



EMPLOYMENT TRIBUNALS

Claimant: Miss J Booth

Respondent: Department for Work and Pensions

Heard at: Manchester

On:

20 June 2019

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: In person

Respondent: Mr A Allen, Counsel

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The claimant is not disabled within the meaning of the Equality Act 2010.
2. The claimant's claim is in time

REASONS

1. The claimant, by a claim form dated 17 November 2018, brought a claim of unfair dismissal and disability discrimination following her resignation from the respondent's employment. The exact date of the termination of her employment is in dispute in this case.

Respondent's Submissions

2. The respondent submitted that the claimant had not provided enough evidence to establish that she was disabled within the meaning of the Equality Act 2010, and further that the claimant did not have two years' service as on the basis of case law her effective date of termination was not 23 August but 14 August at the latest. Accordingly she did not have two years' service.

3. The respondent initially had relied on time limit points but these were withdrawn today.

Claimant's Submissions

4. The claimant submitted that she had had anxiety and depression for ten years and been on an antidepressant throughout that whole period, and her condition worsened when under pressure at work in 2018.

5. In respect of the date of dismissal, the claimant submitted that although her notice was to expire on 14 August this had been extended by agreement to 23 August.

Witnesses

6. I heard from the claimant in respect of her disability.

7. There was an agreed bundle.

Preamble

8. After reading the documentation I raised with the parties the fact that the claimant's evidence and documentation regarding her alleged disability was extremely limited and there was no evidence regarding the situation in 2008 when she was diagnosed with depression and anxiety.

9. I discussed with the claimant the possibility of asking for a postponement in order to provide more cogent evidence, but I also advised that the respondent would probably ask for costs, which they confirmed that they would do. Whilst it was not inevitable that costs would be awarded the claimant needed to be aware of this risk. The claimant decided that she wished to go ahead on the basis of the information available.

10. In respect of the time limit point, the respondent had been relying on the fact that the events the claimant relied on which led her to resign and claim a constructive dismissal were obviously earlier events than her resignation on 4 or 10 July and accordingly she was out of time. However, recent authority had been brought to their attention and they decided that it was more appropriate for the matter to be decided at the main hearing as I had suggested at the beginning of the hearing. Accordingly, we were all in agreement that if the matter went ahead any time limit issues would be determined at the substantive hearing.

11. The respondent also confirmed that if the claimant's effective date of termination was 23 August her unfair dismissal claim was in time.

Tribunal's Findings of Fact

Termination of Employment

12. The claimant began working for the respondent on 22 August 2016. I make no findings of fact in relation to her employment as that is for a substantive hearing.

13. In respect of the termination of her employment, on 10 July 2018 the claimant handed to her manager a letter of resignation dated 4 July 2018 that stated:

“I am submitting my resignation and give five weeks’ notice as from today.”

14. The respondent suggested that the claimant asked if the notice could be extended to ensure she would receive a full month’s salary for July to August and give her some time to secure new employment, and the respondent agreed to that. While the claimant disputed this was exactly what happened, in the ET3 the respondent said:

“Accordingly it was agreed that the respondent treated the resignation as being made on 16 July 2018 followed by a notice period which together with leave entitlement would make her last day of service 23 August.”

15. I heard no evidence regarding this issue, as the claimant had not submitted a witness statement and the respondent had not brought any witnesses, as they did not understand the circumstances to be in dispute. The claimant however said it was the respondent that asked her to stay on for longer, however I did not take evidence on this as this may have led to a postponement as the respondent may have needed to bring oral evidence themselves then and it seemed outside of the overriding objective to postpone the matter on the basis of this factual dispute which may not be of any major consequence.

16. The claimant worked until 27 July 2018 and took the remainder of her leave after that, taking her to 23 August.

Disability

17. At a preliminary hearing case management discussion on 21 February the claimant was advised to provide a witness statement on the issue of disability identifying what physical or mental impairments were relied on, stating in relation to each between which dates it was alleged she was a disabled person because of that impairment, dealing by specific reference to Schedule 1 of the Equality Act 2010 and any relevant provision of any statutory guidance or Code of Practice with the effect of the alleged disability on the ability of the claimant to carry out normal day-to-day activities. The claimant was also referred to the Presidential Guidance.

18. The claimant's witness statement said as follows:

“(1) I suffer with anxiety and depression.

(2) This problem started in 2008 (in response to specific life events about which I am happy to provide more details if requested). My GP started me on antidepressants in 2008 and I have been taking them continuously ever since. I had counselling between 2009 and 2011. I informed my manager about my mental health problems on 11 August 2016 (amended by the claimant in evidence to 2017). I did not do so earlier as I felt that they were under control with the help of my medication until then.

- (3) As regards the effect of my mental health problems on my ability to carry out normal day-to-day activities:
- I can cope very well in a work setting if I am treated fairly and with respect. I am a strong person and always present a cheerful front even when I am feeling down, and having felt intensely unhappy on many occasions due to the events described in my earlier statement.
 - Despite difficulties I have described I always put my (very vulnerable) customers first – I attach some customer feedback from the time when the Wilmslow office was closing and one more recent letter that I received shortly before I left the DWP.
 - The behaviour of my DWP managers (especially SD) caused me to feel anxious and panicky, and that impacted on my ability to cope. That in turn caused me to constantly doubt myself and then it just became a vicious circle. Nearly all the feedback I received from SD was very negative. I feel that she had no real wish to help me improve and was “going through the motion” with the expectation that I would fail.
 - On my return to work on 13 April 2018 I felt that SD’s treatment of me made it near impossible for me to function effectively and “to make the required improvements” to enable me to keep my job. That impacted on every area of my life. My self belief, confidence and mental health plummeted. I stopped wanting to socialise out of work and felt constantly worried and distracted.

19. The previous statement referred to was a statement providing more factual details of the claimant's claim and not providing any further descriptions of her condition.

20. The claimant provided a doctor's letter from 19 February:

“This is to confirm that I saw this lady in surgery on 6 March 2018. She had previously suffered with anxiety and depression and was taking citalopram 40mg daily but prior to being seen things had got worse as she was having problems at work with being bullied. She also had concerns about her finances and her mum who was unwell with dementia. She had poor sleep, poor concentration, poor memory but was eating ok and had no thoughts of self harm. She felt that she didn't want to increase her medication further but that she needed some time off work and I initially gave her a sick note for two weeks which was reviewed on 20 March. She was feeling better by this time but not quite ready for work so I extended the note for a further two weeks and reassessed her on 29 March. She was still struggling with anxiety and although there was a certain amount of pressure to go back to work she did not feel ready. She had already referred herself to All Therapies Team and I have confirmation of that, but she was hoping to be able to get some counselling through work. At that appointment I gave her a further sick note for two more weeks and assumed she went back to work after that as I have not seen her since.”

21. The claimant's medical notes noted three attendances in relation to anxiety and depression. The medical notes went back to 30 November 2017 and ended on 11 February 2019. On 6 March 2018 the problem was stated as "anxiety state" and that a fit note had been issued, and it said:

"On citalopram 20mg. Previously suffered with A & D following domestic abuse. Had counselling which was helpful. Currently feeling anxious and low and as if needs break from everything. Problems at work, being bullied, mum has dementia, financial concerns, poor sleeping, eating ok but can't concentrate and memory poor. No thoughts of self harm but sometimes wonders what's the point.

On 20 March 2018:

"Anxiety state. Feeling better but not quite ready for work."

On 29 March 2018:

"Not fit for work. Anxiety state. Still struggling. Feels everything's got on top of her. Work trying to get her to go back but doesn't feel ready yet...Not suicidal but sometimes feels what's the point. Discussed changing meds. Been stable on citalopram for ten years. A further two weeks off work and revise."

22. Occupational Health saw the claimant on 11 August 2018. Their report said:

"Miss Booth as you know started working at the department 12 months ago. The referral indicates some concerns over her progress in the role since joining. On assessment today, Miss Booth reports a long-term history of depression and anxiety initially triggered by personal issues. She is currently stable and on long-term medication for this. She also reported high blood pressure and vitamin B deficiency, both of which are also well managed on medication. In addition to this she reports some domestic issues in regards to her mum's health, however this is being managed as best it can in the situation.

In regards to work she reports to enjoying the role, however she indicates she does struggle with some of the systems and indicates no formal training on this. A stress assessment was recommended."

The report went on to say that:

"She has a long-term mental health condition which is generally well controlled with medication and my interpretation as relevant with UK legislation is that Miss Janet Booth's condition/impairment is likely to be considered a disability because –

- it has lasted longer than 12 months or is likely to last longer than 12 months,
- is likely to re-occur,
- would have a significant impact on normal day-to-day activities without the benefit of treatment."

23. A question was asked, "I'd like to know how her medication affects her" –

"This is long-term medication and as such side effects are limited. She is likely to experience some fatigue and poor concentration at times due to the nature of the condition."

24. A further Occupational Health report from 7 March 2018 said:

"As you are aware she is off due to anxiety and depression. She has advised me that she has suffered from anxiety and low mood for several years and has been on medication to manage associated symptoms. Janice advised me she feels a recent flare-up of symptoms of feeling overwhelmed, panicked, anxious with reduced concentration and focus commenced after she started working. In particular she has advised that work demands and pressures make these symptoms worse and she is struggling to undertake her role as a result. She also advised me she does not feel supported at work. She has advised me of other underlying medical conditions that are well controlled with medication."

Occupational Health opinion:

"Having completed my assessment today, which included a well validated mental health evaluation, Janice has experienced symptoms relating to anxiety and depression. Her concentration and memory are slightly reduced and she feels panicked about returning to work. She may benefit from further support and I have provided her with some self help measures and encouraged her to contact EAP. Normal recovering cases can take about 4-6 weeks."

25. The claimant had a meeting to discuss whether she should have a higher trigger point for absence. This said in relation to normal activities:

"While Janice was off she was able to undertake normal activities as per our KIT. She was able to collect Hettie from the vets and take her to the vets for follow up appointments, attend the dentist for wisdom tooth extraction, walk to the local shops, visit relatives, drive and have friends around for dinner. She also advised myself and the OHS representative that she was sleeping fine and at that time no increase in the trigger points was agreed."

26. In that meeting on 22 May 2019 the claimant was given advice on the definition for disabled, and it was pointed out to her that the respondent felt that the reason she did not qualify was because her impairment did not have substantial adverse effects.

27. It was noted on 8 May 2018 that the claimant had agreed that her day-to-day activities were not substantially and adversely affected.

The Law

Disability Status

28. The respondent in this case disputes disability, therefore it is relevant to consider section 6 of the Equality Act 2010 which says that:

- “(1) A person (P) has a disability if –
1. P has a physical or mental impairment; and
 2. The impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities...
- (2) This Act (except part 12 and section 190) applies in relation to a person who has a disability as it applies in relation to a person who has a disability; accordingly excepting that part and that section) –
- (a) A reference (however express) to a person who has a disability includes a reference to a person who has had the disability; and
 - (b) A reference (however express) to a person who does not have a disability includes a reference to a person who has not had the disability.”

29. A long-term adverse effect” is defined in Schedule 1 as:

- “(1) The effect of an impairment is long-term if –
1. It has lasted for at least 12 months;
 2. It is likely to last for at least 12 months; or

It is likely to last for the rest of the life of the person affected.”

30. There is a statutory code of practice to be taken into account in determining questions relating to the definition of disability issued in 2011, the relevant parts of this are as follows:

- A1. A person has a disability for the purpose of the Act if he or she has a physical or mental impairment and the impairment has a substantial or long term adverse effect on his or her ability to carry out normal day to day activities.
- A2. This means that in general:
- (1) The person must have an impairment that is either physical or mental (see paragraphs A3 to A8).
 - (2) The impairment must have the adverse effects which are substantial (See Section B.
 - (3) The substantial adverse effects must be long term, See Section C; and
 - (4) The long term substantial effects must be effects on normal day to day activities, see Section D.

31. Whilst it is not necessary for the cause of the impairment to be established the effects that are experienced must arise from the physical or mental impairment. B1

concerns the substantial adverse effect requirement and defines it as follows “a substantial effect is one which is more than minor or trivial”. The following matters should be taken into account, the time taken to carry out an activity, the way in which the activity is carried out and the cumulative effects of that impairment and how far a person can be reasonably expected to modify his or her behaviour with coping and avoidance strategies to prevent or reduce the effects of an impairment on normal day to day activities. The effects of the environment should be taken into account and in relation to the effects of treatment that should be discounted and includes therapies as well as drugs.

32. In respect of “long-term”, the meaning of long-term is set out at section C1 as follows:

“The Act states that for the purposes of deciding whether a person is disabled a long-term effect of an impairment is:

- (a) which has lasted for at least twelve months; or
- (b) whether the total period for which it lasts from time from the first onset is likely to be at least twelve months; or
- (c) which is likely to last for the rest of the life of the person affected.”

33. Section D addresses normal day to day activities. This is no longer defined as is explained in Section D2 but general day to day activities are seen as shopping, reading, writing, having a conversation, using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. It can include general work-related activities, study and education related activities, interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, keeping to a timetable or shift pattern. They did not include activities which are normal for a particular person or a small group of people however it is not necessarily one which is carried out by the majority of people.

34. Section D17 states that some impairments may have an adverse impact on the ability of the person to carry out normal day to day communication activities, for example, they may adversely affect whether a person is able to speak clearly at a normal pace and rhythm and to understand someone else speaking normally in the person's native language. Some impairments could have an adverse effect on a person's ability to understand human non-factual information and non-verbal communication such as body language and facial expressions. Account should be taken of how such factors can have an adverse effect on normal day to day activities. Examples given of a man with Asperger's Syndrome finds it hard to understand non-verbal communication such as facial expressions and non-factual communication such as jokes, he takes everything said very literally.

35. Section D19 says a person's impairment may adversely affect the ability to carry out normal day to day activities that involve aspects such as remembering to do things, organising their thoughts, planning a course of action and carrying it out, taking new knowledge and understanding spoken or written information. This

includes considering whether the person has cognitive difficulties or learns to do things significantly more slowly than a person who does not have an impairment.

36. In the case of **Morgan v Staffordshire University [2002] EAT** useful guidance was given in respect of mental impairment such as relied on here, even though this was originally in relation to the Disability Discrimination Act 2005 including as follows:

“Tribunals are unlikely to be satisfied of the existence of a mental impairment in the absence of suitable expert evidence, however this does not mean that a full Consultant Psychiatrist’s report is needed in every case, there will be many case where the illness is sufficiently marked for the claimant’s GP to prove it, whoever deposes it will be proven for the specific requirements of a legislation to be drawn to that person’s attention. If it becomes clear that despite a GP’s letter or other initially available indication an impairment is to be disputed on technical medical grounds then thought will need to be given to further medical evidence. The EHRC Employment Code makes it clear that the term mental impairment is intended to cover learning disabilities”.

37. Regarding whether the impairment is likely to have lasted 12 months where it has not actually lasted 12 months at the time of the alleged discrimination paragraph C3 of the guidance states that the test for this is if “it could well happen”. In **SCA Packing Limited v Wall [2009] HL** the test of “it could well happen” was endorsed rather than more probable than not and it was explained that likely meant something that was a real possibility rather than something that was probable or more likely than not. The issue of how long an impairment is likely to last has to be determined at the date of the discriminatory act and not at the date of the Tribunal hearing. Anything that happens after the date of the discriminatory act is not relevant. Account should be taken both of the typical length of such an effect on an individual and any other relevant factors specific to the individual such as general state of health and age.

38. In respect of determining the question of disability the tribunal should disregard the effects of medication (Paragraph 5(1) Schedule 1) This is called ‘deduced effect’. Usually medical evidence is brought to describe how the claimant would be but for the medication in question, or the effect of the impairment before medication was taken.

39. The tribunal should also take into account how far a person uses coping strategies to manage their condition and if without them there would be a substantial adverse effect bearing in mind what behavioural modifications it would be reasonable to expect the person to adopt in any event.

40. In respect of ignoring the effect of medical treatment, this includes both medication and counselling, and in *Goodwin v The Patent Office [1999]* the EAT stated that:

“In determining the effects of an impairment without medication the Tribunal will wish to examine how the claimant’s abilities had actually been affected at the material time whilst on medication and then to address their minds to the difficult question as to the effects which they think there would have been but

for the medication: the deduced effects. The question is then whether the actual and deduced effects on the claimant's ability to carry out normal day-to-day activities are clearly more than trivial.”

41. Often there will be evidence from an expert medical practitioner as to the degree to which medical treatment or corrective aids have an impact on the adverse effects on impairment. **Kapadia v London Borough of Lambeth EAT** held that the Tribunal had failed to take account of the medical evidence which showed that but for the counselling sessions there was a very strong likelihood that the claimant would suffer a total mental breakdown.

42. In respect of recurring conditions, paragraph 2(2) Schedule 1 provides that:

“If an impairment ceases to have a substantial adverse on a person’s ability to carry out normal day-to-day activities it is treated as continuing to have that effect if the effect is likely to reoccur. ‘Likely to reoccur’ means ‘it could well happen’.” (Paragraph C3 of the Guidance and **SCA Packaging v Boyle [2009]** House of Lords).

Effective Date of Termination

43. In respect of the effective date of termination the respondent agreed that the claimant had presented her notice on 10 July, although the letter stated 4 July, and that she gave five weeks’ notice, and therefore on the basis of that notice the effective date of termination was either 8 or 14 August 2018. I heard no evidence as to the facts but there was no dispute that one way or another the parties agreed that the claimant’s leaving date be treated as 23 August 2018, the claimant viewing this as an extension of the notice period.

44. The respondent made the following submissions in respect of the effective date of termination:

- In **Riordan v The War Office [1961]** notice cannot be unilaterally withdrawn or varied by either party.
- In **TBA Industrial Products Limited v Morland [1982] Court of Appeal** the Court of Appeal held it was not open to the parties to agree to change the EDT as specified in the notice, in a situation where the employer had given notice of redundancy but at the same time he had been given the option of leaving before the due date. He took that option and left two months early. The respondent disputed the claimant was entitled to claim unfair dismissal on the basis that he was out of time if the effective date of termination was when he left rather than when notice expired. The court said:

“The effective date of termination of a contract of employment was a date given in an unconditional notice determining the contract. The employee’s acceptance of the employer’s offer of leaving earlier neither amounted to a counter offer nor to a variation or waiver of the original notice.”

45. In an EAT case of 1990, **Mowlem Northern Limited v Watson**, the EAT suggested however that the parties could agree to postpone the date of termination even after notice had been given. In that case the claimant was served with a notice of redundancy due to expire on 11 March but the respondent asked the claimant to work on on a temporary basis as it was possible a new contract would be obtained and the redundancies withdrawn. However, if the new contract did not materialise he could decide what he wanted to do. There was nothing said about him forfeiting his redundancy rights in respect of the notice expiring in March. When it looked like no work was going to materialise the claimant found other employment and claimed his redundancy payment. It was upheld that there was a dismissal for redundancy. The recorded Judgment states that the court held in dismissing the appeal that:

“There was nothing in law to preclude a mutual agreement between the parties to postpone the date of expiry of a notice of dismissal for redundancy until the happening of a particular event.”

46. In **Willetts v The Jennifer Trust for Spinal Muscular Atrophy EAT [2011]** the Judge found as a matter of fact that the original notice given by the claimant (in this case 28 June) was varied by agreement between the parties during the currency of the notice period whereby the date of termination was extended to 6 August, and accordingly he found that the Employment Judge was wrong to find the EDT was 27 July on the basis of the claimant's original notice. Judge Peter Clark went on to say:

“In deference to the views expressed by the majority of the Court of Appeal in **TBA Industrial Products Limited v Morland [1982]** the true analysis is that the claimant withdrew her original notice of 28 June and gave new notice on 9 July giving a termination date of 6 August with the consent of the respondent. All the evidence points in one direction.”

47. In that case the claimant had been asked to reconsider her position before 9 July after she had given notice, but she wrote again confirming her intention to resign, giving a further four weeks' notice expiring on 6 August. The respondent tried to rely on the claimant's original notice given on 28 July.

48. In **Willetts** the Judge also quoted **Mowlam Northern Limited** as authority that notice can be extended during the operational period of the notice or shortened (**Palfrey v Transco**) by agreement between the parties. What the parties cannot agree to is a retrospective effective date of termination (**Fitzgerald v University of Kent at Canterbury [2004]**).

49. The respondent also relies on the case of **Wallis v Ladbrokes Betting & Gaming Limited EAT [2015]** where a claimant had unequivocally resigned and then on the facts attempted to subsequently unilaterally withdraw or change her notice period, and although the **Morland** case was referred to on the facts this case does not concern the same point, as there was a factual finding which was upheld that there was no agreement between the parties extending the notice period.

Conclusions

Effective Date of Termination

50. In respect of the effective date of termination I find that there is authority to support the proposition that a notice period can be extended by agreement. It is suggested so in **Mowlam** and it is said it can be shortened in **Palfrey**. If it can be shortened it can be lengthened.

51. In respect of **Morland**, the situation here was different in that in **Morland** the respondent was giving notice for redundancy rather than the claimant voluntarily resigning (in this case to claim constructive dismissal).

52. In **Morland** the circumstances were different in other ways: in that case it was never apparent that the effective date of termination had been changed; the claimant was simply given the option to leave earlier. In this claimant's case within the original notice period it was agreed that the claimant would work to 23 August. The respondent's response form says:

"Accordingly it was agreed that the respondent treat the resignation as being made on 16 July following by a notice period which together with leave entitlement would make her last day of service 23 August 2018."

The dates exactly match a situation where the claimant's five weeks notice runs from 16th July.

53. Although different versions of the facts were contended for which were not explored in the Tribunal, ultimately there was no dispute that it was agreed that the claimant would continue to work until 23 August. In the situation of a voluntary resignation I cannot see how this is anything other than agreeing to extend the notice period or, as described by Peter Clark in **Willetts** and as described in almost identical terms in the respondent's response form, treating the notice as having been given at a later date with a later end date.

54. Accordingly, 23 August was the effective date of termination and the claimant has two years' service for the purposes of an unfair dismissal claim.

Disability Claim

55. In respect of disability the claimant has not provided sufficient evidence to meet the relevant tests. The claimant brought no actual evidence that in 2008 she had been diagnosed with anxiety and depression and provided no evidence as to her inability at that stage to undertake normal day-to-day activities; neither did she bring any evidence to suggest that were she not on antidepressants there would be a substantial and adverse effect on her normal day-to-day activities arising from her impairment. Not only did she not have any relatively expert evidence on this, she did not provide any evidence of this in her own witness statement. The most she said in her witness statement was that in the period in question in March 2018 she could not be motivated to socialise, and that taken with the GP's record that she was not sleeping well, she was distracted and had poor concentration. However, this was in relation to whilst she was on medication. Neither was there a suggestion that this was for a lengthy period or would continue for a lengthy period.

56. I note that Occupational health believed the claimant would 'qualify' as a disabled person however in the tribunal evidence is required and I cannot simply assume there would be substantial adverse effects on the claimant's day to day

activities without her medication I felt unable to simply make an assumption that if the claimant was not receiving the antidepressants the effect on her would be that certain unspecified day-to-day activities would be substantially and adversely affected, whether long-term or on a recurring basis.

57. The evidence was simply not there, and therefore I could not find that the claimant was disabled either on the straightforward substantial adverse effects and long-term tests or on the recurring test, basing both on deduced effects as there was no evidence whatsoever of the deduced effects.

58. Accordingly, I find that the claimant was not disabled for the purposes of the Equality Act 2010.

Employment Judge Feeney

Date: 3 July 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

17 July 2019

FOR THE TRIBUNAL OFFICE

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