



EMPLOYMENT TRIBUNALS

Claimant: Mr L Watkinson

Respondents: Tab Refractory Construction and Maintenance Company Limited

Heard at: Liverpool **On:** 12 August 2019

Before: Employment Judge Buzzard
Mrs A Ramsden
Ms R C Wood

REPRESENTATION:

Claimant: In person

Respondents: Mr Wilkinson, Consultant

JUDGMENT having been sent to the parties on 28 August 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Claims

1.1. The claimant made two claims in this case as follows:

1.1.1. Unfair Dismissal; and

1.1.2. Disability Discrimination.

2. Unfair Dismissal Issues

2.1. There is a dispute between the parties over whether the claimant was dismissed.

2.2. The claimant did not seek to assert that he was constructively dismissed. He argued that he was actually dismissed by a Mr Midgely of the respondent. It

was his case that at a meeting between himself and Mr Midgley he was expressly told that he was dismissed. The claimant was clear at the outset that he did not say he resigned in response to the actions of the respondent in circumstances that could amount to a constructive dismissal.

- 2.3. The respondent specifically denied that the claimant had been dismissed. Whilst the respondent accepted there was a discussion with Mr Midgely, in a smoking area over a cigarette, it was not accepted that the claimant was told he was dismissed. The respondent asserted that the claimant resigned his employment in anticipation of disciplinary action being taken against him.
- 2.4. For a claimant to pursue a claim of unfair dismissal they have to show they are eligible to claim unfair dismissal. An important part of eligibility is the need to show that they were dismissed. Accordingly, the claimant bears the burden of proving he was dismissed to establish that he has a claim that such dismissal was unfair.
- 2.5. The determination of whether or not the claimant was dismissed is a question of fact. When determining standard of proof applied is the balance of probabilities, based only on the evidenced before the hearing.
- 2.6. In this case it was found that the claimant was not dismissed.

3. Disability Discrimination Issues

- 3.1. The claimant's discrimination claim was not clear from his ET1, but was confirmed at a case management hearing before Judge Horne on 9 January 2019.
- 3.2. To be eligible to claim discrimination based on disability, a claimant has to show they are disabled as defined in the Equality Act 2010. The claimant's contention was that a diagnosis with depression meant that he was disabled as defined by the Equality Act 2010 at the relevant times.
- 3.3. Judge Shotter confirmed to the parties on 2 April 2019 that the question of the claimant's status as a disabled person at the relevant times would be dealt with as a preliminary issue at the outset of the full hearing of the claimant's claims. Following a brief discussion with the parties at the start of the hearing it was agreed that it was still appropriate to determine if the claimant was a disabled person and thus eligible to make a claim of disability discrimination as a preliminary point. Accordingly, as the question of the claimant's disability status was dealt with as a distinct preliminary issue, these reasons record the reasons for the decision in relation to that issue separately.

4. Law Relevant to Disability Status

- 4.1. The definition of disability under the Equality Act 2010 has several requirements. These are:

- 4.1.1. the claimant must have an impairment; and
 - 4.1.2. that impairment must have a substantial adverse effect on the claimant's ability to carry out normal day to day activities; and
 - 4.1.3. that effect must have lasted, or be likely to last, for 12 months at the date of the alleged discrimination. This is the requirement that the condition is long term.
- 4.2. There are other elements to the definition of disability which are not relevant to this claim.
- 4.3. The Equality Act 2010, at schedule 1(2)(1)(b) states:
- “2(1) The effect of an impairment is long term if –
(b) It is likely to last for at least 12 months, ...”*
- 4.4. The respondent did not dispute that the claimant had an impairment, specifically a diagnosis of depression. The respondent did not accept that impairment had any substantial adverse effect on the claimant (see 4.1.2 above) or was long term (see 4.1.3 above).

5. Evidence relating to disability

- 5.1. The claimant gave oral evidence regarding his depression. The respondent did not present witness evidence in relation to the disability issue. The Tribunal were presented with a bundle of evidence headed “*Bundle re Disability*”. This contained, amongst other documents, the claimant's medical records from the relevant period.
- 5.2. The claimant's complaints of discrimination relate to the period up to the termination of his employment, which was in October 2017.
- 5.3. The respondent accepts that the claimant suffered from depression; the claimant, according to his medical records, having been diagnosed as suffering from depression on 3 July 2017. The claimant is identified in his medical records to have had two subsequent ‘*depression interim reviews*’. The claimant's medical records expressly state that his depression had resolved as at 8 December 2017.
- 5.4. Accordingly, the claimant's medical records show that he was depressed from the 3 July 2017 until 8 December 2017. This is a period of approximately five months. As at the date of the claimant's employment ending, which was in October 2017, he had been diagnosed with depression for less than four months.
- 5.5. The claimant's oral evidence was that the symptoms of his depression had started some time before he first consulted his doctor. The claimant's statement suggests that he had been dealing with symptoms “*during the 12 months*” prior the termination of his employment. The claimant accepted that his medical records did not reflect this.

- 5.6. The claimant is recorded in his medical records to have been taken by the Police, under s136 of the Mental Health Act, to a psychiatric unit for assessment on 30 July 2017. This was at 5:00am, when he was found sat on a bridge. The claimant's statement attributes this to a "*particularly low period*" and that he was "*under the influence of alcohol*". The claimant confirmed that he was discharged sufficiently quickly that the very next day he drove from the UK to Belgium. Further the claimant's medical records refer to the fact that he did not have any suicidal thoughts during this entire episode. In addition, the claimant's statement refers to the fact that he was under the influence of alcohol at that time. The claimant did not dispute any of these facts.
- 5.7. The claimant described the two symptoms of his depression which he relies on as adverse effects of his depression on his ability to carry out normal day to day activities. During cross examination agreed that there were no other adverse effects he relied on. The effects referred to were as follows:
 - 5.7.1. that on some days he struggled with concentration during activities that required concentration, giving examples, such as watching the television and reading a newspaper; and
 - 5.7.2. that on some days he struggled to get out of bed, sometimes having a number of consecutive days when this was a problem.
- 5.8. The claimant was cross examined about these symptoms. In addition, the tribunal were referred to the claimant's medical records which include a reference to struggling to concentrate on more than half days on the date of his diagnosis with depression, 3 July 2017.
- 5.9. In relation to the days when the claimant could not get out of bed, his evidence was that he would on those days choose to get out of bed if he perceived that not doing so would endanger his employment with the respondent. The claimant described it as his "*choice*" several times during cross examination when questioned about struggling to get out of bed. There was no suggestion from the claimant that he had been unable to choose to get out of bed.
- 5.10. In relation to the claimant's difficulty with concentration, he was again cross examined. The claimant did not say that he was unable to watch television or read a newspaper, even on the days when he was finding it difficult to concentrate.
- 5.11. The claimant was based in Germany for the relevant time prior to the summer of 2017. His evidence was that he did not have a doctor with whom he was registered in Germany. The claimant confirmed he had been in hospital in Germany in 2016 following an incident, which was not depression related. The claimant's evidence was that he did not have any follow up in Germany or the UK following his discharge from hospital. The claimant did return to the UK on a regular basis, but only rarely saw his doctor in the UK.

- 5.12. The claimant's medical records show that he was prescribed medication when first diagnosed with depression in July 2017. The claimant's witness statement clearly states that the claimant "*did try to keep to the medication but still found I was self-medicating with alcohol*". Within a subsequent referral letter, which was in the bundle, the claimant is recorded as confirming that he only took the prescribed medication for a very short period of time because he did not like the side effects. The time period in question was a matter of a few days. In this respect the claimant's statement and the medical records disclosed appear not to be consistent. In oral evidence the claimant confirmed that he had only taken the prescription medication for a matter of days.

6. Findings relating to Disability

Did the claimant have an impairment?

- 6.1. There is no dispute that the claimant, from, at the latest, the date of his diagnosis with depression, had an impairment. Depression is not automatically a disability. Depression affects people in different ways. The impact of depression must be such that it is having substantial adverse effect on the claimant's ability to carry out day-to-day activities before it meets the definition of a disability.

Did the impairment have adverse effects on the claimant's ability to carry out day to day activities?

- 6.2. The claimant argues that his impairment had substantial adverse effects on his ability to carry out normal day to day activities. Being able to watch television, read a newspaper and get out of bed are normal day to day activities. Accordingly, given the claimant's medical records show that he was struggling to concentrate sufficiently to watch television, it is found that there were adverse effects on this claimant's ability to carry out at least that day to day activity.
- 6.3. Whilst the claimant has produced evidence that he was taken by the police to a psychiatric unit, his evidence was that he was not detained after assessment and that he had been under the influence of alcohol when taken to the unit. The claimant's medical records show that he was not having suicidal thoughts. Further, the next day the claimant was well enough, not just to return to work, but to drive to continental Europe for work.
- 6.4. The submission from the respondent that this is not an adverse effect because the claimant could watch television and/or the difficulty with concentration was not constant do not prevent the effect being adverse. It does not matter that the claimant could overcome the effect, or that it was not present every day.

Were any adverse effects substantial?

- 6.5. The mere presence of an adverse effect does not, however, mean that adverse effect was substantial. The finding of the tribunal is that evidence has not been produced to show that the effects identified were substantial.

- 6.6. The claimant bears the burden of showing that he met the definition of disability under the Equality Act 2010 at the relevant time. This means he needs to show that his depression had a substantial adverse effect on his ability to carry out a day to day activity. When assessing this, the impact of medication taken by the claimant to control or mitigate any effects has to be disregarded. In this case, although prescribed medication, the claimant on his own account only took this for a few days.
- 6.7. The oral evidence that the claimant provided was limited when dealing with the nature and extent of the alleged effects on his ability to carry out normal day to day activities. Taken together the evidence before the Tribunal does show that by July 2017 the claimant had described symptoms of his depression to his GP of a severity sufficient to justify a prescription of medication. At the same time, by his own evidence, the claimant chose not to take that medication. This suggests that the effects were not at that time having a substantial enough effect on his ability to carry out normal day to day activities for him to take his medication. He refers to not liking the side effects, however there is nothing recorded in later consultations with his GP to suggest that he had raised any concern that he could not take his prescribed medication due to side effects. The fact that the claimant chose not to take medication means that there is no difficulty in eliminating the potential mitigation of symptoms by the medication.
- 6.8. The claimant has given no clear description of the severity of his difficulty concentrating. He has stated that he struggled to get out of bed, but conceded that this was something about which he was able to exercise choice. Whilst these effects could meet the definition of disability, the mere fact that someone struggles to concentrate and struggles to get out of bed in the morning is not, without evidence of the severity of those effects, sufficient to show substantial adverse effects. For this reason, the effects are not found to have been substantial.

Were any effects long term?

- 6.9. Regardless of this finding, the Tribunal considered if the effects had met the definition of long term, as set out in the Equality Act 2010.
- 6.10. The claimant has not given any clear evidence of when the effects of his depression were present. He has confirmed that he did not seek any medical assistance until 3 July 2017 when he was first diagnosed with depression. Further, by 8 December 2017, despite not taking his prescribed medication, his depression had resolved. Outside that period, the claimant has gone no further than suggesting that his symptoms started in late 2016. This suggestion is not supported by any part of the claimant's medical records or any other contemporaneous evidence.
- 6.11. It is accepted that the claimant must have begun to feel depressed before to going to see his doctor on 3 July 2017. Depression does not suddenly start. The question is how when the adverse effects on his ability to carry out the day to day activities he relies on started.

- 6.12. The claimant accepted that the effects he relied on were not at the same level of severity from the date he first suggested he noticed symptoms of depression, until his depression had resolved. This means that he did not seek to argue that his depression would have met the definition of a disability for the entire period from late 2016 (the earliest date he stated he noticed symptoms) until 8 December 2017 (by which his depression had resolved). Accordingly, based on this the claimant's depression even if, when symptoms were at their height, any adverse effects on his ability to do normal day to day activities were substantial, effects of that level of severity would not have lasted for a period of 12 months. Accordingly, the claimant would only meet the requirement of long term if it was considered likely that any period when the identified adverse effects were substantial they had been likely to last for 12 months.
- 6.13. The claimant did not produce any medical or other evidence regarding how long, at any point in time, his symptoms were likely to last. He invited the Tribunal to assume that, at an unspecified point, the substantial adverse effects of his depression were likely to last at least 12 months. This is an inference that was not supported by the evidence.
- 6.14. Taken at their highest, the adverse effects on the claimant only appeared to have been close to the threshold of substantial for around three or four months by October 2017. Nothing in the claimant's medical records supports a suggestion of a longer period.
- 6.15. In the absence of medical evidence regarding the potential longevity of the claimant's depression at any point prior to his dismissal, the claimant is not found to have discharged the burden of showing that his depression met the definition of long term.

Conclusions on Disability

- 6.16. The claimant had an impairment, depression. The claimant's depression had adverse effects on his ability to carry out at least one day to day activity. Those effects are found not to have been substantial, and not to have been long term.
- 6.17. Accordingly, the unanimous decision of the Tribunal is that the claimant has not shown that he met the definition of disability under the Equality Act 2010 at the relevant times. It follows that all the claimant's claims of disability discrimination fail and are dismissed.

7. Evidence relating to Unfair Dismissal

- 7.1. The claimant must have been dismissed to be able to claim that dismissal was unfair. The parties were not in agreement regarding whether the claimant had been dismissed by the respondent.
- 7.2. The claimant gave evidence on his own behalf about his alleged dismissal. Mr Midgley, the claimant's former line manager, gave evidence on behalf of the respondent. Mr Midgley was the person alleged to have told the claimant

he was dismissed. The Tribunal were also given a bundle of documentary evidence.

- 7.3. It was agreed that on Sunday 22 October 2017 the claimant was due to work. The claimant failed to attend work on time that day, arriving several hours late. On arrival at work the claimant was sent home, on the evidence of Mr Midgely because the claimant did not "*seem in a fit state*" to carry out any work. The evidence of Mr Midgely was that the claimant had been spoken to on 20 October 2017 regarding punctuality, and reminded he needed to ensure that he was in a fit state to work on the 22 October 2017. Mr Midgely explained that he was concerned that the claimant should avoid alcohol the evening before this.
- 7.4. The claimant was next due to attend work on Monday 23 October 2017. He was again late for work.
- 7.5. When the claimant arrived at work in the afternoon, to collect his bike, the claimant wanted to speak to Mr Midgely. The parties were agreed that the claimant had had a conversation with Mr Midgely, which the claimant described as a meeting. The parties further agreed that this conversation was not in a meeting room or in any formal context, having occurred whilst Mr Midgely took a cigarette break. The conversation was accordingly very brief, the claimant believing it lasted about five minutes with just himself and Mr Midgely and then continuing for a few minutes after other staff others joined them to smoke. Mr Midgely's evidence was that the part of the conversation involving just himself and the claimant lasted only one or two minutes.
- 7.6. The claimant's evidence was that in that conversation Mr Midgely had told him that his "*hands were tied*", that there was "*nothing he could do*" and that he would have to let the claimant go.
- 7.7. Mr Midgely says that he did not say to the claimant that his "*hands were tied*", that there was "*nothing he could do*" or that he would have to let the claimant go. Mr Midgely's evidence was that, in conversation the day before, the Sunday when the claimant had been sent home, he had told the claimant there was nothing he could do to assist the claimant. Mr Midgely denied this was repeated in the conversation on the Monday. The claimant was adamant that Mr Midgely had said this on both occasions. It is not significant to the findings in this case whether Mr Midgely made this comment on the Sunday or the Monday, or both days.
- 7.8. The claimant accepted in cross examination that his recollection of the events of 22 and 23 October 2017 was partial and incomplete.
- 7.9. Mr Midgely denied that his comments, that there was nothing he could do to help the claimant, were intended or could be construed as a dismissal. He stated that he was merely informing the claimant that matters were no longer within his discretion to overlook, and the claimant was likely to face disciplinary action. In cross examination Mr Midgely stated that he had in the past helped the claimant, but on this occasion the claimant's conduct had

been observed by one of the owners of the respondent, which made it difficult to simply overlook.

- 7.10. Following the conversation on the Monday, nothing appears to have occurred until the claimant was asked two days later, on Wednesday 25th October, to return some IT equipment, namely his laptop and his mobile phone. The evidence of Mr Midgley was that this was a step that was taken within the respondent, on the instruction of the IT department, with any employee who subject to disciplinary proceedings.
- 7.11. Copies of text messages were before the Tribunal that showed the claimant attempted to return this IT equipment on that Wednesday. The claimant had found nobody available to accept the IT equipment when he had sought to return it. On the same day as the abortive IT equipment return the claimant appears to have sent a text message to Mr Midgely asking for his P45 and also asking for a letter. There was a dispute about what that letter was supposed to be: the claimant believed the letter was a letter confirming his dismissal; Mr Midgley said he had no recollection of any letter and at the time had not read the text properly, focussing only on the claimant's request for his P45.
- 7.12. The claimant's evidence was that he believed he was dismissed during the conversation with Mr Midgely on Monday 23 October 2017. Mr Midgley's evidence was that he had done no more than tell the claimant that he was going to have to face the consequences of what he had done on the 22 October 2017, i.e he would have to face a disciplinary process. The claimant's evidence was that had he been told he was going to be disciplined he would have fought that, because the potential of losing his job was a significant potential loss of income.
- 7.13. The claimant did not explain why, if he believed he had been summarily dismissed over a cigarette on a Monday afternoon by Mr Midgley acting alone, he would not fight that for exactly the same reasons. There is no evidence to suggest that the claimant did contest his dismissal with the respondent, by complaining to another manager or otherwise seeking to appeal against what Mr Midgley had said.
- 7.14. Mr Midgely confirmed in evidence that the respondent used external HR advisers, and accordingly any actions taken were delayed where possible to facilitate advice being sought.
- 7.15. Shortly after these events there were further text messages from the claimant to Mr Midgely in which he sought clarification about how quickly he might be able to return to his role with the respondent. Mr Midgley indicated in response that the claimant might have to wait as long as until Christmas (around six or seven weeks by that point) before he could return. This is consistent with the evidence of Mr Midgely, that he had sought to help the claimant in the past.

8. Findings in relation to dismissal

- 8.1. The claimant bears the burden to prove that he was dismissed.
- 8.2. On his own account the claimant's recollection of the conversation on Monday 23 October 2017, when he says he was dismissed by Mr Midgely, is partial and incomplete. Mr Midgely made no similar concession, however it is noted that the events in question were almost two years prior to the hearing.
- 8.3. The claimant invited the tribunal to infer that, because he was asked for his IT equipment, he had been dismissed. The respondent does not accept that inference can be drawn, and points to the evidence of Mr Midgely, that that request would be made of any employee being disciplined. This is a cogent and rational explanation.
- 8.4. The claimant invites an inference that because he had not received a letter inviting him to a disciplinary hearing within 48 hours of the conversation on 23 October 2017 he must have been dismissed. The respondent again did not accept that any such inference could be drawn. The lack of a letter of dismissal could equally be cited as being a basis for inferring that there was no dismissal. The reality is that 48 hours is not long in the context of disciplinary action and dismissal. This is especially the case where, as here, the respondent uses external HR advisers.
- 8.5. The respondent invited the tribunal to conclude that it was unlikely that a dismissal would be communicated, without any preamble or process, over a cigarette in a potentially public area. This would not appear to be consistent with an employer that has engaged and uses external HR advisers, or indeed any prior action of the respondent.
- 8.6. The claimant appears in communications with the respondent appears unconcerned that he had been asked to return his IT equipment. The claimant's messages clearly show he hoped, and expected, to return to employment with the respondent. That is consistent with the claimant believing and understanding that Mr Midgely would try to help him by arranging a return to work with the respondent in the very near future. Such an expectation is difficult to rationalise with a summary dismissal by Mr Midgely over a cigarette a few days previously. It is, however, consistent with Mr Midgely's account that the claimant's conduct prior to 23 October 2017 was such that he could not protect the claimant from disciplinary action.

Was the Claimant Dismissed?

- 8.7. Taken together, the evidence does not suggest that Mr Midgely told the claimant on 23 October 2017 that he was dismissed, or words to that effect. The claimant was told that disciplinary action would have to be taken against him.
- 8.8. Whilst the claimant may well have interpreted that as saying he was likely to be dismissed, such a conclusion would not mean he was dismissed.

Conclusions on Unfair Dismissal

- 8.9. The claimant was not dismissed by the respondent. Accordingly, his claim of unfair dismissal must fail and is dismissed.

Employment Judge Buzzard
14 October 2019

Date

REASONS SENT TO THE PARTIES ON

17 October 2019

FOR THE TRIBUNAL OFFICE

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