



EMPLOYMENT TRIBUNALS

Claimant: Mr J Lovera Freitas

Respondent: Forterra Building Products Limited

Heard at: Nottingham **On:** Thursday 11 January 2018

Before: Employment Judge P Britton (sitting alone)

Representatives

Claimant: In Person accompanied by Miss J Carrieri-Mendible

Respondent: Miss F Hargreaves, Solicitor

JUDGMENT

The Claimant was not a disabled person at the time of material events. Thus the case is dismissed.

REASONS

Introduction

1. As directed by my colleague Employment Judge Hutchinson, consequent upon the case management discussion which he held on 10 October 2017 I am tasked today with determining whether at the material time the Claimant was a disabled person as defined at Section 6 and Schedule 1 of the Equality Act 2010 (the EqA). This is fundamental to this particular case because if I find that the Claimant was not a disabled person at the material time, then his case comes to an end as he lacks the otherwise required 2 years qualifying service to bring a claim for unfair dismissal pursuant to the provisions of the Employment Rights Act 1996.

2. As to what is the disability relied upon, it is pleaded in the claim (ET1) which the Claimant presented to the Tribunal on 7 August 2017 as:

“...My depression and anxiety disorder (which was confirmed by NHS Mental Health Specialist on 10 October 2016 and since then I have been receiving counselling from NHS as well as taking medication to cope with my anxiety and depression...)”

3. At the case management discussion Employment Judge Hutchinson established that the Claimant was relying upon:

“He suffers from a mental impairment, namely depression.”

4. What EJ Hutchinson then did was set out most carefully the relevant requirements for the Claimant to establish pursuant to Section 6; and inter alia he stated that “in assessing the likelihood of an effect lasting 12 months account should 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”.

5. But at the heart of this case first is the following. On Friday 17 February 2017 the Claimant underwent a surgical procedure at the local hospital in relation to an injury to his right shoulder. That in turn relates to whether or not the Claimant suffered an accident at work back in July 2016 and which is not an issue for me today. As to the 17 February, post the operation the Claimant posted on Facebook at 9:35 on the Saturday graphic pictures¹ of himself in the hospital wearing a surgical gown and displaying an intravenous tube presumably near the surgical site. The text message written by him captioning the photographs read:

“Before and after... Just a bit over 3 hours operation..... It was worse than expected... Real damage... Thank you..... Managers and work colleagues for all your fucking fake friendship and your shit support.... It has changed my life mentally, physically, psychological moral... And much more....”

6. Suffice it to say that this Facebook entry which apropos Bp217 clearly stated the Claimant “works at Hanson Building Products “and which is the former name of Forterra, was seen by colleague employees and reported to the Respondent. As a consequence of that there was a disciplinary process which prima facie meets ACAS code of practice best practice culminating in a disciplinary hearing heard by Mr Nick Clark, Logistics Manager, on 10 March 2017 at which the Claimant was represented by a trade union official Mr Aimes. The outcome was that the Claimant was summarily dismissed by Mr Clark that day (Bp227-228) for gross misconduct in relation to the Facebook entry essentially because it was defamatory, was easily able to be traced to the Respondent and thus inter alia of course would bring it into disrepute and thus be an abuse of trust and confidence.

7. The Claimant then lodged an appeal inter alia praying in his aid by way of mitigation that inter alia at the time of posting the Facebook entry he was being treated for depression: he made reference to treatment by NHS Mental Health Specialists and that he was on Citalopram. There was an appeal hearing before George Stewart, Operations Director, on 30 March 2017. The Claimant was represented by 2 officials from the GMB; similarly invoked by them was that:

“referenced depression, illnesses and under Psychiatric care, falls under Equality Act, this was not taken into account.”

8. The appeal was rejected on 2 April 2017 by Mr Stewart (Bp242-3).

9. Thus as the Claimant cannot utilise the ERA 1996 as he did not have qualifying service, what he is contending is that whether it be s13 EqA direct discrimination; s15 unfavourable treatment because of his dismissal; or s20-21 failure to make reasonable adjustments, that in terms of the dismissal and the rejection of his subsequent appeal he has been discriminated against as a disabled person. He does not need qualifying service to being an EqA claim.

¹ See Bp (bundle page) 220 in the joint bundle before me.

10. Thus the first fundamental is whether or not the Claimant was a disabled person by reason of depression when he posted the Facebook entry and because that is what led to his dismissal.

11. In coming to my decision I have been taken to and thus carefully considered every page of the bundle of documents before me as all of it is relevant. I have also had regard to two substantial additional sets of paperwork put in by the Claimant and which thus means that I have been able to read all the medical records available for the Claimant and in particular in relation to the issue of depression.

12. I have been greatly assisted by the written opening submissions of Ms Hargreaves which are scrupulously fair and address and accurately summarise inter alia not just the medical records but the core jurisprudence on the topic including **J v DLA Piper UK LLP** UK EAT/0263/09 and the dicta therein of Mr Justice Underhill as he then was and which I have paid close regard to.

The Law

13. Section 6 of the EQA states:-

(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."*

14. I remind myself that the burden of proof is of course upon the Claimant to establish on the balance of probabilities that he comes within the definition.

15. In relation to the issue of substantial in terms of the definition at 6(1)(b) I am well aware that this means "more than minor or trivial" and I am also then aware that under Schedule 1, paragraph 2 of the EQA that "*for the purposes of deciding whether a person is disabled 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.*"

16. Thus if the Claimant's medical notes reveal a possible depressive condition, the crucial issue is what impact it had at the material time obviously discounting the beneficial effects of any medication. Thus I remind myself of paragraph D3 of the Guidance on the definition of disability (2011) published by the Secretary of State under the EQA and of which I am required to consider if an aspect appears relevant:

"In general, day to day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation, using the telephone, watching television, getting washed and dressed, preparing and eating fruit, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities..."

17. Finally C4 of the guidance: *In assessing the likelihood of an effect lasting for*

12 months account should 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..." The alleged discrimination is of course the dismissal on the 10 March 2017 albeit I repeat that the posting on Facebook on 17 February was the trigger.

18. In terms of his directions Employment Judge Hutchinson ordered as is usual in these types of cases that as well as the Claimant disclosing his medical notes, that he also required provide an impact statement addressing the issue of substantial impairment on ability to undertake normal day to day activities. He has done that (Bp 36). Manifestly his stated restrictions on his ability to undertake normal day to day activities are substantial. But what he does not address is as to whether or not he was so afflicted at the material time. Thus this has been a core focus in terms of the cross examination of him under oath and questions from me.

First findings of fact plus observations

19. First I will sketch out a little of the background in the case. Post the Claimant having the accident at work in relation to injuring his right shoulder in June 2016 he was unable to work, and there is before me a raft of "fit notes" submitted thereafter. There became an issue as to whether or not he did so suffer the accident at work. There is substantial conflict on that point. The Respondent contends that the Claimant, him being a keep fit specialist was in fact undertaking some press ups at work in preparation for a boxing match. This is how he injured his shoulder. The exercising was not in the course of his work. Hence it refused to exercise its discretion to pay him enhanced sick pay. Thus the Claimant was only in receipt of statutory sick pay. I am not making findings of fact either way. I will however accept that as a result the Claimant was under stress because he was without remuneration other than SSP and when it ran out dependent on State benefits in respect of which it seems his entitlement was restricted. Furthermore he had a complicated personal life scenario. Because inter alia of his aggressive behaviour and I detect dalliance elsewhere he had separated from his long term partner some time before albeit she remained loyal to him. He was concerned she might leave the Country albeit she did not do so. But he was able to see his two children from the relationship at weekends and even after the accident at work and still at the time of material events undertake activities such as take them for a walk in the park. He had problems with accommodation and into 2017 was worried he might lose his home. But his friends did rally round. And in the context of his complaint about not being paid sick pay he was able to instruct personal injury lawyers and enlist the aid of a friend who wrote articulate letters on his behalf to the Respondent. Furthermore he was able to write articulate e-mails (ie Bp 188) throughout the period culminating in the Facebook entry and which itself does not demonstrate any lack of intellectual capacity. Also from the documents before me he may have tried to influence a work colleague to support him as to his version of events viz the accident at work and which led to that colleague complaining (Bp 188). He was intellectually able to respond to the accusation.

20. So if I look at matters apropos the **DLA Piper** type of scenario there were adverse life circumstances impacting upon the Claimant by the end of 2016 namely loss of income; his dispute with the Respondent about his accident at work; his frustration that he could not keep up his strenuous physical activities because of the shoulder injury in respect of which the then treatment was problematic; and the messy domestic scenario.

21. On 7 October 2016 faced with the worsening problems to his shoulder and it not getting any better he saw his GP. He set out the events as above but did not go so far as to say that he couldn't undertake normal day to day activities if I set aside the exercise point, and there was no reference to for instance being unable to use public transport which he refers to in his impact statement. The GP decided first to refer him to the local hospital viz his shoulder and which led following scans etc to the operation on 16 February 2016. But what was the diagnosis as to his mental health at this stage? It was just stated "*problem generalised anxiety disorder... 7 item score (XaNkT) no indication of current risk of harm to self or others or of self neglect.*" His first fit note during this period only refers to shoulder pain. He again presented on 14 October feeling "*low and stressed... Split with partner one year ago. Sees kids aged 2 and 3 at weekends. Poor sleep, crying at times, worrying a lot. Intrusive thoughts about work and legal case, sometimes has felt would be better if didn't wake up but no plans to harm himself. Kids very strong protective factor...*" The diagnosis was that this was "*ongoing stress, low mood and anxiety due to work related injury and family situation.*" He was started on a course of Citalopram, the well-known antidepressant but at the low starter dosage of 20 mg per day. And throughout the period of material events that was not changed. The prescription was only increased on 7 June 2017 so well after material events and of course by now he had lost his job.

22. Moving into to 2017 he of course remained on his 20 mg of Citalopram per day but the primary focus now was the shoulder and the pain which meant he couldn't sleep at night or shower himself. The core point being that as at 17 February there is no medical evidence of any exacerbation in his mental state. To turn it round another way there is no diagnosis of depression. The fit notes in this period apart from referencing the shoulder otherwise refer to stress or low mood.

23. Cross referencing to the occupational health intervention under the Respondent's management for attendance procedure, the occupational health nurse saw the Claimant circa 7 November 2016 and inter alia then wrote a letter to the Claimant's GP requiring an opinion not only as to the right shoulder but also his current mental health and the prognosis and also as to whether there were any historical mental health issues. The GP replied (Bp 105) on 24 November 2016. Inter alia he stated: "*he is also suffering from a considerable amount of stress and low mood which seems to have been triggered by this injury and the way that he perceives his workplace have responded to his problems...*" Then having made further reference to the shoulder issue and the referral to which I have referred, confirmation was given that the Claimant had no pre-existing historical mental health issues; indeed as I have said the first presentation is October 2016. Then reference was made to medication and inter alia that he had been recently started on Citalopram. But the doctor did not opine that the mental health issues would prevent the Claimant returning to work and of course work can be considered a normal day to day activity. So he concluded "*currently not fit to perform manual work but I believe that probably his mental health and anxiety would improve by him returning to work in a non manual role if that was possible*".

24. The final port of call is the report (Bp121) from the Let's Talk Wellbeing Service dated 17th March 2017. Following a referral from the GP he had undergone 8 sessions of cognitive behavioural therapy (CBT). The outcome was that having made some improvement the Claimant was discharged. This is of

course circa the time of his dismissal by the Respondent. The report before me at Bp 121 makes no reference to any ongoing issue relating to such as depression. There is no such diagnosis. There was no referral to such as a consultant psychologist. During the period the Claimant makes reference to having seen such as a psychotherapist privately but there is no report from that individual or any note whatsoever of any treatment, diagnosis etc.

25. Finally insofar as it assists, the Claimant is in the curious position that his mental health state was not really being relied upon by him or his trade union representatives as an explanation for posting the Facebook entry, certainly at the disciplinary hearing (Bp 229-233). In essence what he was relying upon was that because of the anaesthetic he suffered side effects. He has explained that rather graphically to me today including hallucination. Thus he was endeavouring to explain through his trade union official that this had been essentially why he had posted the Facebook entry because he was still suffering the effects from that anaesthetic and was therefore not in control of himself. Well of course that's got absolutely nothing to do with the reliance upon depression for the behaviour concerned. There was an endeavour at the appeal hearing to now as I have already said flag up depression but he never went so far as to contend that the only reason he posted the entry was because of the disability by now relied upon, namely depression and anxiety disorder as to which see the letter of appeal dated 17 March and Bp234 in particular.

26. Returning to the medical notes, there is an entry on 20 February, so that's just after the Facebook entry. The same problems were recounted, in other words the relationship issues but able to see his children; sleep still an issue but has advice on such as seeing a sleep therapist. The dosage of Citalopram as I have already said was not increased. And there is a reference to anxiety but this appears to be much more about the problems with the surgical procedure on 16 February. He was seen again on the 28th. He had been in a road traffic accident on 23 February 2017 and was presenting with possible whiplash and concerns that it might have damaged the recovery of his right shoulder. That he was very distressed is understandable. As it is an examination was able to reassure him that no damage had been done. Otherwise he was recorded as *"clearly also in a low mood as shoulder injury has had significant impact on his lifestyle and general health."*

27. Then on 17 March 2017 there is a note (Bp 46) that he has completed his 8 sessions of CBT and been discharged back to the care of the GP. Again there is a reference to "generalised anxiety disorder" but by way of that having been the proceeding diagnosis insofar as it went but nothing more, and of course we get him presenting having been dismissed on 20 March and that he is stressed with that. There is no reference to any exacerbation of his condition however and nothing at all remotely near to suggesting that he is now suffering from depression. There is also no reference to any other disabilities to undertake normal day to day activities, and I note that if it is has to do with mental cognisance then the Claimant was able to explain himself at both internal proceedings and indeed gave lengthy explanations.

28. As to inability to undertake normal day to day activities, the report from physiotherapy dated 7 May 2016 (Bp129) records how he had made an *"excellent start to his rehabilitation.....has aspirations to return to work in a manual capacity, but also to full gym based activity To that end he is undergoing a progressive period of rehabilitation at the treatment centre...fully support Joseph's attendance at the gym and/or swimming pool..."*

29. And albeit the GP increased the dosage of Citalopram to 30mg on 3 May, the record of the consultation in summary shows an obsessional focus on the work based events but otherwise relative stability on the domestic front and that he *“looked well kempt...”* Turn it round another way; there is no diagnosis of depression and no reference to inability to undertake normal day to day activities. He was clearly angry with the legal situation. The trade union didn't want to assist him further, and there may have been a lack of commitment to his personal injury case by his no win no fee lawyers.

30. And so we get to 5 June 2017 when he attended his GP. In contradiction to what he had previously said on the trade union front, his trade union wanted confirmation that he had been suffering from depression for the last 12 months. This was repeated by the Claimant on 8 June. He clearly knew the definition of disability and the 12 month point. The GP records (Bp50) *“... as low mood is work related and this continues to give him ongoing stress , I suspect that his low mood will continue to be to be an issue until this is resolved, has thought about ending his life , his children are a strong protective factor however, not tried anything feels that he has lost everything in this process – his house, his dignity his money and his respect; no longer requires a letter- he informs me – the court will contact if they need evidence.”*

31. Another fit note was issued for “low mood” as at 27 June; he had lost his house and the diagnosis was “anxiety/low mood”. Finally in this period recorded on 3 July was that he was homeless but staying at different friends homes each night. Despite this as at 10 July when seen his mood was *“slightly better .. has been taking friends as support to appointments with lawyers etc is taking employers to court..”* So as before he is able to travel and communicate and presents well kept etc. There is then a hiatus in terms of presenting to the GP until 6 September when there is a first diagnosis of depression and which becomes acute in November when the crisis management team became involved.

Summary so far

32. So at the material time I accept he was suffering from low mood/stress and some anxiety. He was taking a low dose of an anti depressant. There is no evidence of clinical depression at that stage. This developed later. Also he was able to undertake normal day to day activities and mentally function to a significant extent. To repeat myself he was able to clearly explain himself not only when he saw his doctors but also when he took part in the disciplinary proceedings; and on the personal injury and sick pay fronts. He was able to see his children and take them out. Albeit difficult circumstances he could move from one temporary accommodation to another. He could attend rehabilitation. Thus I am sceptical in terms of his impact statement and he was unconvincing, indeed vague, under cross examination. Thus as to his reliance on alleged loss of libido this was not raised with the GP at any time. I say that with confidence as I would normally expect as the GP consultation is confidential and where usually these things will be discussed, that there would be a record of it being so discussed if it was mentioned. It is obvious from the medical notes that his GP's were sympathetic and gave a lot of time to the Claimant during the period I am dealing with. In the impact statement there is reference to being unable in effect to cook, eat and play with his children for long periods of time. But although there is some reference to feeling tired in the GP Notes it doesn't go remotely that far. In other words those very full notes do not provide corroboration. Then there is this

assertion by him: "My severe anxiety disables me from using public transport as I feel claustrophobic, closed in and this normally leads to panic attacks. I am afraid to walk alone..." There is no evidence in the GP notes to that effect at all; also nothing raised internally to that effect or indeed on any of these fronts that I am now exploring by either of the trade union representatives and I bear in mind that the second of them at the appeal hearing was an experienced full time GMB representative who clearly knew his way round the Equality Act.

33. That now brings me to paragraph 11 of the submissions of Ms Hargreaves and the reference to **J v DLA Piper UK LLP** and paragraphs 41-45 of the Judgment. Applying the same to the facts as I have now found them to be, the low mood and anxiety was during the material period commencing October 2016 derived from the obvious adverse life events to which I have now referred. There is no evidence that it was caused by clinical depression. The latter was diagnosed long after the material events.

Conclusion

34. It therefore follows that in this case I have concluded that at the time of material events the Claimant was not a disabled person.

35. It follows that I must dismiss the claim.

Observation

36. Had I found that the Claimant was disabled at the material time, then the following applies.

36.1 That which was posted on Facebook was prima facie defamatory. It clearly potentially brought the Respondent into disrepute.

36.2 It came to the attention of colleague employees.

36.3 It therefore worked its way up to senior management.

36.4 The overwhelming motivation was anger at his plight and it was clearly done intentionally. In other words the disability did not mean the Claimant could not control himself and there is no medical evidence at all to the contrary.

36.5 Thus at a hearing on the merits bearing in mind the provisions of Section 13 or s15 of the Equality Act 2010 and that the Respondent is pleading that even if he was a disabled person that which he did justified this dismissal because first applying s13 an employee not disabled would also have been dismissed and then as to s15 the dismissal was justified as a proportionate response, I consider that it is more likely that not that the Claimant would either have lost his case or received at the most a minimal award given the huge contributory factor.

Employment Judge P Britton
Date 27 March 2018

JUDGMENT SENT TO THE PARTIES ON

03 April 2018

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FOR THE TRIBUNAL OFFICE