



EMPLOYMENT TRIBUNALS

Claimant

First Respondent

Mr S Howe

v

**South Yorkshire Fire and Rescue
Service**

Martin Blunden

Jamie Courtney

PRELIMINARY HEARING

Heard at: **Sheffield**

On: **29 November 2018**

Before:

Employment Judge O'Neill

Appearance:

For the Claimant: **Mr Alfred Weiss of Counsel**

For the Respondent: **Mr Edward Legard of Counsel**

RESERVED JUDGMENT AT A PRELIMINARY HEARING

1. The claims of disability discrimination fail the Claimant having not shown that he had the protected characteristic of disability within the meaning of the Equality Act 2010.
2. The only surviving claim is that of unfair dismissal.
3. The only relevant Respondent in the unfair dismissal claim is the First Respondent South Yorkshire Fire and Rescue Service. The Second Respondent Martin Blunden and the Third Respondent Jamie Courtney are removed from the proceedings under Rule 34.

REASONS

Issues

1. This Preliminary hearing was directed to consider the following issues
 - a) Whether at the material time the Claimant was a person with a disability as defined by the Equality Act 2010 (but not whether the Respondents knew or ought reasonably to have known that).
 - b) Whether the Third Respondent should be discharged from the proceedings. The Third Respondent is the Chief Fire Officer.

Legal Framework

2. A) Section 6 Equality Act 2010 (EqA)

“(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.

(2) A reference to a disabled person is a reference to a person who has a disability.

When determining the issue of disability both the Code of Practice on employment (insofar as it concerns the question of disability) and the 2011 Statutory Guidance must be considered.

B) By Schedule 1, para 2 of EqA:

 - (1) The effect of an impairment is long-term if –
 - (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.
3. I have had regard to the following decisions referred to me by Counsel:

Goodwin v Patent Office [1999] IRLR4.

Taylor v Ladbrokes Betting & Gaming Ltd [2017] IRLR 312

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Morgan v Staffordshire University [2002] IRLR 190;

J v DLA Piper UK LLP [2010] IRLR 936.

Aderemi v LSE Railway Limited [2013] ICR 591.)

Leonard v South Derbyshire Chamber of Commerce [2001] IRLR 19.

Cruickshank v VAW Motorcast [2002] IRLR 24.

Banaszczyk v Booker Ltd [2016] IRLR 273

Herry v Dudley MBC [2017] ICR 610.

Richmond Adult Community College v McDougal [2018] IRLR 227

Swift v CC of Wiltshire Constabulary [2004] IRLR 540

Royal Bank of Scotland v Morris UKEAT/0436/10

Evidence

4. The parties presented an agreed Bundle of documents, paginated and indexed.
5. I declined to admit some documents which would in normal circumstances be privileged and which included letters between the Claimant and his Solicitors.
6. The Claimant and his wife Joanne Howe produced written statements and gave oral testimony.
7. Counsel made very helpful submissions both orally and in writing.

Findings

8. Having considered all of the evidence both oral and documentary I make the following findings of facts on the balance of probabilities which are relevant to the issues to be determined. When I heard or read evidence about which I make no finding or do not make a finding to the same level of detail as the evidence presented to me that reflects the extent to which I consider that particular matter assists me in determining the issues. Some of my findings are also set out in my conclusions below in an attempt to avoid unnecessary repetition and some of my conclusions are set out in the findings of fact adjacent to those findings.
9. The Claimant was employed by the First Respondent in the Accounts Department from 1999 until his dismissal on 24 November 2017. He was not a qualified Accountant. In or about 2011 the Head of Finance left and the Claimant acted up as Head of Finance and was appointed to the post in March 2016 after he had secured membership by examination to the Association of Accounting Technicians and the restructure had been finalised.
10. In 2015 the First Respondent underwent a restructure including of the senior tiers of management. This was a period of insecurity for the Claimant who feared he was at risk of redundancy as a consequence, (notwithstanding the fact that he was part of the team which developed the new structure) and also feared that he would not be confirmed as Head of Department permanently for want of formal qualifications. It was the Claimants own evidence that the position carried a great weight of responsibility, being in charge of a budget of almost £50 million, being responsible for financial legal compliance and having a salary of about £60,000. The Claimant assumed that a fully qualified Chartered Accountant would be appointed and that he was under qualified.
11. Despite the Claimant's fears he was appointed as permanent Head of Finance in March 2016. This was a very demanding role. The Claimant conceded that he was working at the edge of his comfort zone and the demands of the post necessitated him taking work home. The burden of responsibility felt even heavier in 2016 when the Director of Finance left. In addition, the reorganisation

brought broader responsibilities for which the Claimant felt he was not qualified. Never the less he accepted the promotion to Head of Finance aware of what the reorganisation looked like as he had helped to devise it.

12. In this period the Claimant had a three-day absence in January 2015 for a stomach upset but made no visit to the GP at that time according to the GP Notes.
13. In 2015 the Claimant did not visit his GP again until 8 September 2015 when he reported feeling tired and that he was going through a stressful time at work with job cuts on the horizon. The GP records that his sleeping and eating patterns are of no concern but the Claimant is in low mood. The main issue during this visit appears to be a bowel complaint and I note that the Claimant has reported similar symptoms going back to 2010 when there is no assertion that there was any mental impairment or stress. The GP notes make no link between the bowel complaint symptoms and stress.
14. In October 2015 the Claimant attended the First Respondent's Occupational Health Unit to discuss the health of a member of his staff with the OH professional. While there he took the opportunity of discussing his own stress issues. The OHU offered to arrange a meeting with Kevin Tobin who I infer is a Counsellor of some kind but the Claimant did not take up the offer. Neither did the Claimant attend his GP again in 2015.
15. The letter from the Claimant's GP dated 10 May 2018 confirms no medical issues related to work related stress or depression before June 2017.
16. In the circumstances I do not find that the Claimant had any mental impairment by way of depression or otherwise in 2015. I accept that the situation at work may have been stressful because of the uncertainties related to the restructure and the delay in confirming his promotion to Head of Finance but the Claimant has produced no evidence to support a finding of clinical depression or mental impairment in 2015. He does not report any significant symptoms to the GP, he attends the GP only once in 2015 and that was mainly for stomach and digestive tract issues, no drugs were prescribed and he was not referred to a Psychiatrist, Psychologist or Counsellor.
17. In 2016 the Claimant made no visit to the OHU or to the GP at all. In March he accepted the promotion to Head of Finance, knowing what it entailed, and at the time appeared expressed no concerns or doubts to anyone about his capacity to do it. That further indicates he was not suffering from a mental illness then. He went through the steps necessary to become a member of the Association of Technical Accountants to bolster up his CV.
18. Despite the account he gives in his impact statement and the statement of his wife I do not find that the Claimant has shown that he was suffering from a mental impairment in 2016. I accept that he began to find the position of Head of finance very tough and that he was doubting his qualification and capacity to do it and was taking work home which is not unusual in such senior roles but this reaction falls short of establishing a mental impairment.

In the circumstances I do not find that the Claimant had any mental impairment by way of depression or otherwise in 2016.

19. However, in 2017 the situation appears to change and in June 2017 he attended the GP on a number of occasions and on 11 July 2017 he reported to the OHU. In his Impact statement the Claimant describes returning from a family holiday and unable to face returning to work. Mrs Howe confirms in her statement that matters came to a head in June and the Claimant simply could not get out of bed and in the period following describes finding him in tears, avoiding contact with friends and family, sleeping and in low mood, lacking enjoyment in family life.
20. This is reflected in the notes of the GP who he attended very regularly from June 2017 onwards. Initially the GP inserted stress on the Fit note but after the first Fit note the reason for the absence stated depression for which the GP prescribed medication (sertraline). This is reflected also in the attendances at the OHU.
21. The GP Dr Davies by letter dated 10 May 2018 reported that he had started seeing the Claimant in June 2017 and that the workplace stress had adversely affected his work, family and social life. Initially the GP diagnosed a possible depressive disorder but by the end of June 2017 in the notes and the Fit note he confirmed that the Claimant was suffering from depression.
I find that the Claimant has shown that he has had a mental impairment namely a depressive disorder as from 26 June 2017 and continuing at least to the last GP note in Bundle on 30 April 2018.
22. In the letter the GP confirmed that the depressive disorder (which I find to be a mental impairment) has been triggered by work related issues and stress caused by work. I do not accept the submission of Mr Legard to the effect that work related stress and the mental illness of depression are mutually exclusive and that the former can only amount to a reaction to adverse circumstances. Nor do I accept that such is the conclusion in the EAT decision of *J v DLA Piper*. It is possible for the one to trigger the other as was the case with the Claimant. At paragraph 68(5) of the decision the EAT state *"But NB that "clinical" depression may also be triggered by adverse circumstances or events, so that the distinction cannot be neatly characterised as being between cases where the symptoms can be shown to be caused/triggered by adverse circumstances or events and cases where they cannot."* In the Claimant's case the GP confirms *"It has been clear all along that his depression has been triggered by work related issues and stress caused by those"*.
23. In reaching my conclusion that the Claimant has shown that he has a depressive disorder, I take into account the guidance in ***Morgan v Staffordshire University [2002] IRLR 190***; but I do not accept Mr Legard's submission that a GP is not sufficiently expert to be relied upon. I refer to the comment at paragraph 52 of ***J v DLA Piper UK LLP [2010] IRLR 936*** *"As noted at paras. 29 and 30 above, the Tribunal did not apparently regard her evidence as "expert". In our view it was wrong not to do so. A GP is fully qualified to express an opinion on whether a patient is suffering from depression, and on any associated questions arising under the 1995 Act: depression is a condition very often encountered in general practice. No doubt*

his or her evidence would, other things being equal, have less weight than that of a specialist, and in difficult cases the opinion of a specialist may be valuable; but that does not mean that a GP's evidence can be ignored if the evidence of a specialist is not available or is inconclusive."

24. The Claimant remained off work attending both his GP and the Respondent's OHU from June 2017 until his dismissal and appropriate Fit-notes were submitted to support his inability to work during this period.
His wife describes that he was withdrawing from their friends and family. She says that weeks passed when he did little else but sleep. She found him weeping in the bath. He was so depressed because he was unable to provide for them that he mooted whether the family would be better off without him. She and her daughter feared the worst when he spoke like this and were afraid to leave him in the house alone although the GP does not record any suicidal tendencies.
25. The Claimant described in his impact statement how he felt in terms more distant from his family and found looking after the children in the school holidays difficult and dreaded the family holiday when there would be no escape from the family. He described frequently breaking down in tears. He said he could no longer face playing in the Monday football team because he felt he was such poor company and gave that up. He described retreating to his bedroom during his middle child's 14th birthday party which was a camping party in their garden because he could not face being in such a crowd and he didn't want the children to see him. He described how his poor company on the holiday in Split with friends brought that relationship to an end and they have not seen the couple since. He said that on some days he enjoyed doing garden work for a friend but on others he could not get out of bed.
26. The Claimant began having meetings with the Second Respondent and it would seem from what he is recorded as having told the GP and the OHU that he could not cope in his position as Head of Finance, that he was reluctant to consider returning to a more junior position, and what he hoped for was a severance package.
27. Taking into account the statutory **Guidance on Matters to be Taken into Account in Determining Questions Relating to Disability (2011)** and in particular the Appendix thereto setting out a list of factors '*which would be reasonable to regard as having a substantial adverse effect on normal day to day activity*' then I conclude that the Claimant has shown that his impairment has had such a substantial adverse effect if I find the Claimant and his wife to be credible.
28. The Claimant's wife Joanne Howe confirmed her statement under oath but was not cross examined. I find her statement credible in relation to the period leading up to June 2017 and afterward and accords with the medical evidence.
29. The Respondents seek to cast doubt on the credibility of the Claimant and this picture of debility and referred me to the emails and texts between the Claimant and the Second Respondent in which the Claimant appeared to be enjoying

family life and to the social media pages of photographs and messages and to the fact that the Claimant appears to have taken 7 overseas holidays in the period June 2017 to July 2018 as well as running the Great North Marathon in very good time with two old friends. Further, it was suggested that this pattern of holidaying supported the contention that the Claimant had no mental impairment but simply a reaction to adverse circumstances in the workplace.

30. The Claimant explained that the GP had advised him to take physical exercise to improve his mental health and that is advice that I have come across in other cases of depression which leads me to conclude that it is likely to be true. The Claimant says that he enjoyed the training which he undertook alone. Despite his apparent fear of social situations, the Claimant was able to participate in the Great North Run in 2017 and 2018 and he says that he was spurred on because he and his two lifelong friends were running to raise money for a medical charity their friend having recently died. I accept his evidence about this.
31. The Claimant explained in terms that he had taken some of these family holidays somewhat reluctantly but he badly wanted to save his marriage and family life and he hoped that by going away with the family he could hold the relationships together. I find this credible.
The Claimant explained that the adult holiday to Croatia with another couple in September 2017 was rather unsuccessful because of his behaviour and the friendship between the two couples broke down and they have not spoken since. I found that explanation plausible and he volunteered it readily.
He explained that one trip to Bulgaria was to look after some practical matters at the flat he owns with his friend Marcus and on another trip to the flat in Bulgaria he had intended to go alone to get away from everything but fearing for his safety there alone Mrs Howe had persuaded Marcus to accompany the Claimant. I accept his evidence on this.
32. He also explained that in the texts and emails to the second respondent that he was trying to put a brave face on things but that the child's party and the so-called relaxing holidays had not been as happy occasions as he made them appear in his texts. I accept that evidence.
33. I do not find that these holiday arrangements and Marathon running demonstrate that the Claimant does not have depression. Nor do I consider that they demonstrate that he falls into the category of merely reacting to adverse life events at work being perfectly well away from the workplace. I accept evidence that away from the workplace in the context of family life he remained significantly depressed although the effects of the depressive disorder might fluctuate such that he had good days and bad and the depression did not prevent him from participating altogether in life outside of work but the adverse effect was more than trivial.
34. The Respondent also sought to have admitted in evidence some documents which in the normal course of events would be privileged including correspondence between the Claimant and his Solicitors relating to terms of severance. I refused the Respondent leave to introduce such documents but the Claimant readily accepted in cross examination that he had had such correspondence and was able to concentrate on it. That the Claimant was able

to do so does not render his account of what he was unable to do unbelievable and I remind myself that the focus in determining the matter of disability is on what the Claimant cannot do.

35. Taking into account the GP notes, the OHU notes and the letter from Dr Davies of 10 May 2018, the unchallenged account of Mrs Howe and the Claimant's own evidence when taken in the round I find that the Claimant has shown that his mental impairment, namely depressive disorder, has had a substantial adverse effect on his normal day to day activities
36. The Claimant is also required to show that the substantial effect of the impairment is long-term in that
 - (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.
37. As set out above I find that the depressive disorder began in June 2017 and was diagnosed as such by Dr Davies on 26 June 2017. As I understand it the most recent disability discrimination claims arise from the dismissal on 24 November 2017 and the date the Respondent confirmed he was not entitled to a right of appeal i.e. 20 December 2017, although some complaints arise out of the meetings with the Second Respondent which took place between October and the date of dismissal and as I understand it, the reasonable adjustment claims arose in the period from June 2017 to dismissal.
38. As at 20 December 2017 the Claimant had been suffering from depression for 6 months and I have concluded that the Claimant has not shown on the balance of probability that he had a mental impairment before June 2017. Therefore, he is unable to show that he fulfils the requirements of paragraph (a) in that it has not lasted for at least 12 months. In addition, no issue of recurrence arises as I find it to be a discrete period of mental illness beginning in June 2017 with no link to the past and no evidence of any likelihood of recurrence in the future.
39. No evidence has been put before the Tribunal that the Claimant would have a mental impairment for the rest of his life and thus he fails to meet the requirements of paragraph (c).
40. Therefore, the remaining issue is whether the Claimant can demonstrate under paragraph (b) that at the material time the impairment " is likely to last for at least 12 months". Under the Guidance at C4 and under the approach taken in **Richmond Adult Community College v McDougal [2018] IRLR 227** this is to be judged as at the date of the alleged discrimination.
41. There appears to be no contemporary medical evidence, including the GP notes and the OHU notes to suggest that the depression was at 20 December 2017 expected to last beyond June 2018.
42. The GP note in September 2017 records that the Claimant is better and brighter and feels like he is turning the corner. This improving trend is also recorded by the GP when they meet on 6 October 2017 and on 3 November 2017 when the

Claimant is described as 'doing well'. At that stage the prognosis looked very good and the Claimant was making such good progress he had cut out the medication.

43. In November he learnt that the hoped-for severance package was not to be offered and the First Respondent had decided to dismiss him on the basis that they say there appeared to be no prospect of any return to work. This caused a minor setback in the Claimant's recovery although he did not visit the GP as an emergency but waited until 19 December 2017, about 4 weeks after the dismissal. There is no record of any extreme behaviour in response to the dismissal.
44. The next visit to the GP was not until 23 February 2018. In those notes it is recorded that 'he is doing ok, up and down days, been taking sertraline on and off, but now trying to manage without, now work has ended feels less stressed,...has a Tribunal Hearing hanging over his head, starting to try and build up gardening business.' I infer from this note that despite the dismissal and the disappointment in failing to achieve the severance package he had hoped for the Claimant did not in fact suffer a major down turn in his health. From this note I also infer that his health is improving again in that he intended to manage without medication, is doing ok and is looking forward to starting his gardening business. This is not a picture of a man with a poor prognosis for recovery.
45. In 2018 his visits to the GP became less frequent. He did not attend the GP again until 30 April 2018 which is the visit on which the GP based his report for this Hearing. There are no other notes of a visit to the GP that year.
46. Initially during his absence from work, the Claimant undertook garden work for a friend as a kind of occupational therapy but by February 2018 he had set up his gardening business and was advertising as having clients across the County. I conclude that starting a business is a clear sign that the Claimant is likely to be on the road to recovery.
47. The letter from Dr Davies of 10 May 2018 contains no express prognosis setting out how long the condition is likely to last. However as at 30 April 2018 when Dr Davies last saw the Claimant before writing the letter for the purposes of the Tribunal at the request of the Claimant's Solicitors, he records in his notes depressive disorder as continuing to be the diagnosis however the symptoms recorded are just poor mood, poor sleep and early waking and there is no indication in the notes or letter as to the severity of the symptoms or how long the depressive disorder was likely to last or when recovery might be expected.
48. The Respondents have drawn to my attention paragraphs 61 – 63 of the Judgement in **Royal Bank of Scotland v Morris UKEAT/0436/10** and the note of caution to Tribunals " *The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the*

real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted”.

49. I have examined the GP and OHU notes very carefully to consider whether a prognosis can be inferred which would take the period in which the Claimant’s mental impairment would have a substantial adverse effect on normal daily life, beyond the twelve-month threshold such that it may be found to have a long-term effect. However, I can find no evidential basis on which to make a finding that at the material time the impairment was likely to last more than twelve months i.e. beyond June 2018.

50. In the circumstances the Claimant has failed to show on the balance of probability that his mental impairment is long-term within the meaning of the EqA.

Conclusions

51. Given my findings above the Claimant has shown on the balance of probability that
a) he had a mental impairment namely a depressive disorder
b) the impairment had a substantial adverse effect on effect on his ability to carry out normal day-to-day activities.

52. Given my findings above, the Claimant has failed to show on the balance of probability that his impairment is long term within the meaning of the EqA.

53. In the circumstances he has failed to show that at the material time he had the protected characteristic of disability within the meaning of the EqA and therefore his claims of disability discrimination fail.

54. His other claim for unfair dismissal survives.

55. Given that the only surviving claim is that of unfair dismissal and all parties accept that the Claimant was employed and dismissed by the First Respondent, all other Respondents may be removed under Rule 34 ET(Constitution and Rules of Procedure) Regulations 2013.

29 November 2018

Employment Judge O’Neill

Sent to the parties on:

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For the Tribunal:

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