EMPLOYMENT TRIBUNALS

Claimant: Mr E Smith

Respondent: Intelling Limited

Heard at: Manchester **On:** 4 July 2018

Before: Employment Judge Howard

REPRESENTATION:

Claimant: Miss A Smith, Mother
Respondent: Mr P Maratos, Consultant

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The claimant was at the relevant time, being 14 July 2017, a disabled person for the purposes of section 6 and schedule 1 to the Equality Act 2010.

2. The matter will proceed to hearing in accordance with directions given and sent to the parties separately.

REASONS

1. At the outset of the hearing, Mr Maratos renewed an application for a postponement which had been made by email on 21 June 2018. The respondent had received the claimant's further medical evidence the previous day and considered it to be:

> *"…Evident that the claimant's medical evidence is not only one-sided it's also inclusive which will not help the Tribunal determine the issue of disability. To rectify this issue the respondent has sought to instruct a medical expert to conduct a review of the papers. The claimant now states in correspondence the claimant does not consent to the instruction of an expert – whether paid for by you or on a joint basis, and the claimant intends to rely on the evidence*

already presented to establish that he has a disability. In accordance with the case of De Kaiser Limited v Wilson [2001] UKEAT 1438/00/2003 (20 March 2001) the respondent seeks permission of the Tribunal for the respondent to obtain a medical report (on the papers or by way of medical examination). The respondent agrees to fund the report'.

2. The claimant objected to the application, by email of the same day, on the basis that he had complied with the Tribunal's orders on medical evidence, given at the preliminary hearing on 18 January 2018, to provide a disability impact statement and supporting medical evidence. No concern had been raised at that preliminary hearing by the respondent's representative that his medical evidence might be 'one-sided' and no application to instruct a medical expert had been made. As was pointed out on behalf of the claimant in his letter of objection; *'The respondent requested on 22 March for a GP report from the claimant. Again the respondent expressed no concern about the disability evidence being one-sided and made no representations or application for an expert to be instructed…With all due respect to the respondent's representative we don't understand how medical evidence relating to the claimant can be anything other than one-sided given that it is evidence that the claimant's health alone by those that treat him…The claimant did refuse to consent to the sharing of his medical documents. We consider his refusal was entirely reasonable in the circumstances. We fail to see the benefit of instructing an expert to review a GP report, records of GP consultations and the claimant's account of how his impairment affects him. The expert's evidence without seeing the claimant would in our view carry very little weight…The claimant is willing to rely on the evidence that has been provided to prove that he has a disability. To the extent that the respondent disputes disability they will have the opportunity to question the claimant and present submissions to the Tribunal at the preliminary hearing.'*

3. The respondent's application came before Employment Judge Ross on 29 June 2018 who refused it as follows:

"Employment Judge Ross has considered the respondent's application for postponement for the preliminary hearing to determine the issue of disability listed for 4 July 2018 and the objection of the claimant. She is concerned at the lateness of the request to obtain a medical expert. Ultimately whether or not the claimant is disabled for the purposes of the Equality Act 2010 is a matter of fact for the Tribunal. This reply does not prevent the respondent renewing their application at the outset of the hearing."

4. At the outset of the hearing Mr Maratos did renew the application, arguing that there was insufficient evidence to determine when the claimant's impairment reached the threshold to meet the definition of disability; that the GP notes refer to use of cannabis and so requires further medical evidence and that there is a further reference in the GP notes to the claimant failing to take prescribed medication which requires further investigation. Mr Maratos explained that when he assumed conduct of the claim he realised that a further report would be required. He made the request a couple of weeks ago which the claimant refused. The absence of further medical evidence would put the Employment Judge in the position of speculating on important issues. As the claim rests on disability in its entirety, the respondent would be caused prejudice if a postponement was not granted to enable the Employment Judge to reach a sensible determination.

5. Miss Smith argued that the medical notes were clear. There was sufficient medical evidence, including the GP's report, before the Employment Judge, and that they she had spoken to legal advisers whose advice had been that as the claimant had followed the directions of the Employment Judge at the earlier preliminary hearing no further medical evidence was necessary, and in any event the medical expert would simply reiterate what was in the GP notes. The Employment Judge confirmed with Miss Smith that she understood that the burden was on the claimant to prove disability, based on the evidence. Miss Smith understood that and explained that her son, just wanted to proceed today.

6. The Employment Judge refused the application to postpone and to direct further medical evidence. The burden of proof was on the claimant. It was a matter of fact for the Employment Judge to decide on the evidence presented to her. The claimant has complied with directions on medical evidence and it was open to Mr Maratos to put the various issues that he had identified to the claimant in cross examination and by way of submissions, and the preliminary hearing proceeded.

7. I heard evidence from the claimant and was referred to his GP medical records, a report from his GP and his disability impact statement.

8. The claimant relies upon his condition of anxiety and depression as amounting to a disability which became long-term, beginning in around 2015. The relevant time at which the duration of the substantive adverse effects of his condition is assessed for the purposes of his claims is 14 July 2017 when he was dismissed.

9. The claimant first presented to his GP with anxiety in August 2012. He reported feeling panicky in June 2015 and on 22 January 2016 he reported *'symptoms of anxiety when someone is at the door, the phone rings or going out with friends'*, and the physical symptoms of being shaky, sweaty and palpitations in anxious situations. On 30 August 2016 he reported recurrent panic attacks, heart racing and pressure in the head, recorded as *'anxiety related with long durations episodes'*. The GP recorded *'a long history of anxiousness and now more frequent bouts of panic and occasional nightmares'*, and he was prescribed propranolol. On 5 May 2017 he was recorded as having *'recurrent anxiety'* which had *'come back tenfold'* when relocated for work. He was prescribed further propranolol and has taken it ever since. He was seen on 19 May 2017, recorded as *'anxiety triggered by change in work role, very anxious at thought of going into work, heart racing, feeling clammy'* and was given a fit note for three weeks.

10. In December 2017 after his dismissal in July 2017, he was prescribed Sertraline which he now takes. The GP records report his *'active problems'* as *'anxiety states'* and *'anxiety states'* is also recorded under the heading *'minor past'*. The significance of that latter description is unclear in the context of GP records and I draw no conclusions from it. I draw my conclusions from the content of the GP records themselves, the GP report of 1 June 2018 and the claimant's evidence given today and contained in his impact statement.

11. The GP report states that the claimant has had anxiety state since 2012 and has received various treatments. As at the relevant time that was propranolol. The claimant described his symptoms when not taking Propranolol as *'heart racing, sweating and increased anxiety'* which is consistent with the contemporaneous medical records. The GP also reports that the anxiety condition was present

between February 2016 and July 2017, consistent with the records and the claimant's evidence.

12. I accept the claimant's evidence as contained in his statement and amplified in evidence today. His condition fluctuates, as his GP reports, in that some days he can have severe disabling anxiety and others feel quite confident. The claimant has had an underlying condition of anxiety since at least 2012, the effects of which became substantial from at least 2016 when he reported his symptoms to the doctor. As his symptoms of anxiety worsened, so did his depressive mood.

13. From that stage his ability to carry out normal day-to-day activities was substantially adversely affected in that his mood state of being highly emotional, low, sad with suicidal thoughts and lack of interest and enjoyment of activities, prevented and continues to prevent him from engaging in normal everyday activities such as going outdoors, answering the phone, personal care and regular eating and participating in normal social life for someone of his age. His sleeping patterns are very disrupted in that he finds it very difficult to get to sleep, often not until the early hours and gets very little uninterrupted sleep. The effect of all this has been to isolate him, which has worsened his depression. As he described, since 2016 onwards, he never goes out and he only has a couple of friends who visit him. He gets very anxious when the phone rings or someone is at the door. He eats very little and his sleep is disturbed. Since 2016 the claimant has suffered from panic attacks which are controlled by propranol. If he did not take propranol he would be debilitated by those panic attacks and the physical effects of anxiety.

14. During this time, with the aid of medication, the claimant was managing to work, his role required little personal contact as it mainly involved electronic communication. In May 2017 his role changed and he was required to take on *'cold calling'*. This undoubtedly exacerbated his pre-existing condition and he was signed off work for several weeks.

15. I am satisfied that his condition of anxiety and depression met the requirements of the definition of disability from January 2016 onwards, in that it had lasted 12 months of the date of his dismissal. In any event, as at July 2017 it was more likely than not that his condition would last for 12 months based on the findings that I have made.

16. Accordingly, the claimant was a disabled person because of anxiety/depression at the relevant time.

The Law

17. When reaching my decision, I took account of the written submissions provided by Howells LLP on behalf of the claimant and the oral submissions of Mr Maratos.

18. I applied the definition of disability contained within section 6 of the Equality Act 2010 which provides that:

> *"(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."

19. I was guided by the guidance of the EAT in **Goodwin v Patent Office [1999] ICR 302** in addressing each limb of the definition, asking myself what the nature of the impairment was, whether the impairment affected the claimant's ability to carry out normal day-to-day activities and if so, was that effect adverse? If so, was the adverse condition substantial? If so,was the adverse condition long-term?

20. On long-term, I applied Part 1 to Schedule 1, determination of disability:

"The effect of an impairment is long-term is –

(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."

21. At Part 1 to Schedule 1(5), effect of medical treatment:

"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 have been taken to treat or correct it; and

(b) But for that it would be likely to have that effect."

22. I took account of the Equality Act 2010 guidance on matters to be taken into account in determining questions relating to the definition of disability, in particular when considering normal day-to-day activities upon which the claimant's impairment might have an adverse effect.

23. I was mindful that applying **McNicol v Balfour Beatty [2002] ICR 381** EAT the approach of the Tribunal should be that the term "impairment" bears its ordinary and natural meaning:

"It is left to the good sense of the Tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects…The essential question in each case is whether on sensible interpretation of the relevant evidence including the expert medical evidence and reasonable inferences which can be made from all the evidence, the applicant can fairly be described as having a physical or mental impairment."

24. I was mindful of the EAT's guidance in **MoD v Hay [2008] IRLR 928** that the statutory approach to determining if a claimant has an impairment is:

"Self-evidently a functional one directed towards what a claimant cannot or can no longer do at a practical level."

25. On the question of "substantial", I was guided by the EAT in **Goodwin v Patent Office [1999] ICR 302**, that my focus must be on what the claimant cannot do as opposed to what he is actually able to do.

26. I applied the EHRC's Statutory Code of Practice Appendix 1 for guidance on normal day-to-day activities, which includes:

"Day-to-day activities thus include but are not limited to activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing and taking exams, going to the toilet, talking, listening to conversations and music, reading, taking part in normal social interactions or forming social relationships, nourishing and caring for oneself. Normal day-to-day activities also encompass the activities that are relevant to working life."

27. Appendix 1 paragraph 9 states:

"Account should also be taken of where a person avoids doing things which for example causes pain, fatigue or substantial social embarrassment or because of a loss of energy and motivation."

28. It was clear that the claimant struggles to motivate himself and severely lacks energy at times because of his impairment.

29. In submission, Mr Maratos referred to reference in the GP notes of the claimant smoking cannabis and a period of time when he was drinking too much alcohol. The claimant had explained in evidence that he had never drunk or smoked cannabis daily but following his dismissal, when things were really bad mentally, he had used both quite heavily for a period of time because he had lost his job and could not find another one. The claimant's use of alcohol and cannabis in those circumstances did not exacerbate or detract from the adverse effects that I have found and, in any event, post-dated the relevant date upon which I was required to focus.

30. For these reasons I found that the claimant was a disabled person at the relevant time and his claim will proceed in accordance with the directions given and sent to the parties separately.

Employment Judge Howard
Date 16th July 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 August 2018

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.