



EMPLOYMENT TRIBUNALS

Claimant: Mr O Ogunfuwa

Respondent: D I Insurance Services Ltd

Heard at: London South (Croydon) **On:** 13 May 2019

Before: Employment Judge Tsamados (sitting alone)

Representation

Claimant: Ms K Hosking of Counsel

Respondent: Mr D Dyal of Counsel

PRELIMINARY HEARING JUDGMENT

The Claimant was not a disabled person at the material times. The Employment Tribunal has no jurisdiction to hear his complaint of disability discrimination and it is dismissed.

REASONS

These reasons were requested by the Claimant's Counsel.

Background

1. This is an Open Preliminary Hearing to determine whether the Claimant was a disabled person for the purposes of the Equality Act 2010.
2. By a Claim Form presented on 23 February 2018 the Claimant brought complaints of unfair dismissal and disability discrimination against his ex-employer, the Respondent. In its Response received on 9 May 2018, the Respondent has denied the claim in its entirety.
3. At Telephone Preliminary Hearing on Case Management, conducted by Employment Judge Kurrien, on 23 May 2018, the Claimant was ordered by 15 June 2018 to provide to the Respondent and the Tribunal disability impact

statement and if he wished any supporting medical evidence. The Respondent was ordered by 29 June 2018 to inform the Claimant and the Tribunal whether it accepted the Claimant was disabled at the relevant dates and if not, why not. Further case management orders were set, and a further Telephone Preliminary Hearing on Case Management was listed for 16 July 2018.

4. The Claimant provided his disability impact statement to the Respondent on 15 June 2018 and to the Tribunal on 29 June 2018. In an email dated 28 June 2018, the Respondent expressed concern that the Claimant's statement did not comply with the terms of Employment Judge Kurrein's order and indicated that, based on the information provided, disability was still contested.
5. In the event, the proposed Telephone Preliminary Hearing did not take place and was relisted for 1 August 2018 and heard by Employment Judge Sage. At that hearing, an Open Preliminary Hearing was set for 1 February 2019 at Ashford Tribunal to determine whether the Claimant's medical condition amounts to a disability. The issues were determined, case management orders set and a full merits hearing listed for 5 days commencing on 13 May 2019.
6. The particular issue of disability was identified at paragraph 3 of the case management summary of that hearing, as follows:

"1.1 Was the Claimant disabled within the meaning of the Equality Act 2010 at all material times. Claimant relies on his condition Granulomatous Vasculitis with Sarcoidosis."
7. However, following correspondence from the parties, Acting Regional Employment Judge Davies determined that the 13 May 2019 hearing would be used to solely to determine the issue of disability and the remaining 4 days vacated.
8. Today's hearing is therefore dealing with the issue of disability only and will be following by a Closed Preliminary Hearing to deal with resultant case management and listing for a full merits hearing.

The issue

9. The Claimant's representative identified that the material times were from August 2016 when the symptoms began to 30 January 2018 when the Claimant's appeals against his dismissal and grievance came to an end. The reference to the earliest incident of October 2014 in the Claimant's Scott Schedule was a typo. Whilst these dates were different from those apparent in the Claimant's particulars of claim, the Respondent's representative did not object but indicated that he would deal with them in his cross examination and submissions.

Evidence

10. I heard evidence from the Claimant by way of a written statement and in oral testimony. I was provided with a bundle of documents which I refer to as R1

as well as written submissions from each party and a chronology from the Claimant (which the Respondent in effect agreed having read it during the reading adjournment).

Findings

11. As this is a Preliminary Hearing, I am anxious not to make any findings of fact that go any further than required by the issue before me, so as not to impinge upon matters to be determined at the full hearing of the claim.
12. However, by way of context, the Claimant was employed by the Respondent from 3rd February 2014 until 24th November 2017 as a Trade Support and Financial Controller. He was absent from work on the grounds of ill-health from August 2016 until 3 May 2017. He was advised by the Respondent at a meeting held on 12 July 2017 that he was at risk of redundancy. He was notified of his redundancy on 1st September 2017. He had raised a grievance prior to dismissal. His grievance and dismissal appeal outcomes were not notified to him until receipt of a letter on 30 January 2018. These are matters that will no doubt form part of the substantive claim and would require determination and are only provided here by way of background.
13. The Claimant's position is that in early August 2016 he developed abdominal symptoms which became increasingly severe. He was hospitalised from 5-24 September 2016 and was diagnosed with Granulomatous Vasculitis with Sarcoidosis ("the condition"). He was treated with steroids until February 2017 and began a one month phased return to work at the beginning of May 2017. He has provided an impact statement which stands as his written evidence to the Employment Tribunal. This sets out the effects of the condition but refers to his hospital medical records which are in R1.
14. The Respondent's position is that, whilst it acknowledges the seriousness of the Claimant's condition, the Claimant has perhaps misremembered or has in some places exaggerated the position at the material times. The Respondent was clear to say that no dishonesty was being alleged on the part of the Claimant. The Respondent challenged the period of time that the Claimant had the condition and the level of impact.
15. The Claimant states that the condition was diagnosed in late August 2016. The Respondent avers that the condition was diagnosed in mid to late September 2016 and relies on: the Claimant's GP records at R1 155 which set out his attendance at the GP surgery on 22 August 2016, the record of which does not refer to the Claimant's stomach conditions or contain a diagnosis; and at R1 157 when the Claimant saw his GP on 1st September 2016, which whilst containing a record of his stomach problems does not give a diagnosis. The Claimant saw his GP on 23 September 2016 and the GP suspected Vasculitis (at R1 159). However, it was not until after his admission to hospital that a diagnosis of Granulomatous, the type of Vasculitis that the Claimant has, was made (on 29 September 2016).
16. The Claimant stated that although this was formally the date, it was actually suspected earlier. However, on balance of probability I accept the contemporaneous medical records and find that the condition did not begin until 29 September 2016 when it was diagnosed (in part).

17. The Claimant sets out at section 6 of his impact statement what medication he was taking at the time of his diagnosis and at the time of his dismissal. When the latter was queried by the Respondent's Counsel, he stated that he meant at the time of dismissal from hospital not dismissal by the Respondent.
18. The Respondent's Counsel did not accept that interpretation but went on to challenge the extent to which the Claimant was taking medication, this averred to be indicative of the level of adverse impact that the condition had upon the Claimant at the material time. The Respondent's Counsel took the Claimant to various medical records and stated that from these it was apparent that the Claimant was not taking any medication from February 2017 until November 2017. The Claimant denied this.
19. The Respondent's Counsel took the Claimant to the Respondent's Occupational Health report at R1 143, which at the second para last sentence states "not on any medication". The Respondent put it to the Claimant that he was not on any medication in March 2017.
20. The Respondent's Counsel also took the Claimant to his GP records at R1 162 between attendances on 25 August 2016 and 23 February 2017 which contain no references to the Claimant being prescribed any medication. In particular, the record of the Claimant's visit to his GP on 25 August which states that he was not taking antiemetics (anti sickness medication) at that point.
21. The Respondent's Counsel took the Claimant to R1 164 and his attendance at his GP on 6 November 2017 which states "not on medication at present" at the end of the entry. He also took him to R1 165 his drug prescription chart from which it appears he not prescribed anything from 10 January 2017 onwards.
22. The Respondent's Counsel also took the Claimant to R1 220 a clinic letter which related to his attendance at the clinic 19 February 2018. This sets out the history of when the Claimant stopped taking his steroid medication and over the page at R1 221 describes ongoing symptoms and that the Claimant was taking Ondamsetron (another anti sickness drug) perhaps once every few weeks. The Respondent's Counsel pointed to the first reference to this medication appearing at R1 214 in November 2017.
23. From all of this, the Respondent's position is that the Claimant was not taking any medication from February 2017 until around early November 2017 and thereafter occasional use of Ondamsetron.
24. The Claimant's evidence was that he had been prescribed enough medication to take as and when required so as to self-manage his condition. He stated that when the GP asked if he was taking medication, he meant at the time, not that he was not taking medication at all. He further stated that the reference in the Occupational Health report was incorrect. He said in re-examination that he did get prescriptions from the hospitals he attended as well. However, his Counsel stated that there was only one such prescription in the bundle from which it was impossible to determine the date on which it had been issued.

25. Having considered the evidence carefully, on balance of probability I accept the evidence of the contemporaneous medical records. The Claimant was not taking any medication from February 2017 until around early November 2017 and thereafter occasional use of Ondamsetron. It seems less probable that the Claimant would tell the medical professionals that he was not taking medication if this was not strictly correct as his stated in his testimony.
26. At section 4 of his impact statement, the Claimant sets out the impact of his condition on his ability to work. The Respondent referred the Claimant to his GP records at R1 162 and his attendance on 2 May 2017, the day before his return to work. This states that the Claimant is feeling well and has been given the green light by his consultant to go back to work on adjusted hours. It also gives a diagnosis of Vasculitis/remission. The Respondent put it to the Claimant that this was at odds with his impact statement. The Claimant said that there was a difference between feeling well and managing his condition.
27. The Claimant did not see his GP again until August 2017 from the GP records, although the Claimant disputed this. The Respondent put to him that if he was having problems of the sort that he described in his impact statement he would have seen his GP before then. The Claimant responded that he had been given advice and was managing his condition.
28. Again, after considering the evidence carefully, on balance of probability I find that the Claimant did not consult his GP between 2nd May and 25 August 2017. The record on 25 August 2017 refers to “mild symptoms at present and could be manifestation of stress or recurrence of vasculitis” and further down “mild discomfort abdo” (abdomen) at R1 162.
29. Whilst the Claimant did say that his symptoms have flare ups, I find on balance of probability that his symptoms were relatively mild at this stage and not as set out in his impact statement. Perhaps his has misremembered the extent at that time.
30. Further, given that he was not taking any medication by then, his nausea was at a low level by the time of his return to work, although I accept that his concern about suffering discomfort was such that he had decided it was not a good idea to drive to work by car but to travel by public transport instead.
31. In addition, his GP has indicated in August 2017 that the diagnosis was stress at work and nausea (R1 162).
32. The Claimant was also taken to R1 220 clinic letter clinic on 19 Feb 2017 at R1 221 (as highlighted).
33. On balance of probability in view of the contemporaneous medical records I find that the symptoms that the Claimant has described at section 5 of his impact statement only subsisted until around April 2017 and not thereafter.

Relevant law

34. Section 6 Equality Act 2010:

“Disability

(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...”

35. Part 1 Schedule 1 Equality Act 2010:

“Long-term effects

2(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.

(2) 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.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.”

Conclusions

36. Both Counsel provided written submissions which they spoke to. The Respondent's Counsel provided copies of Boyle v SCA Packaging Ltd [2009] ICR 1056, HL and McDougall v Richmond Adult Community College [2008] ICR 431, CA.
37. To be considered long-term, the effect of an impairment must have lasted or be likely to last for at least 12 months or for the rest of the claimant's life. “Likely” means it “could well happen” (Boyle v SCA Packaging Ltd).
38. In determining whether the adverse effect of a person's impairment was “likely to recur”, an Employment Tribunal should not have regard to subsequent events. The likelihood must be assessed as it existed at the date of the discrimination and not in the light of what has happened by the time of the hearing. (McDougall v Richmond Adult Community College). Medical evidence obtained after the event, as long as it relates to the circumstances at the time, can be considered.
39. With no disrespect to the Claimant and the condition he has suffered from, the issue for me is to determine whether this falls within section 6 of the Equality Act 2010. I do accept that the impact of the condition must have been substantial and adverse at times, but at the material time I have found that it did not arise until 25 September 2016 and that it only persisted at this level until the end of April 2017.
40. I then considered whether under Schedule 1 paragraph 2 of the 2010 Act whether the condition was likely to recur.
41. I took into account that the condition caused abdominal pains, nausea and

fatigue and the Claimant's Counsel's submissions that there was a level unpredictability of the symptoms which would have a debilitating and pervasive impact as a result of not knowing when they might recur.

42. However, in looking at the evidence available at the material time there is insufficient evidence from which to conclude that the adverse effect of the condition was likely to recur.
43. Whilst there is a letter from Imperial College Healthcare NHS Trust dated 28 December 2018 (at R1 250), this refers to the claimant's medical condition in general terms as at that time.
44. The Claimant did not consult his GP between 2 May and 25 August 2017 and the GP note of 25 August 2017 describes "mild symptoms at present and could be manifestation of stress or recurrence of vasculitis" and further down "mild discomfort abdo" (abdomen) at R1 162.
45. The medication that the Claimant had been taking was intended to help relieve the symptoms not to cure them and as I have found the Claimant was not taking any medication from February 2017 until around early November 2017. It was only from November 2017 that he was prescribed the second type of anti-sickness medication and then he was only taking it occasionally by February 2018.
46. And as I have found, the evidence within the medical records is inconsistent with the symptoms described in the claimant's impact statement and oral evidence in terms of extent and level of impact at the material time.
47. I therefore conclude that the Claimant was not a disabled person at the material time and so the Employment Tribunal has no jurisdiction to hear his complaint of disability discrimination.
48. Case management of the remaining complaint of unfair dismissal is dealt with separately.

Employment Judge Tsamados

Date
28 May 2019