from the Claimant at various times, do not support the Claimant's assertions that there were ongoing adverse effects, when the Claimant was not signed off work sick, from the stress condition that was diagnosed.

Discussion and Decision

48 Applying the law to the facts, I found that the Claimant did have a stress and anxiety condition, which amounted to a mental impairment. I considered that the stress and anxiety condition was not simply a reaction to circumstances, or an entrenched feeling of unhappiness. It did have an effect on the Claimant's ability to carry out normal day-to-day activities, such as sleeping and concentrating, when it was manifested and recorded in the GP notes.

49 I found that the Claimant did not have a heart condition; that is not supported by the GP evidence at all.

50 I found that the Claimant did have a mental impairment between 13 May and 23 May, between 25 November 2015 and 4 March 2016 and from 22 September 2016. I also found that, within those discreet periods, the impairment did have substantial adverse effects on the Claimant's ability to carry out normal day-to-day activities; in that the Claimant suffered from insomnia, had difficulty concentrating, had panic attacks and needed beta blockers and was unable to work.

51 However, in the periods between May 2015 and November 2015 and between March 2016 and September 2016, I found that the Claimant's stress/anxiety condition did not have any substantial, more than minor, adverse effects, on her ability to carry out normal day-to-day activities. She did not require any medication at those times to control her symptoms. She was able to work between March and September 2016 in two different jobs, one of which required a high level of motivation and social interaction. There is no evidence in the GP records, during those periods, of any effect on the Claimant's sleep, or appetite, or heart rate. I found that the adverse effects did not last for 12 months in the relevant period.

52 Furthermore, I did not find that the adverse effects were considered likely to recur. In February 2016 the Occupational Health report said that the Claimant could return to work immediately if the work issues were resolved. That opinion was borne out by the fact that the Claimant did, in fact, return to work shortly thereafter and worked successfully for many months.

53 The Claimant was signed off work again from 22 September 2016 and was off work until November 2016.

54 The medical evidence did not indicate, at the time, that the adverse effects were likely to recur. I take into account that "likely" in this context means, "could well happen".

55 It may well be that, at some point towards the end of 2016, the previous pattern of the Claimant's stress and anxiety condition would lead a medical doctor to conclude that further recurrences of substantial adverse effects "could well happen," so they were to be treated as likely to last for 12 months or more. I did not consider that the medical evidence showed likely recurrence, or likely long-term subsistence, of substantial adverse effects at the relevant times for this claim. The burden of proof was on the Claimant to establish the essential components of disability and I concluded that she had not discharged it.

56 On the evidence, I found that what the Claimant had an intermittent mental impairment, causing intermittent, short-term, adverse effects on her ability to carry out

normal day-to-day activities. Those intermittent effects seem to have been caused by individual problems in the Claimant's work. They were short lived, and not long term, when they arose.

Employment Judge Brown

28 March 2017