



EMPLOYMENT TRIBUNALS

Claimant
Mr S Berry

v

Respondent
City of London Police

Heard at: Central London Employment Tribunal On: 22 August 2019
Before: Employment Judge Norris, sitting alone

Appearances

For the Claimant: Did not appear and was not represented
For the Respondent: Mr D Panesar, Counsel

JUDGMENT ON A PRELIMINARY HEARING

1. The Claimant was not a “person who has a disability” within the definition at section 6 Equality Act 2010 at the relevant time (January to June 2018).
2. His complaints of direct disability discrimination and failures to make reasonable adjustments are struck out as the Tribunal does not have jurisdiction to hear it.
3. The complaint of victimisation proceeds to a full hearing, already listed to start on January 27 2020 but the time for the Hearing shall be reduced to three days (27-29 January 2020) before a full panel and 30 January 2020 is vacated. A separate Unless Order is made (see Order aside) in this respect.

REASONS

Background and chronology

1. The Claimant’s claim of disability discrimination (direct disability discrimination, failures to make reasonable adjustments and victimisation) was lodged on 1 July 2018. A complaint of constructive dismissal was later dismissed on withdrawal.
2. In essence, the Claimant relies on depression as a disability and contends that a conditional offer of employment as a Police Constable was put on hold and/or withdrawn on the Respondent learning of that disability. The Respondent

defended the claim, among other grounds that on the basis that the Claimant did not have a disability at the relevant time.

3. There have been two prior Preliminary Hearings (PHs), both concerned with case management. The first, at East London before EJ Martin on 1 October 2018, listed the issues to be determined as: direct disability discrimination, a failure to make reasonable adjustments and victimisation. The claim was then transferred to London Central from East London Tribunal. A further PHCM was conducted by EJ Spencer on 17 June 2019. The Hearing was listed for four days in January 2020 before a full panel. An additional PCP was set out in relation to the claim for the failure to make reasonable adjustments and the Claimant was ordered to clarify the complaint of victimisation by identifying the document(s) relied on as a protected act.
4. In addition, EJ Spencer listed the matter for an open PH at which an Employment Judge was to determine whether the Claimant was, at the relevant time, a disabled person within the definition at section 6 of the Equality Act 2010 (EqA). The relevant time was determined to be January to June 2018. The Claimant having already provided his GP records to the Respondent, Orders were made that the Claimant was to provide any further medical evidence on which he relied for the preliminary point, by 8 July 2019, and at the same time to send a disability impact statement. By 29 July 2019, the Respondent was to provide a paginated file of documents (bundle) to the Claimant.
5. The Order in relation to the disability impact statement was clear that the Claimant was to set out in writing:
 - a) *The precise nature and extent of the effects he alleges his impairment of depression has had on his ability to carry out normal day to day activities;*
 - b) *When it was diagnosed and the period or periods over which those effects have lasted or are likely to last;*
 - c) *Whether or not he has been treated for the impairment;*
 - d) *What difference, if any, such treatment has had on the effects of the impairment; and*
 - e) *Any other fact on which the Claimant wishes to rely to establish that he was a disabled person at the relevant time."*

He was referred to the definition in the EqA and also to the Schedule, as well as the Guidance on matters to be taken into account in determining questions relation to the definition of disability. It was noted that no additional evidence in chief or medical evidence was to be relied on at the Tribunal, other than that produced in compliance with these Orders, without the Tribunals' permission.

6. I note that at the previous PHCM, EJ Martin had also required the Claimant to produce a disability impact statement, by no later than 12 November 2018. In that Case Management Summary, the Judge had said that the statement should set out:

"... whether he is suffering from a physical and/or mental impairment and identify the medical condition. The Claimant should indicate when it is alleged that the

medical condition began, how long it has lasted or is likely to last. The Claimant should then set out in detail what effect that condition has on his ability to carry out normal day-to-day activities. He should indicate if any measures are being taken to treat or correct the impairment and what effect the impairment would have on his ability to carry out normal day-to-day activities without those measures”.

7. What the Claimant produced in response to those two Orders appears to have been a single email with the subject line “Medical impact statement *FINAL COPY*” on 27 October 2018. Given its brevity I reproduce it here in its entirety:

*“As requested by the court judge I will explain the medical necessity for taking fluoxetine tablets (*mg)*

This medication is of the lowest dosage prescribed by a GP.

The medication reduces the anxious feelings and low mood that I experience on a regular basis.

My mood can fluctuate from low to high and my medication helps me find a constant and acceptable level of well-being.

The medication enables me to sleep and rest well. I am reliant on the medication to live a healthy and happy life both physically and mentally.

I have performed a policing role [the Claimant was a PCSO] effectively for 13 years while suffering from depression. Personally it took a lot of courage to admit to myself and my family that I have a mental health disability.

I have been taking anti-depressants for the last three years and my current employer fully support this.

The City of London Police took the decision to place me on medical hold after isolating me for over 8 months.

It is apparently clear that the COLP do not both respect or embrace mental health requirements by requiring me to become free of medication.

To follow as requested by the court judge:

I will next supply a supporting letter from my GP and disclose my medical history.”

8. As I have noted above, there was no apparent compliance with the later Order made by Judge Spencer and I have concluded that the Claimant wants to rely on this email as his evidence in chief on the preliminary point. I was unable to ask him about this as he did not appear at the PH before me. I delayed the start of the hearing until 10.30 while I read the papers. The Claimant had still not attended and no communication had been received from him. The clerk rang the mobile phone number given, with no response and no facility to leave a message. I decided in the circumstances to proceed in the Claimant’s absence, considering his “Medical impact statement” in conjunction with the GP records that were supplied to the Respondent and were in a bundle before me.
9. I note for completeness that there was no “supporting letter from my GP” in the bundle. The Respondent confirmed that it has not heard from the Claimant since 12 August, when he sent in a revised schedule of loss by email. In that email (which was apparently copied to the Tribunal, though there was no copy on the file), the Claimant had added “I endured this treatment [victimisation and disability discrimination] over a prolonged period and this finally resulted in my application being terminated after receiving two conditional offers of employment. This has caused such a level of mental health trauma that I have been diagnosed with

Bipolar Disorder and am receiving counselling to aid my recovery. I have been prescribed further medication to treat this condition and further prevent panic attacks...”.

Law

10. Section 6 EqA provides that a person has a disability if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day to day activities. The burden of proof of showing that a person has a disability is on the person who asserts it, i.e. the Claimant. It is not for the Respondent to disprove it.
11. At Appendix 1 of the Code of Practice on Employment (2011), the notes confirm that there is no need for a person to have a medically diagnosed cause for their impairment. It is important to consider the effect of the impairment and not the cause. At paragraph 8 it notes that a “substantial adverse effect” is something which is “more than minor or trivial”. It continues:

“The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal difference [in ability] which might exist among people. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities but it may still have a substantial adverse long-term effect on how they carry out those activities. For example, where an impairment causes pain or fatigue in performing normal day-to-day activities, the person may have the capacity to do something but suffer pain in doing so; or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time”.
12. In relation to “long-term”, that is said to be where an impairment has lasted at least 12 months. If the impairment has a substantial adverse effect on normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur; that is, if it “might well” recur. Day-to-day activities are confirmed as those which are carried out by most men or women on a fairly regular and frequent basis, such as walking, driving, cooking, eating, taking part in normal social interaction and nourishing and caring for oneself.
13. Where a person is receiving medical treatment (which may include talking therapy and does not, for example, exclusively mean they are taking medication), the treatment is ignored and the person’s impairment is considered at the level it would be without such treatment.
14. It is an essential pre-requisite of a direct disability discrimination complaint that the Claimant has the disability relied on. It is also a pre-requisite of a failure to make reasonable adjustments complaint. The Respondent may still defend such complaints by showing that it did not know, and could not reasonably have known, of the disability if he has one; but if the Claimant has not shown that he was a disabled person at the relevant time, with the disability on which he seeks to rely, the Tribunal does not have jurisdiction to hear those complaints.

15. It is a different matter for victimisation. In order to show victimisation, the Claimant must show that he has been subjected to a detriment because he has done a protected act, or because the Respondent believes he has done or may do a protected act (section 27 EqA). Bringing proceedings, giving evidence or information in connection with proceedings, doing any other thing for the purposes of or in connection with the EqA and/or making an allegation (whether express or not) that someone has contravened the EqA are all protected acts, save where the evidence, allegation or information is false and made in bad faith. In other words, someone may be mistaken in their allegation, but it is not necessary for them to be correct to found a complaint. If they show facts from which a Tribunal could conclude that the reason for any detrimental treatment found (in this case, the withdrawal of the conditional offer of employment) was that they had done a protected act, the burden shifts to the Respondent to disprove it.

Findings and conclusions

16. I have noted above that the Claimant had not complied with the two Orders to set out in a signed witness statement the impact that his depression is said to have on his ability to carry out day to day activities, or any real detail around that impact (this notwithstanding his longstanding role as a PCSO in which it is to be supposed he has experience of drafting witness statements for himself and/or others). I have therefore, with the assistance of Mr Panesar, who fairly acknowledged the points that the Claimant might have taken had he been present at the PH, taken the Claimant's case from the medical records and small number of other documentation before me.
17. Although I was considering the impact at the relevant time (January to June 2018) it was necessary for me to look back through the medical records to establish the Claimant's medical history, in light of the Code of Practice.
18. According to the bundle, the first occasion when the Claimant raised with his GP the issue of depression was in October 2015 when it was described as "moderate depression". The Claimant was, his GP records, asked about his current symptoms. He said that there was "flacuation" (presumably, fluctuation) between very sad and very happy. It had been the same for a long time but he had always tried to deal with it. There was a family history of depression (both parents). His quality of personal relationships was "good", his social support "OK", he had no employment or financial worries, no alcohol misuse, and no suicidal ideation. His GP prescribed 20mg a day of fluoxetine (i.e. Prozac), an anti-depressant.
19. The following month, the Claimant is recorded as feeling much better on the medication and had contacted NHS Counselling and was waiting for an appointment. He continued to be prescribed 20 mgs per day. On 18 November he contacted his GP to say that the "symptoms" (not further detailed) started to come back when he ran out of medication. He appears to have continued to take 20 mg a day of fluoxetine until October 2016. There is nothing in the bundle directly to reflect that the Claimant had a course of counselling (though see below).
20. On 24 October 2016, the Claimant saw his GP and was signed off work with depression. The notes indicate that he had been on fluoxetine for a year but had

“felt not right and then grad worse – last few weeks nightmares of death”. She prescribed him citalopram, a different anti-depressant, again at 20 mg daily. In response to a phone call from the Claimant the following month, she agreed to increase the dosage to 30 mg per day. This was further increased by a different clinician to 40mg per day (two 20 mg tablets) in January 2017, at which point it appears the Claimant went back to work. He remained on the 40 mg a day dosage until 21 March 2018, when (following his interaction with the Respondent) he requested to reduce the dosage to 20 mg. In May 2018 indeed, it was reduced still further (to 10 mg) but then went back up.

21. I am therefore satisfied that the Claimant meets the test of “long-term” in that he has clearly been on medication for depression for considerably more than the 12 months required by the statutory definition. The question is whether the impairment had a substantial effect (i.e. one that was more than minor or trivial) on his day-to-day activities. Put another way, I have asked myself whether he has shown that his fluctuations in mood are more than those that might be encountered in people generally so as to have such an impact on his activities.
22. It must be said that this has been very difficult in the absence of hearing in writing or in person from the Claimant. At its highest, he appears to have said to his GP in 2016 that for a few weeks (the exact period is not given) he had been having nightmares of death, and in his email of October 2018 he says the medication helps him to “sleep and rest well”. Sleeping and resting might well come within the range of normal day to day activities. The difficulty is that the Claimant has not come close to describing how his depression has caused him a more than minor or trivial impact on that ability, or how his symptoms would be without his anti-depressant medication; to glean from the GP records that he had nightmares for a few weeks in 2016 is simply not enough.
23. Indeed, that analysis takes the Claimant’s case beyond what he himself has relied on in the paperwork before me. In the medical history questionnaire which the Claimant completed for the role with the Respondent, he has ticked “yes” under “medical conditions” to “Anxiety/depression, phobias, mental breakdown or stress-related problems” and “no” to “Any other mental illness”. He was required to give further details of the conditions where he had ticked “yes”. In this regard he stated “Mild depression. Have received counselling [sic] No further issues”. In answer to the question of whether he had a disability, the Claimant ticked “no”. The question included the statutory definition taken from the EqA for guidance. The Claimant also indicated that in October 2016 to January 2017, he had had 31 days off work, giving the reason as “Depression, injury (on duty)”.
24. The Claimant’s GP had countersigned the back of the form on 30 August 2017. This indicated that according to the Claimant’s medical records and the GP’s knowledge of him, the answers given by the Claimant appeared correct.
25. On the application form to become a Police Constable, the Claimant had once more ticked “no” in answer to the question of whether he considered himself to be a person with a disability. He left blank the section where he could inform the Respondent of any reasonable adjustments to be made to assist him in the application or recruitment process. Later on in the form, in the Equal Opportunities section, he left both boxes (yes/no) blank under Disability. Again, the statutory definition was included, this time as a footer. Finally, in the claim

form to the Tribunal, he again ticked “no” in answer to the question of whether he had a disability.

26. Therefore, I find as follows: the Claimant was taking anti-depressant medication between 10 mgs and 40 mgs daily. The highest dosage of 40 mgs was between January 2017 and March 2018. I have no evidence before me from which to assess what day to day activities might have been impacted or how, or the severity or otherwise of that impact. What I do have is the Claimant stating some months later in his application that he had had “mild depression” for a short period but no disability, and his GP countersigning that document; and thereafter his declaration in his disability impact statement that his GP his prescribing the lowest dosage possible to manage his symptoms of anxious feelings and low mood/mood fluctuations.
27. It is perhaps obvious both that many people experience symptoms of anxious feelings, low mood and mood fluctuations and that a GP is to a large extent guided in a ten-minute standard appointment by what is told them by their patient. Certainly, if the Claimant’s depressive symptoms had exceeded mild for any sustained period of time, I would have expected his GP to refer him to a specialist or for (further counselling), but I have only the reference to him awaiting an appointment in November 2015 and his own indication that following counselling (with no indication of when or how long this lasted) his issues were resolved.
28. In the OH assessment dated 23 January 2018, the Respondent’s OH Physician notes that the Claimant had a “discrete episode” of impaired mental health with an obvious trigger (of a serious knee injury) and a previous episode some two years before, treated by medication which has caused the Claimant to feel “much better health-wise”. It is to be noted that the Claimant, whilst relying on his depression as a disability, has expressed considerable concern at the Respondent treating his condition with such seriousness that it delayed his appointment to the role; indeed, that of course is what he says has led to the claim before this Tribunal. Nonetheless, while he says that his GP is “shocked” by the course of events, he has produced nothing to suggest that the GP does consider him to have a disability. It may for example be the case that his GP believed his condition to be so mild as not to warrant the “hold” in the offer in the first place; I simply do not have the evidence before me to say with any confidence (and certainly not on the balance of probabilities) why the GP would be shocked by the Respondent’s approach.
29. Finally, while I note that the Claimant now says he has a diagnosis of bi-polar disorder, that is not the disability relied on by him for the purposes of this claim (and therefore is not before me for consideration); and there is also no medical evidence to support that assertion in the bundle in any case; the GP records end at 6 December 2018 and it is unclear when the Claimant says the diagnosis was forthcoming, or by whom.
30. Accordingly, I have concluded that the Claimant does not meet the “substantial impact on day to day activities” part of the definition and is therefore not a disabled person under the EqA. In the circumstances, the Tribunal does not have jurisdiction to hear complaints of direct disability discrimination and/or failure to make reasonable adjustments, and they are struck out.

31. So far as the victimisation complaint is concerned, that may proceed to a full Hearing provided the Claimant complies with the Unless Order (see below and aside). The Respondent will rely on evidence from (probably) three witnesses and the Claimant will give evidence himself. I gather the bundle is unlikely to be large and reading in should be completed on the first morning. We therefore concluded that the Hearing would be completed in three days, rather than the four for which it had been listed, and we vacated the fourth day (30 January 2020).
32. In addition to the previous Orders made by EJ Spencer, I make the following Orders:
- a. The Claimant is to identify the documents in which he says he has done a protected act by 18 September 2019 (this is now the subject of the Unless Order aside, because this was previously ordered by EJ Spencer but the Claimant has not done it);
 - b. The Respondent is to send the Claimant an outline skeleton argument by no later than 20 January 2020, with copies of any authorities on which it will rely (or extracts therefrom);
 - c. The Respondent is to provide on the first morning of the Hearing an opening note to guide the Tribunal panel in its reading on day one of the Hearing;

Employment Judge Norris

22nd August 2019

Sent to the parties on:

04/09/2019

For the Tribunal:

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