Case Number: 1301721/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms J Broadbent	**v**	Netwatch Global Ltd

PRELIMINARY HEARING

Heard at: Birmingham **On: 6 January 2017**

Before: Employment Judge Woffenden

Appearances
For the Claimant: **Mr Starcevic - Counsel**
For the Respondent: **Mrs Sefton – Counsel**

Judgment having been sent to the parties on 10 January 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

1 The claimant presented a Claim form to the tribunal on 10 June 2016 alleging a failure to comply with the duty to make reasonable adjustments and of unfavorable treatment because of something arising in consequence of disability. The disability relied on was depression.

2 On 11 November 2016 Employment Judge Dean ordered that there be a Preliminary Hearing to determine whether the claimant was a disabled person within the meaning of the Equality Act 2010 and if so when the claimant was a disabled person and the nature of the disability. The claimant has today applied (and the respondent did not oppose) to amend paragraph 15 of the claimant's particulars of complaint to change the definition of the condition alleged to be a mental impairment to depression and anxiety.

3 The claimant was afforded breaks during the hearing as and when required.

4 I heard evidence from the claimant by way of a witness statement and from James Beckett (the claimant's Line Manager) on behalf of the respondent .There was a bundle of documents consisting of 185 pages. I read only those documents to which reference was made in witness statements and under cross-examination.

5 From the evidence I saw and heard I make the following findings of fact:-

5.1 The claimant's date of birth is 23 September 1996. She began employment with the respondent on 9 July 2014 when she was 17. It was her first permanent employment.

5.2 On 4 March 2016 the respondent dismissed her from her job as a quality assurance auditor and on 10 June 2016 she presented her complaint to the Employment Tribunal.

5.3 The claimant had had symptoms of anxiety (panic attacks) while at school (which were 'relatively minor' and before large events or occasions) and her former GP provided information to her school to enable her to have special arrangements made for her while taking her exams, but prior to 1 December 2015 any symptoms of anxiety she suffered did not have a substantial impact on her life and she did not mention them to her work colleagues nor seek medical advice.

5.4 On 1 December 2015 the claimant suffered a frightening panic attack while driving on her way to an outpatient appointment. She was unable to attend that appointment or work that day but returned to work the day after. She saw her GP on 4 December 2015, and his notes record she complained about the panic attack and of low mood. The problem was recorded as "anxiety states (First)."

5.5 The GP commenced investigations in to potential vitamin deficiency. The claimant was prescribed a "careful trial of Betablockers" and referred to Cognitive Behavioral Therapy ("CBT") counseling. She took no time off work for ill-health until 4 February 2016 and did not see her GP again until 13 January 2016 when she was treated for vitamin B12 deficiency.

5.6 There was no evidence of her raising symptoms of anxiety and/or depression with her GP between 4 December 2015 and 8 February 2016. In the meantime, her work performance was good and she actively participated in social life both in and out of the workplace. On 13 January 2016 she was told of an anticipated move of the respondent's business from Worcester to Birmingham and although that was not in itself unwelcome, the lack of the incentives to move which she had been expecting did come as a shock to the claimant.

5.7 On 8 February 2016 the claimant's GP issued a fit note stating she was not fit for work (2 weeks) and again on 22 February 2016 (2 weeks) with a diagnosis of stress at work. On 21 March 2016 the claimant was given a fit note stating she was not fit for work from 14 March 2016 to 14 April 2016. It records a diagnosis of anxiety and stress which the GP's notes state related to her work situation. The diagnosis of anxiety and depression first appear in the GP notes on 10 June 2016. The claimant was not (as she stated in evidence in chief) diagnosed with anxiety and depression around 4 February 2016. She was not prescribed antidepressants by her GP until 21 March 2016 after employment ended. She received Cognitive Behavioural Therapy ('CBT') in 7 or 8 counselling sessions from January to April 2016.Her evidence under cross-examination was of panic attacks after December 2015. Her evidence in chief was that her health was at its worst in February 2016 suffering daily panic attacks and unable to leave the house or do anything about the house, but contemporaneous answers she gave in response to counselling questionnaires regarding the nature and severity of her symptoms indicate that she felt better

in February 2016 than she did any time thereafter up to 10 October 2016. Her evidence under cross-examination (which I found wholly credible and accept) was that her condition had got a lot worse for her after she was dismissed by the respondent.

5.8 The claimant relies on a short report upon her prepared by her GP dated 10 June 2016 (the date on which she presented her claim to the Employment Tribunal). It is in the form of replies to questions posed by the claimant's solicitor about the claimant's current condition i.e. at that time and not about the claimant's condition in February to March 2016. The GP confirmed that the claimant's condition of anxiety and depression began in December 2015 and stated his opinion that the impairment *'is*' long term, having lasted since December 2015. His contemporaneous notes do not indicate what his opinion was at the time with which the tribunal is concerned i.e. as at the time of the alleged discrimination. The GP confirmed that she had been referred to counselling and was on regular medication .His opinion with regard to the extent of her condition absent counselling support was that her condition would have rapidly escalated and she would "be in a mess" from this and that the combination of medications and counselling had given her a quality of life she was able to enjoy. Although he has been the claimant's treating physician throughout December 2015 to 10 June 2016 when asked for confirmation that her impairment has an adverse effect on her ability to carry out day to day activities and if so to provide detail he gave only one specific example of a substantial adverse effect on normal day-to-day activities, i.e. the panic attack on 1 December 2015. The GP was also asked about whether he considered any improvement in the claimant's 'impairment' 'may be temporary (with the likelihood of a relapse or reoccurrence) or permanent'. He replied that the impairment was temporary but with the likelihood of relapse and recurrence.

The Law

6 The burden of proof is on the claimant to show (on the balance of probabilities) that she was a disabled person as at the date of the alleged discriminatory acts. A person has a disability if she/he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities (section 6 (1) (a) and (b) EqA).

7 Tribunals must take account of the "Guidance on matters to be taken into account in determining questions relating to the definition of disability" ('the Guidance').

8 Under Schedule 1 EqA the effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months or it is likely to last for the rest of the life of the person affected.

9 'Likely' means 'could well happen' (**SCA Packaging v Boyle [2009] ICR 1056)**.Paragraph C4 of the Guidance says:. .account should only be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual [for example, general state of health or age].

10 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. “Measures” includes, in particular medical treatment.

11 Paragraph B 12 of the Guidance states that the EqA provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, “likely” should be interpreted as meaning “could well happen.” The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question. This provision applies even if the measures result in the effect being completely under control or not at all apparent (paragraph B 13).

12 In **Goodwin v Patent Office 1999 ICR 302** the EAT said that the words used to define disability in section 1 (1) Disability Discrimination Act 1995 (now section 6 (1) EqA) required a tribunal to look at the evidence by reference to 4 different questions:

1 did the claimant have a mental and/or physical impairment? (the “impairment condition”)

2 did the impairment affect the claimant’s ability to carry out normal day-to-day activities (the “adverse effect condition”)

3 was the adverse condition substantial (the “substantial condition”); and

4 was the adverse condition long-term (the “long-term condition”). These four questions should be posed sequentially.

13 In the case of **J v DLA Piper UK LLP 2010 1052, EAT** the then EAT president Mr Justice Underhill said at paragraphs 38 and 40:

’38. There are indeed sometimes cases where identifying the nature of the impairment from which a claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier –and is entirely legitimate –for the tribunal to park that issue and ask first whether the claimant’s ability to carry out normal day to day activities has been adversely affected –one might indeed say ‘impaired’- on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common –sense inference that the claimant is suffering from a condition which has produced that adverse effect –in other words, an ‘impairment’. If that inference can be drawn, it will be unnecessary for the tribunal to try and resolve difficult medical issues of the kind to which we have referred.

‘(1) It remains good practice for a tribunal to state conclusions separately on the question of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long term effect under it) as recommended in Goodwin.

(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where they may be a dispute about the existence of an impairment it will make sense, for the reasons given in para.38 above, 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.’’

14 I have had regard to and thank Mr Starcevic and Ms Sefton for their helpful written and oral submissions.

Conclusions

15 There is a dispute between the parties about whether the claimant had an impairment (now identified as depression and anxiety). Adopting the approach suggested in paragraph 38 of **J v DLA Piper**, and considering first whether the claimant's ability to carry out normal day to day activities has been adversely affected there is no evidence of any substantial adverse effect on the claimant's ability to carry out normal day-to-day activities prior to 1 December 2015. Other than a panic attack on 1 December 2015 there is no evidence of such a substantial adverse effect from 1 December 2015 to 4 February 2016. She was able to continue her work and social life. She did not return to her GP until 13 January 2016 and then this was concerning her vitamin deficiency. I did not find her evidence under cross examination of panic attacks from December 2015 to February 2016 credible. Her evidence in chief simply did not address the effect on normal day-to-day activities except as at the time her witness statement was prepared and in February 2016 when her evidence in chief was that her condition was its worst (implying that thereafter it improved) which was inconsistent with her evidence under cross examination that her condition worsened after her dismissal which was corroborated by the answers to counselling questionnaires. The only evidence about the effect on the claimant's ability to carry out normal day-to-day activities without counselling and/or medication is contained in her GP's report which does not address (since he was not asked to do so) what the (likely) effects would have been without such measures in the period 4 February to 7 March 2016 .I conclude on the balance of probabilities that if there was any substantial adverse effect on the claimant's ability to carry out normal day-to-day activities those effects were in the period after her dismissal and not before.

16 If I am wrong on that point turning to the issue of long term there is no medical evidence to suggest that as at 4 February to 7 March 2016 any such effects were likely to last 12 months or more or for the rest of the claimant's life. The GP's report is wholly insufficient in relation to this point .As Ms Sefton submitted he was simply not asked the right questions by the claimant's instructing solicitors. He was asked about the claimant's current condition and 'is that effect long term (i.e. has it lasted or is it likely to last 12 months or more?' and not 'As at 4 February to 7 March 2016 had it lasted or was it likely to last 12 months or more?' Similarly as far as recurrence is concerned the likelihood must be judged on the evidence available at the time of the discriminatory acts and the GP's opinion as to the likelihood of recurrence as at 10 June 2016 is of no assistance. The medical notes provide no contemporaneous prognosis about the likely duration or the likelihood of recurrence.

17 Turning lastly to whether there was an impairment, I conclude on the balance of probabilities that it was not until 21 March 2016 that the claimant had the mental impairment of anxiety which had a substantial adverse effect on her ability to carry out day to day activities. It was then that her GP made his formal diagnosis of that condition (rather than the diagnosis of 'stress at work 'as he had recorded in the earlier fit notes) and by 10 June 2016 the impairment in question was both anxiety and depression.

18 Since I am concerned with the period 4 February to 7 March 2016 in my judgment the claimant has not discharged the burden on her to prove that at the material time she had a mental impairment (anxiety and depression) which had a

substantial adverse effect on her ability to carry out normal day to day activities and was long-term within the meaning of section 6 and schedule 1 EqA.

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Employment Judge **Woffenden**

Date: 29 March 2017

REASONS SENT to the PARTIES ON

....29 March 2017……

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FOR THE TRIBUNAL OFFICE