



EMPLOYMENT TRIBUNALS

Claimant: Mr C Potts

Respondent: Entserve UK Limited t/a DXC Technology

HELD AT: Manchester

ON: 27 November 2018

BEFORE: Employment Judge B Hodgson

REPRESENTATION

Claimant: In person, assisted by Miss E Eccles, lay representative

Respondent: Mr J Dawson, Counsel

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. At all material times, the claimant was a disabled person as defined
2. The respondent's application for a deposit order is rejected

REASONS

Background

1. There was a question mark over the extent of the claims initially presented in this matter and whether or not the claim comprised one of unfair dismissal alone or whether claims of disability discrimination were included within the original claim form - if not, to include such claims would require amendment.
2. The matter came before the Tribunal at a preliminary hearing on 14 March 2018 when it was determined that the claim form already included a claim for unlawful disability discrimination and that there was, accordingly, "no need to amend the claim to include such a claim but further particularisation of that claim or claims is necessary". An order was made that the claimant provide "details of the type and basis of the claims of unlawful disability discrimination he brings". The respondent was, as a consequence, given leave to present an amended response.
3. At that preliminary hearing, the claimant was also ordered to provide a statement "which he relies upon to establish that the mental impairments of body dysmorphia [disorder] and depression amount to a disability as defined under section 6 of the Equality Act 2010, setting out the date on which the conditions started and explaining the adverse effects the conditions have upon his ability to carry out normal day to day activities".
4. The claimant complied with both of these orders and the respondent submitted an amended response.
5. The matter came back before the Tribunal at a further preliminary hearing on 25 July 2018.
6. The respondent confirmed that the question of whether or not the claimant was a disabled person as defined remained in issue and that a deposit order was being sought in respect of the disability discrimination claims.
7. Whilst going on to give full case management orders in respect of the further conduct of the matter to a final hearing, the Tribunal also listed the two issues referred to above to be determined at a third preliminary hearing, this preliminary hearing.

Issues

8. The first issue to be determined is whether or not the claimant was at the relevant time a disabled person as defined. The respondent accepted that the claimant has, at all material times, had (as claimed) a mental impairment, namely body dysmorphia, stress and depression but contended that such condition or conditions does not have a significant and long term adverse effect upon the ability of the claimant to carry out normal day to day activities.

9. In the course of the proceedings, the respondent conceded that it was not pursuing any argument with regard to the element of "long term" within the definition. If the Tribunal were to find that the acknowledged mental impairment of the claimant did have a substantial adverse effect upon his ability to carry out normal day to day activities, the respondent would not be taking any argument that such effect was not "long term".
10. As to the application for a deposit order, this was limited to the disability discrimination claims, the issue being as set out in the Tribunal Regulations, namely whether or not the Tribunal concludes that any specific allegation or argument in this regard has little reasonable prospect of success.

Facts

11. It is important to emphasise that the Tribunal, and the parties' representatives, sought to limit themselves solely to those facts which may be relevant to the preliminary issues before the Tribunal as, whatever the outcome, there would follow a full hearing on the merits of whatever claims remained to be pursued.
12. The Tribunal had before it an agreed bundle of documents and page references within this Judgment are to documents as paginated within that bundle.
13. The claimant gave evidence on his own behalf. As to his evidence in chief, this was given by reference to his written statement and also to his earlier impact statement (at pages 48 – 50). On behalf of the respondent, the Tribunal heard evidence from Mr Robert Hoolihan, a Service Delivery Executive, and Ms Lindsay Latibeaudiere, a Customer Service Team Leader.
14. The claimant was employed by the respondent in the position of Customer Service Agent from 1 February 2012. He was dismissed effective on 30 September 2017, the respondent's reason for dismissal stated to be redundancy.
15. The claimant's GP records are set out at pages 106 – 108. The earliest relevant entry is dated 5 March 2010 which refers to medication being prescribed for "depression" (although in the prescription record at page 102 reference is also made to the same medication being prescribed on 22 December 2009 and 3 February 2010). The next relevant entry is dated 18 January 2016 which refers to "body dysmorphic disorder" with the same medication again being prescribed and there follow various other relevant entries up to 30 April 2018. Notes of various discussions between the claimant and the respondent's Occupational Health advisors are at pages 73 – 76 and 80 - 82.
16. The claimant's absence record with the respondent is set out at pages 92 – 97 with his absences summarised at page 92. This includes three entries citing "stress, anxiety, mental health" as "Reason for absence (Primary Condition)" for the periods 18 May 2017 – 8 June 2017, 21 June 2017 – 13 July 2017 and 6 September 2017 – 4 October 2017.

17. The respondent referred the Tribunal and (in cross-examination) the claimant to a number of meetings held with the claimant for varying reasons including appraisal, grievance, disciplinary and redundancy consultation. The Tribunal considered this evidence (to the extent it was given both by reference to the documentation and the oral evidence) but concluded it did not take matters materially forward in the determination of the issues before the Tribunal at this stage, whilst acknowledging the respondent's argument that reference by the claimant to his having a disability was not a consistent theme raised by him in the course of such meetings.
18. In April 2017, the claimant was moved to a different desk location for reasons related to his mental health and again in July 2017 (see GP letter at page 84 and internal Risk Assessment form at pages 85 – 87).
19. On 21 June 2017 the claimant had a telephone discussion with Mr Hoolihan and there is disagreement between the two of them as to the precise content of that discussion which the Tribunal considers not materially relevant to the issues before it at this stage. There followed a text exchange between them over the following days (see pages 225 – 230).

Law

20. The definition of a disabled person for the purposes of the statute appears at section 6 of the Equality Act 2010. This is supplemented by Schedule 1, Part 1 to the Act, headed "Determination of Disability".
21. Section 6(1) states:

"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."
22. Within the interpretation section, section 212 states that, "in this Act ... 'substantial' means more than minor or trivial".
23. "Guidance on matters to be taken into account in determining questions relating to the definition of disability" was issued in 2011. This guidance does not impose any legal obligations in itself, nor is it an authoritative statement of the law. Any aspect of this guidance, however, which appears to the Tribunal to be relevant in determining whether a person is a disabled person must be taken into account.
24. The application for a Deposit Order is made under Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which states:

"(1) Where at a preliminary hearing ... the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument."

Submissions

25. The respondent submissions were heard first. Counsel for the respondent produced a skeleton argument to which he spoke.
26. He additionally argued orally, arising out of the evidence given to the Tribunal, that the claimant's credibility was in question and the Tribunal should be slow to accept his evidence for three principal reasons:
 - 26.1. The text messages at page 223 and following (especially page 225). The claimant would not accept the texts were indicative of concern on the part of Mr Hoolihan for his wellbeing and they clearly show precisely that. Additionally, the claimant was saying that, on that morning (21 June 2017), he had taken tablets and slept for 48 or even 72 hours but that evidence is not consistent with him responding to texts during this period.
 - 26.2. At page 106, the GP entry of 19 December 2017 is inconsistent with the claimant's own impact statement which leads to concern over the veracity of the content of the statement.
 - 26.3. The claimant's comments in meetings, for example an appraisal at page 137, illustrate that he was able to set out clear forceful statements and no impact of any alleged disability is raised at all. He had given contradictory reasons for this, firstly that these are confidential discussions and, on the other hand, that there is a reluctance to disclose such matters in that context because the record of appraisals is available for everybody to see. Further, see page 168 where the claimant is specifically accepting that, in describing alleged conduct towards him, "maybe discrimination's not the right word".
27. In summary, an examination of the content of the various meetings that the claimant had at work shows that any indication of stress or anxiety that was raised was linked solely to work situations and gave no indication of any wider problems. For example, he was always on time for work which suggested he had no problem leaving the house. The Tribunal should not, therefore, have any confidence in what the claimant says about any adverse effect upon his home life.
28. With regard to the question of the impact of medication, there was no medical evidence as to the position the claimant would be in were he not to take his medication and it is not for the Tribunal to speculate.

29. The respondent's representative acknowledged the definition of "substantial" as being "more than minor or trivial" and that the claimant's evidence needs to be rejected by the Tribunal for the respondent's argument to succeed.
30. The submissions on behalf of the claimant were given orally.
31. His lay representative contended that the medical evidence was clear as to his condition, albeit it was accepted that this was particularly triggered by events at work. It was an overarching condition that disabled him the effects of which fluctuated over a long period of time. Any indication of him being less impacted at any given point of time simply confirms the fluctuating nature of the condition which varies depending upon his state of mind and is subject to "triggers", particularly in the work situation.

Conclusions

32. The Tribunal has set out certain limited facts but the essence of the argument regarding whether or not the claimant is a disabled person as defined rests on whether or not the Tribunal materially accepts his evidence in this regard.
33. The respondent's witnesses have only been able to give evidence regarding their observations of the claimant's actions and conduct at work and it is acknowledged by their representative that this can only be indirect evidence as to any wider effect upon "normal day to day activities". Their evidence is summarised within their own statements. At paragraph 37 of his witness statement, Mr Hoolihan states that "... what I really want to convey is the fact that, in spite of these disclosures by the claimant, there was nothing about his attendance, or about his performance at work, or his general behaviour that gave me any reason to think that he was adversely affected by any ongoing issue". At paragraph 18 of her witness statement, Ms Latibeaudiere states that "based on the claimant's attendance, which was generally good, his performance and his conduct, as well as what he told me, I had no reason to consider that he was affected by any underlying or long-term health issue which caused him any difficulty on a day to day basis". This is notwithstanding the desk moves and the absence record referred to.
34. The claimant in his two witness statements sets out a number of effects he alleges his mental condition has had and continues to have upon him both by reference to work and his "day to day life". If accepted, as fairly and properly acknowledged by the respondent's representative, these would readily pass the threshold of "substantial" as defined.
35. The Tribunal gave full consideration to the three matters expressly relied upon by the respondent to cast doubt on the credibility of the claimant's evidence.
36. It is correct that the claimant's evidence was that on 21 June 2017 he had taken excess medication which had caused him to sleep for upwards of 72 hours and this position is contradicted by the text exchange seen by the Tribunal. The claimant explains this apparent contradiction by saying that he is not suggesting

that he was in a deep sleep throughout this period but was in such a state that he had no recollection of engaging in any text exchange, whilst accepting the evidence of the exchanges produced. The Tribunal accepts his evidence as a credible explanation for the apparent discrepancy. Further, the Tribunal does not regard the disagreement between the parties as to the nature or intent of Mr Hoolihan's messages to be of such significance as to render the claimant's wider evidence to be lacking in credibility

37. At page 106, the GP record includes the reference "chats to people online about games – enjoys". The claimant sets out in his impact statement (see pages 49 – 50) that "I have also found myself shying away from any kind of communication outside of my immediate circle of family, I find it hard to pick up the phone and make a call, even to close friends, or speak online to people playing a video game". The claimant's explanation is that there is in fact no contradiction. The GP entry is a snapshot at a particular time and the effect upon him fluctuates. Again, the Tribunal accepts this evidence as a credible explanation and the Tribunal notes the guidance given as to fluctuating effects.
38. As to the evidence regarding the content of an appraisal, and meetings or discussions generally, the Tribunal does not regard the absence of any consistent reference to the impact of the claimant's mental impairment as sufficiently significant to have a material impact upon the overall credibility of the entirety of the claimant's evidence. In the Tribunal's experience, and as acknowledged by the respondent's representative, it is not uncommon for an individual with a mental impairment not to want to highlight or even reference it.
39. In contrast, the claimant's evidence is supported to a degree by the medical requirement for his desk location to be moved. It is also supported generally by the various GP entries and the requirement for him to be prescribed medication.
40. The Tribunal acknowledges that there is no direct medical evidence as to the impact of the claimant's medication and the consequence of that medication not being taken. The claimant's evidence in this regard however is that his symptoms would worsen were he not to take the medication prescribed and he simply would be "unable to cope". Also, not taking it would result in him being unable to sleep and therefore unable to function. The Tribunal struggles to find other than that the medication would only be prescribed if it served to mitigate the effects of the claimant's mental condition which is consistent with the claimant's evidence.
41. In conclusion, the Tribunal's judgment, on the evidence before it and noting that the burden of proof rests upon the claimant, is that the claimant was, throughout the period of his employment with the respondent, a disabled person as defined.
42. The timing of the respondent's knowledge of such disability is an aspect only alluded to and not explored in any detail at this stage and accordingly the Tribunal expressly makes no findings in this regard.

43. The Tribunal then considered the respondent's application for a deposit order, and in particular the respondent's submissions made in this regard including the various case-law referred to.
44. It is evident from the respondent's own submissions and its amended response (see pages 51 – 61) that there remain many material issues of fact which will need to be determined and whilst in principle this does not automatically prevent the order sought being made, it limits it only to exceptional – perhaps incontrovertible on the face of the papers - circumstances. The Tribunal sees no such exceptional circumstances in this case even allowing for varying degrees of merit in the claims or allegations being made.
45. In terms of time points, there is potential for a successful argument as to a continuing act which can only be determined by a Tribunal deciding on matters of fact. In saying this, whilst the Tribunal fully acknowledges that the respondent is entitled to know the case it has to meet, the Tribunal also notes that the claimant is not professionally represented in terms of how he has precisely set out or pleaded his case. The respondent is unlikely in general to be prejudiced in terms of preparation cost overall including the length of hearing as, were any of the claims or allegations not to be pursued as claims or allegations in themselves, it is probable in any event that the evidence would still be given as background to such claims or allegations as remained.
46. Notwithstanding the respondent's representative carefully and in detail taking the Tribunal through the various allegations made, the Tribunal's conclusion therefore is to reject the application.
47. The matter will now proceed to a full hearing in accordance with the directions given at the preliminary hearing held on 25 July 2018.

Employment Judge B Hodgson

Date 3 January 2019

JUDGMENT SENT TO THE PARTIES ON

9 January 2019

FOR THE TRIBUNAL OFFICE

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