



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE K ANDREWS
(sitting alone on 2 May 2019
with members 3 May 2019
& in chambers 21 May 2019)

MEMBERS: Ms Y Batchelor
Ms S Dengate

BETWEEN:

Ms S Haywoode

Claimant

and

Oasis Children's Venture

Respondent

ON: 2 & 3 May 2019

Appearances:

For the Claimant: In person

For the Respondent: Mr A Sawdon, Chair of Trustees

JUDGMENT

The claimant was disabled at the relevant times as a result of her depression and the respondent had knowledge of that disability. Whether the respondent had knowledge that she was likely to be placed at the relevant disadvantage remains to be determined.

REASONS

1. This is the reserved decision of the Tribunal on the preliminary issue of whether the claimant was disabled at the relevant time and, if so, whether the respondent had the necessary knowledge of that disability. The

answers to those questions determine whether the claimant may pursue her claim that the respondent breached its duty to make reasonable adjustments. The claimant relies upon two alleged disabilities: dyslexia and depression.

2. The claimant confirmed that paragraph 5 of the document attached to her claim form sets out her reasonable adjustments claim. It says:

'On the 11.7.17 I emailed management requesting reasonable adjustments and on 17.8.17 I advised my manager of my disabilities and requested that adjustments be made for these. She asked me to put this request in writing, which I did on 1.9.17.'

3. The background to the claimant's employment and these proceedings is set out in the reserved Judgment of the Tribunal in claim number 2301169/2017 between the same parties ('the first claim') and is adopted by this Tribunal.
4. It had previously been thought that in that first claim the preliminary issue of the fact or otherwise of the claimant's disability (which in that case was pleaded as OCD/depression) had been decided. On careful reading of that Judgment, however, it is clear that that Tribunal did not make any such finding but instead found that even if she was disabled, the respondent did not have the necessary knowledge at the relevant time (which is a different time period to that relevant to this claim). Accordingly the fact of whether the claimant was disabled at the relevant time for this claim remains live. This Tribunal will however adopt the findings of fact already made in the first claim as to the respondent's state of knowledge of the claimant's depression as at 20 April 2017 and make findings thereafter.

Evidence

5. We heard evidence from the claimant on the issue of her alleged disabilities and considered her witness statement and two disability impact statements. Adjustments were made for the claimant whilst she gave her evidence including allowing her to take notes of the questions asked, time to gather her thoughts and to take whatever breaks she felt necessary. We also heard evidence from Ms J Brown, director of the respondent, on the issue of the respondent's knowledge or otherwise of the alleged disabilities. No witness statement had been prepared by Ms Brown and therefore I asked questions of her by way of evidence in chief. Both witnesses were cross examined by the other party and answered questions as appropriate from the panel.
6. We had two bundles of documents – one from the claimant and one from the respondent. There was considerable overlap between them and the parties were advised to make sure that they referred the Tribunal to any specific documents they wanted us to consider. The respondent also prepared a list of medical documents that they acknowledged were received by them and when as set out below. The claimant confirmed that the dates given by the respondent in that list 'sounded about right'.

Date of document	Document	Date received by respondent
7 July 2017	Talking Therapies letter	4 October 2017
25 July 2017	Dr McLachlan's letter and notes	4 October 2017
2014	Ofsted documents	Likely on or around 17 November 2017
13 March 2018	Dr McLachlan's letter to Howells solicitors	21 March 2018
30 January 2019	Psychiatric statement of Dr D Arnone	4 February 2019

Relevant Law

7. Section 6 and schedule 1 of the Equality Act 2010 set out the provisions with regard to the meaning of disability. In addition, Guidance was issued in 2011 to assist Tribunals when determining whether a person meets that definition.
8. Section 6 says that a person has a disability if he has a physical or mental impairment and it has a substantial and long-term adverse effect on his ability to carry out normal day to day activities. Substantial is defined as more than minor or trivial. Normal day to day activities is not defined but the Guidance suggests that they are things people do on a regular or daily basis. They can also include general work-related activities and study and education-related activities.
9. Schedule 1 says that the effect of an impairment is long term if it has lasted for at least 12 months, is likely to so last or is likely to last for the rest of the life of the person affected. Paragraph 2(2) says that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out such activities it is to be treated as continuing to have that effect if that effect is likely to recur.
10. In determining whether an impairment has a substantial adverse effect on a person's ability to carry out day to day activities, measures to treat or correct the impairment are not taken into account if - but for those measures - it would have that effect.
11. The Guidance includes a section on what is a "substantial adverse effect". Also that it is not necessary to consider how an impairment is caused even if the cause is a consequence of an excluded condition. Further that the cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect for the purposes of meeting the definition of a disabled person.
12. The question of disability has been distilled into four questions that a Tribunal should consider:

- a. Did the claimant have a mental or physical impairment?
 - b. Did the impairment affect his ability to carry out normal day to day activities?
 - c. Was the effect substantial?
 - d. Was the effect long term?
13. Making that assessment is a question of fact and degree based upon the evidence paying particular attention to what the claimant cannot do rather than what she can and how the claimant carries out an activity compared to how she would do it if she were not impaired. On the other hand, the fact that a claimant can only carry out activities with difficulty does not establish a disability.
14. Even if the claimant was in fact disabled at the relevant time, a respondent will only be liable for a breach of the duty to make reasonable adjustments if it had actual or constructive knowledge (the burden of proof resting on the respondent if it says that it did not have constructive knowledge) that the claimant had a disability and was likely to be placed at the relevant disadvantage (Schedule 20(1)(b) of the 2010 Act). This is an issue for the Tribunal to determine based on its findings of fact.

Findings of Fact

15. Having assessed all the evidence, both oral and written, we find on the balance of probabilities the following to be the relevant facts.
16. The claimant was first diagnosed with neurotic (reactive) depression in 1994 and from then was at various times prescribed medication until 2014. She has also, again at various times, undertaken differing therapies including CBT and counselling. The claimant was also diagnosed as dyslexic in October 2001. Her evidence was that her dyslexia was well controlled and that she has successful strategies to manage it when she is otherwise well. When she is suffering from her depression however it exacerbates her dyslexia making it much harder for her to concentrate, order her thoughts, retain information, understand what she is being asked or to explain herself.
17. She said that when she joined the respondent she was recovering from a significant period of depression, wanted to move on from it and thought she had it under control. One of her strategies for coping with her depression is to keep herself to herself and this led to her being regarded as a quiet person. When her depression is bad it results in uncontrollable emotion, feelings of worthlessness, low self-esteem and anxiety resulting in an inability to concentrate on and undertake day to day activities such as social interaction, public transport and leaving the house alone. Her sleep can also be affected. The claimant said that she would try to 'pull myself out' and carry on as normal, including attending work with great effort, but this could become harder. Her medical records show that she suffered relapses

from time to time over a period of many years as well as some periods during which she was able to function within usual parameters.

18. In 2014 the claimant applied to register with Ofsted as a child minder. In her application (first seen by the respondent in the middle of November 2017) she confirmed that she was not suffering from a list of health conditions – including depression – although she did disclose that ‘in the recent past’ she had taken anti-depressant medication but she was ‘now off it and feeling well’. Her GP, Dr McLachlan, also completed the form to state that she had had past episodes of depression but her mood was normal.
19. The claimant’s evidence was that in a meeting in February/March 2017 she mentioned depression to Ms Brown but she was not believed. Ms Brown accepted that ‘she might have mentioned depression in that meeting’ and it was wrong to say that she did not believe her. This accords with the findings of fact in the first claim that anxiety was mentioned in a meeting between the parties on 13 February 2017.
20. The claimant submitted her claim form in the first claim in April 2017 and it was sent to the respondent on 9 May 2017. In that form she referred to her ‘mental disability’. A preliminary hearing was held on 26 June 2017 and Mr Sawdon was present for the respondent. The claimant’s claim was amended to add a claim of disability discrimination, the claimed disability being OCD/depression.
21. The claimant then telephoned Lambeth Talking Therapies, part of the South London and Maudsley NHS Foundation Trust (SLAM), on 6 July 2017 during which she confirmed that at times things seemed so difficult that she had thoughts of hurting herself and that 6 weeks previously she had thoughts related to suicide but was not currently suicidal. She was advised to contact the GP if her mood worsened and it was recommended that she was monitored regularly. This was recorded in a letter to Dr McLachlan on 7 July 2017. (The respondent received a copy of this letter on 4 October 2017 as part of the disclosure process in the first claim.)
22. On 11 July 2017 the claimant emailed Ms Brown. This is the first request for adjustments relied upon by the claimant. In that email she referred to the preliminary hearing of 26 June and expressly asked for ‘reasonable adjustments for me that is required by law’. Although she stated that ‘as you know I do not like large crowds’, she did not expressly refer to disability or her depression.
23. Ms Brown replied on 17 July 2017 and said that she could not agree to the requested change. She also said ‘Issues of disability are before the tribunal for its hearing in May 2018.’
24. Ms Brown told us that it did not occur to her at the time to ask about the claimant’s anxiety/depression and that when she wrote her email of 17 July she thought any issues regarding disability or reasonable adjustments would be sorted out by the Tribunal at the final hearing of the first claim in May 2018.

25. Also on 4 October 2017 the respondent received copies of a letter from Dr McLachlan dated 25 July 2017 that confirmed that the claimant had suffered with longstanding depression for which she had received treatment at the practice and appropriate specialist services. A patient summary was enclosed together with relevant notes showing when depression had been noted and medication prescribed. These show the pattern of relapses from time to time over many years together with periods of relatively good mental health.
26. In August 2017 the claimant undertook cognitive therapies.
27. On 13 March 2018 Dr McLachlan wrote to Howell's solicitors (then acting for the claimant) and confirmed that she had two conditions that he considered to cause a substantial and long-term, depression and dyslexia, that the dyslexia was worse when she was anxious or fatigued and that her depression could impact upon sleep. The respondent first saw this letter on 21 March 2018.
28. On 30 January 2019 a report was prepared by Dr D Arnone, consultant psychiatrist at SLAM, for the purposes of this hearing. It was disclosed to the respondent on 4 February 2019. It states that the claimant's major current diagnoses were recurrent depressive episodes (current episode moderate), predominantly obsessional thoughts or ruminations and dyslexia and alexia. She had been referred to SLAM in October 2018 and had recommenced pharmacological treatment, was receiving fortnightly counselling and having regular meetings with the care coordinator. He confirmed that she:

'...currently presents with residual symptoms of major depression and significant features of anxiety which can be debilitating when attending social situations especially when there are many people and particularly when feeling under scrutiny by others particularly in unfamiliar situations. High levels of stress tend to exacerbate anxiety, and this can negatively impact on mood. These are exacerbated by intrusive thoughts and recurrent mental images... affecting her wish to live. In my opinion her conditions cause substantial long-term impairment.... [Her] records suggest that she experienced previous episodes of depression... These symptoms could worsen dyslexia'

Conclusions

29. The respondent submitted that the claimant was exaggerating or fabricating her condition in order to engineer a claim of disability discrimination. Based on the medical evidence before us we cannot agree with this submission. It is clear that the claimant suffers from time to time from a mental impairment (depression) that does have a substantial adverse impact on her ability to carry out normal day to day activities as evidenced both by her own evidence and the letter from Dr Arnone. When she improves as she does from time to time (and sometimes for significant periods of time) that impairment ceases to have that effect but there is undoubtedly a strong likelihood that it will recur in the future if she faces certain triggers. This is evidenced by the pattern shown by her medical records and the events in 2017 and their effect on her and, again, Dr Arnone's opinion. Accordingly the effect is long term.

30. During periods of depression her dyslexia is exacerbated and adds to the impact of the depression on her. Otherwise, on the evidence before us, we conclude that her dyslexia, although a mental impairment and long term, does not in itself and when she is otherwise well, have the necessary substantial adverse impact to amount to a disability.
31. Accordingly we find that in the relevant period – April 2017 to October 2017 – the claimant was disabled as a result of her depression.
32. As to whether the respondent had knowledge of that disability, at the very least they had constructive knowledge when they received the first claim form in May 2017 where she expressly stated that she had a mental disability. Certainly after the preliminary hearing on 26 June 2017 they had actual knowledge of her allegation even if at that time they disagreed with her case. They were told in terms at that hearing that the claimant considered herself to have the mental impairment of OCD/depression.
33. Accordingly when the claimant sent her email of 11 July 2017 the respondent had knowledge of the fact of disability. It was not good enough for Ms Brown to adopt the position that she did of saying that issues of disability were for the Tribunal. The parties were still in an employment relationship and the respondent had all the duties flowing from that. Whether the respondent had the necessary knowledge that the claimant was likely to be placed at the relevant disadvantage as required by schedule 20(1)(b), is a matter that is better determined by the full Tribunal at the liability hearing commencing 30 September this year having heard all the relevant evidence as to events at the time.

Employment Judge K Andrews
Date: 21 May 2019