



THE EMPLOYMENT TRIBUNALS

Claimant: Mr Matthew Tough

Respondent: Commissioners for HM Revenue and Customs

Heard at: North Shields

On: 22 November 2018

Before: Employment Judge Beever (sitting alone)

Representation:

Claimant: In Person

Respondent: Mr Crammond, Counsel

JUDGEMENT

1. The claimant was not a disabled person within the meaning of the EqA at the material date of 18 June 2018.
2. The claimant's claims in these proceedings are accordingly struck out and dismissed.

REASONS

1. The tribunal gave an oral judgement with reasons at the conclusion of the hearing on 22 November 2018. The tribunal found that the claimant was not a disabled

person within the meaning of the Equality Act 2010 at the material date of 18 June 2018. The claimant requested written reasons.

Introduction

2. The claimant is acting in person but had clearly studied and researched the case. The tribunal explained the process and the legal questions that the tribunal was required to undertake and the scope of its determination. The claimant appeared fully to understand and he played a full part in the hearing.
3. This Preliminary Hearing is listed to deal with the preliminary issue of disability pursuant to the order of EJ Martin on 31 August 2018.

Scope of Determination

4. The tribunal is being asked to determine whether the claimant is a disabled person. He claims to be so by reason of depression and anxiety. For purposes relating to the preliminary issue, the Grounds of Claim (GoC) recite events commencing from 26 March 2018. The decision-maker's meeting occurred on 11 May 2018, from which there was an appeal, and the claimant's effective date of termination was 18 June 2018.
5. The question that the tribunal might ordinarily determine is whether the claimant was a disabled person at the material times identified in the GoC, being the dates of the acts complained of. In this case, without making findings about any allegation or timing of any allegation, that is a reference to date(s) between 26 March 2018 and 18 June 2018.
6. Having heard submissions, and on reflection, the tribunal concluded that it should determine a question as to whether the claimant was a disabled person by 18 June 2018 and if yes, at what point prior to that date was the claimant disabled within the meaning of the Equality Act 2010 (EqA).

The Law

7. Section 6 of EqA provides that a person has a disability if he or she "has a physical or mental impairment and the impairment has a substantial and long term adverse effect on his/her ability to carry out normal day to day activities".
8. In *J v DLA Piper* [2010] ICR 1052, the EAT approved the 4 "step" sequential approach in *Goodwin v Patent Office* [1999] ICR 302: (i) did the claimant have a mental and/or physical impairment? (the "impairment condition"); (ii) did the impairment affects the claimant's ability to carry out normal day-to-day activities? (the "adverse effect condition"); (iii) was the adverse condition substantial? (the "substantial condition"), (iv) was the adverse condition long term? (the "long-term condition").
9. In *Aderemi v London and South Eastern Railway Ltd* [2013] ICR 591 guidance is given on what might be termed "substantial" (para 14): "... Once [a claimant] has

established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a tribunal has then to assess whether that is or is not substantial. Here, however, it is to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly a substantial effect those matters which are clearly trivial. It provides for a bifurcation: unless a matter can be classified as within the heading “trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other”.

10. The Piper case provides useful guidance in paragraphs 40-45, and in particular the legitimacy of the distinction between the “two states of affairs” described as a mental illness, conveniently referred to as clinical depression, and the second not characterised as a mental condition but simply a reaction to adverse circumstances. It was thought that the difficulties arising were unlikely to cause a real problem because it was a common sense observation that adverse reactions are not normally long lived. The tribunal returns to this point later on.

11. In addition to section 6 of the Act, Schedule 1 provides further relevant provisions:

Paragraph 2 provides that 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

.....

Paragraph 2(2) provides that if an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities it is to be treated as continuing to have that effect if that effect is likely to recur.

Paragraph 5 provides that 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.

12. These provisions share a feature which is the predictive exercise as to whether an effect is “likely”. First, in determining whether an event was “likely”, this is to be interpreted as “could well happen” – SCA Packaging v Boyle [2009] UKHL 37, a threshold which is lower than the balance of probabilities test applied in other situations. Secondly, whilst this is a predictive exercise, it remains the case that the question for the tribunal is whether the claimant was disabled at the relevant time, and that the focus is on the relevant time and it is not permissible to look at evidence which postdates that relevant time. See McDougall v Richmond Adult Community College [2008] IRLR 227.

13. Tying these various elements together, the tribunal's task is to assess whether an impairment has an adverse effect which has been established by a claimant as substantial. If it is, whether that substantial effect is long-term either in the sense that it has (i) lasted 12 months, (ii) is likely to last 12 months or (iii) if not, whether it is likely to recur.
14. The tribunal has also considered the Equality Act guidance on matters to be taken into account in determining questions relating to the definition of disability. It reminds itself that at all times the focus is on what the claimant cannot do, rather than what he is able to do.

Findings

15. The tribunal was provided with an impact statement from the claimant including a document handed to the tribunal at the hearing [C1], in which the first 2-3 pages addresses the question of disability. The paginated bundle extended to 128 pages.
16. The claimant's employment began on 15 January 2018. His role was as a customer service consultant at an administrative officer grade, on an apprenticeship based in Peterlee County Durham. His role required him to handle customer telephone calls, and providing advice and assistance to customers.
17. The claimant's performance was monitored throughout his employment as he was on a probationary period. The respondent's case is that for mixed reasons of attendance and performance a decision was taken to terminate the claimant's employment. This judgement makes no findings about the circumstances of or indeed justification or otherwise for the termination of employment.
18. The claimant's impact statement makes it clear that his symptoms, at that time of low mood, began on 26 March 2018. His symptoms began as a result of an accumulation of what the claimant said, in perhaps what was an understatement, had "felt like a bad few days" when he had had to deal with a series of issues including being evicted from his house, being defrauded of a substantial sum of money and facing litigation from solicitors with whom he had incurred significant bill. He was in his words "dealing with a lot of different things" and what had exacerbated the position was the impending anniversary of his son's most unfortunate and untimely death.
19. So, as at 26 March there was plainly "a lot going on although not too much to worry about" in work terms, nevertheless the claimant felt that he needed to inform his employer in case it should affect his performance. On 26 and 27 of March 2018, there are detailed notes evidencing discussions about what was happening in the claimant's private life.
20. The claimant's anxieties did not improve. Following a recommendation, he was referred to Workplace Wellness and on 5 April, he informed them of concerns

which were significantly impacting upon his quality of life (38) suggestive of “low mood, low-energy with poor appetite and sleep and persistent and uncontrollable worry.” The claimant told me that this summary represented a focus on his low mood but he also described to me significant issues with memory loss and concentration.

21. He began a period of sickness absence on 6 April 2018. This is evidenced from a note with his line manager (39) in which he described in graphic terms struggling to concentrate, but described the need to be at home in order to sort out a spiralling level of domestic issues. He said that he “feels that once he has sorted this out it will be manageable again” and that he was going to see his GP on Monday 9 April 2018. This description is consistent with a note dated 8 April (41) in which the claimant described feeling overwhelmed by the magnitude of the things that were going on and that this, “was really affecting his concentration but that he was hoping to sort things out which would help him to get his head straight”.
22. The claimant’s first pertinent visit to the GP was on 9 April (126) where he repeated his symptoms of low mood, concentration suffering, with financial worries and his doctor advised him to self-certify and consider counselling. In answer to a question as to why he might have been suffering such symptoms he described that the “straw that broke the camel’s back was the eviction”, that is, an eviction from the house in which he lived with his partner and young family. The patient health questionnaire records significant self-reported complaints albeit that the claimant fairly acknowledged in cross examination that the questionnaire was completed on the same day as his son’s memorial and that would have been reflected in the answers.
23. In a note of the same day to his line manager the claimant advised that he was hoping, “to be okay when he is all moved” but felt like he was being pulled left right and centre. At this point in the timeline, the claimant in cross examination acknowledged that he was hoping that these would all be short term issues so that for example once that he could, “sort out getting his family into a house and getting back to work, and once his son’s memorial on 9 April had passed then matters he hoped might settle”. On 12 April (46) he is “stressed to bits” because his solicitor is suing him to chase the money owed.
24. An accumulation of all of these events led the claimant to be in a position where by this point it was “very difficult to absorb what people were saying and you might well be unable to concentrate or indeed to even remember the question when in the course of giving an answer”.
25. The claimant returned back to work on 26 April. He had in fact commenced a course of sertraline on 23 April which had been increased in dosage on 1 May. He says that despite the medication, his symptoms stayed the same and the reason, he thought, was because on his return to work he was subject to

meetings and was challenged for his poor work performance so that “from the minute I got back if felt like I was going to get fired”.

26. From the respondent’s perspective at this point, the claimant was on the face of it not performing adequately and his attendance had triggered the attendance monitoring thresholds. This had resulted in an probation meeting which in turn led to a decision maker meeting on 11 May (83) in the course of that meeting (87), the claimant described his symptoms as including “being worried where even the simplest sentence he wasn’t understanding what people are saying”. He said he went on to medication as counselling was taking too long. He was asked what the trigger for all of this was “particularly when you are so upbeat and positive when you joined”. The claimant explained: he described the accumulated events relating to his eviction, the pressure of his wife’s pregnancy and the anniversary of losing his son, together with the court case and the arrears. In the meeting he sought to explain to his manager that he did not think that his performance or attendance would be repeated. He thought that, “it was a one-off and wouldn’t happen again”. In cross-examination he said that excerpt was a reference to the fact that he was putting forward a “business case” for why he should not lose his job and that from his point of view he was now on medication which was controlling the position. The meeting notes the respondent’s comment that “with mental illness I don’t think we can ever say for definite that it won’t happen again” (87).
27. The claimant’s appeal took place on 30 May, in the course of which the claimant advised that he had not any previous history of mental health (113) and the notes which were written by the claimant for the appeal hearing (99) repeat the theme that the probability of these events recurring is small such that his was in effect “a one-off case”. Notwithstanding the claimant’s representations, the decision to dismiss the claimant was upheld and his employment terminated on 18 June 2018.
28. Turning to the GP Notes, they record that the claimant visited his GP on 9 April at which visit the GP diagnosed a depression. The GP had obtained the health questionnaire compiled by the claimant. On 23 April he was commenced on sertraline and on 27 April, following his return to work, he was diagnosed as having depression and had described having low mood and being apprehensive. His mood was better by 11 May and again much better by 4 June. He remained on sertraline. I have seen and taken into account a letter dated 12 June from his GP which describes the domestic stresses evidenced on 9 April, with worsening symptoms on 23 April when medication was commenced. The only other relevant entry is on 1 May in which his mood was described to be better although still feeling very much stressed. The letter requests that symptoms of severe depression might be taken into account (118).

Discussion and Conclusions

29. Having established those facts the tribunal turned to its conclusions. It took into account the guidance of the Piper case and in particular to pay attention to the dangers of applying labels to situations where there may be difficult distinctions to apply. In this case the distinction referred to by the Piper case has some relevance. Should the claimant's situation be described as a mental illness amounting to an impairment or should it be described as a reaction to adverse life events? I agree with the caution expressed in the Piper case and remind myself that fundamentally what is at issue is whether the claimant is suffering adverse effects of a degree sufficient to meet the definition of the Equality Act.
30. The tribunal finds that the claimant had adverse effects which can properly be described as substantial. In his oral evidence, he has described numerous times that the effect of a number of events in his life have caused him considerable difficulty in concentration and in feelings of anxiety. In his oral evidence, he described graphically that it was like, "being drunk in the sense of it all being a blur yet at the same time suffering a flight-or-fight sensation". The tribunal concludes that from 5 April 2018 the claimant was suffering significant concentration and memory problems. He would start answering questions but would drift off mid-answer; he found it difficult to put sentences together forgetting even what people were saying to him. He experienced a reduction in concentration.
31. From 5 April 2018, as further evidenced by the Wellness at Work document, the claimant was suffering from significant adverse effects. In addition, these symptoms continued at least to stay the same and that was so despite the fact that the claimant was medicated on sertraline from 23 April 2018.
32. In a sense that finding is to skip the prior question of whether the adverse effects were the result of an impairment or simply adverse life events. The Piper case is unhelpful in this regard because it suggests that the distinction can sometimes be sidestepped: where activities had been substantially impaired for 12 months or more, it would be "common sense" to conclude that there was a clinical depression rather than a reaction to adverse circumstances. It does not greatly assist in a case such as the present where symptoms had lasted for a short time and plainly had not lasted for 12 months or more by the time of the material date.
33. The tribunal acknowledges that the GP notes make reference to a diagnosis of depression but it may not always be safe to rely solely upon a surgery note as sufficient to establish the existence of an identifiable impairment or indeed the likely consequence thereof. The picture that is painted by the evidence of events occurring between 26 March and 18 April is much more one of an individual under considerable strain as a result of the accumulation of a number of different events in his life. The use of sertraline is no doubt considered to be effective in helping him to manage his symptoms. Nevertheless the actual evidence of an impairment is less convincing. On balance, however, and having regard to the totality of the

evidence including the GP records, the tribunal finds that by the latest 18 June 2018 the claimant had an impairment in that he was suffering from depression.

34. The tribunal has thus found in the claimant's favour in respect of the first 3 Piper questions. What is more challenging for the purpose of the tribunal's determination is to look at the question of the long-term condition, the fourth question posed by Piper. By 18 June 2018, the claimant had been suffering symptoms for less than 3 months. At that time, he had endured some very unpleasant events. He had been prescribed medication to assist him since the end of April 2018. There is no medical evidence or medical opinion that provides any factual basis for the likelihood that the claimant's condition was likely to continue for any period of time including for at least 12 months.
35. The tribunal reminds itself that the test of what is "likely" is not balance of probabilities but rather it is a case of "could well happen" nevertheless even such a lower threshold test requires sufficient material evidence upon which to base a conclusion.
36. By the time of termination of employment, the claimant's adverse effects had lasted approximately 11 weeks, i.e., less than 3 months. The tribunal also has in the forefront of its mind that it must disregard events occurring after the material date in assessing whether it was likely that the effect continue and/or would recur.
37. Of course one can always say as was said at the Decision Meeting that "with mental illness I don't think we can ever say for definite that it won't happen again". Nevertheless, these features are pertinent:
- 37.1. No prior history of illness
 - 37.2. Symptoms and adverse effects had arisen on the claimant's own case as a result of a highly unfortunate but unusual accumulation of events,
 - 37.3. By the time of the claimant's termination (the material date), such effects had been present for less than 3 months
 - 37.4. There is no medical evidence or opinion to support a conclusion that as at 18 June 2018, the claimant's adverse effects were likely to last at least until the end of March 2019
 - 37.5. Nor was there any medical evidence to support a conclusion that the claimant's adverse effects were the consequence of an impairment that was of a type or kind that was likely to last at least 12 months or if not was likely to recur.
38. The tribunal concludes that the claimant's situation does not meet the long-term condition. This is not to deny severity of what the claimant has suffered. The tribunal is obliged to apply a test without looking forwards: for example, as to what was then known on 21 September 2018, where the claimant asserts that he was informed that he was likely to remain on sertraline for "at least 12 months"

and his symptoms had shown signs of deteriorating albeit only “for the last few weeks”.

39. The tribunal has expressed doubts about whether it is properly open to conclude that by 18 June 2018 what the claimant described did in fact amount to an impairment; but in the event it concluded that it did. However, there is no medical evidence or opinion. In terms of the factual evidence, the tribunal is not satisfied that there is a sufficient factual basis to conclude that by 18 June 2018 it was likely that the claimant’s substantial adverse effects would continue until at least March 2019. Less than 3 months had elapsed, during which time the claimant himself believed that his symptoms had continued because he was being challenged on his work performance and he believed that he was going to “get fired”.
40. The tribunal concludes that the long-term condition for disability for the purposes of the Equality Act has not been met because the claimant has not been able to satisfy the definition of long-term as set out in Schedule 1 of the Equality Act.
41. The tribunal therefore finds on the evidence that the claimant has failed to establish that he was a disabled person within the meaning of the Equality Act from the material date namely 18 June 2018.
42. Turning to deal with the consequences of that finding, both the claimant and the respondent’s counsel agreed at the outset of the hearing that all of the causes of action in these proceedings that are relied on by the claimant are premised on the basis that the claimant was a disabled person. It follows from that that the consequence of my finding is that the claims must be struck out. Both parties agreed that was the consequence of my finding.
43. The claimant’s claims are dismissed.

EMPLOYMENT JUDGE BEEVER

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON**

6 December 2018

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