



EMPLOYMENT TRIBUNALS

Claimant
Mr N Paling

v

Respondent
Triumph Motorcycles Limited

RECORD OF AN ATTENDED PRELIMINARY HEARING

Heard at: Leicester

On: Friday 13 September 2019

Before: Employment Judge Victoria Butler (sitting alone)

Appearances

For the Claimant: Mr D Gray-Jones of Counsel
For the Respondent: Mr R Barker, Solicitor

JUDGMENT having been sent to the parties on 5 October 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:

JUDGMENT

The Employment Judge gives judgment as follows:

1. The claimant was not a disabled person for the purposes of the Equality Act 2010 at the material time.

REASONS

Background to this hearing

1. The Claimant submitted his claim form to the Tribunal on 13 December 2018 and he brings the following claims:
 - unfair dismissal;
 - indirect disability discrimination under Section 19 of the Equality Act (“EQA”);
 - discrimination arising from disability under Section 15 of the EQA; and
 - a failure to make reasonable adjustments under Section 20 of the EQA
2. The parties attended a Preliminary Hearing by telephone before Employment Judge Hutchinson on 29 May 2019 in which this matter was listed for the hearing before me to determine whether the Claimant suffered a disability in accordance with the EQA at the material time.

The hearing

3. Both parties were legally represented and no specific adjustments during the hearing were required. Mr Gray-Jones asked me to bear in mind that the Claimant was anxious so I confirmed that if any additional breaks, or other such adjustments, were required as the hearing progressed, then he should tell me so they could be accommodated.
4. The parties had agreed a bundle of documents and a chronology, and the Claimant relied on an impact statement which had been sent to the Respondent in accordance with the orders made on 29 May 2019. Both representatives produced written documents which were supplemented with oral submissions.
5. Mr Grey-Jones confirmed that the impairment relied upon by the Claimant was anxiety and depression.

The evidence

6. The Claimant relied on his statement which set out the impact his anxiety and depression has had on him. The Respondent had opportunity to cross examine him and both parties’ representatives made oral submissions in addition to their written documents.

The facts

7. The Claimant had previously been of good health and had never suffered from any form of disability. In his own words ‘he would not have known what anxiety was 18 months ago’.
8. The Claimant was employed by the Respondent as an Assembly Worker from 14 September 1998 until his dismissal on 9 August 2018.

9. The Claimant alleged that he was, in effect, being bullied by his Line Manager and raised a grievance on 5 January 2018 after he was asked to move from the packing line where he had worked for twenty years to the moving track.
10. The Claimant was initially signed as unfit to work on 4 January 2018. The diagnosis was 'stress and anxiety' which appeared on his FIT note (p.87). He visited his GP again on the following dates with the following diagnoses:
 - 6 February 2018 - 'stress and anxiety' (p.88).
 - 21 February 2018 - 'stress and anxiety' (p.88).
 - 28 March 2018 - 'stress' (p.88).
 - 25 April 2018 - 'work related stress, reactive anxiety and depression due to it' (p.88).
 - 4 June 2018 - 'work related stress, reactive anxiety and depression due to it' (p.89).

11. He was prescribed a very small dose of Diazepam and a mild sleeping tablet and remained signed off until 23 July 2018. The Claimant attended the Respondent's Occupational Health provider on 1 May 2018 and a report was produced dated 9 May 2018. The opinion and prognosis of the examining doctor was as follows (p.64-66):

"In my opinion Mr Paling is currently unfit to carry out his duties or any alternative duties.

It is expected with further medical support Mr Paling's symptoms will improve and enabling a return to work; however that might take 4 weeks or longer.

I understand issues at work are related to Mr Paling's manager and a few colleagues. To minimise his anxiety for a return to work it would be beneficial if he were not required to work with the manager or colleagues on his return to work. Over time the relationship may improve and he may be able to return working with the same people.....

At the time Mr Paling feels ready to return to work it is beneficial that he will do so on a phased basis.....

At the moment I feel Mr Paling would benefit from further medical support which would be available via his GP. Alternatively, you may wish to consider private funding of Talking Therapies.

I feel long term it is expected Mr Paling's symptoms will improve. The timeframe of improvement is likely to be influenced by the availability of further medical support as well as adaptations being available in the workplace.

In my opinion Mr Paling is at the moment unlikely to fall within the remits of the Equality Act 2010 for disability. Disregarding the effects of treatment he has significant impairment of daily life activities; however, at the moment they do not last for 12 months or longer. This may change in the future."

12. The Claimant's GP produced a report for the Respondent dated 22 May 2018 which confirmed that the Claimant very rarely attended the surgery and had never suffered from stress, anxiety or depression in the past until this recent episode. The GP's opinion on a return to work was that *"In my opinion Neil*

should be able to return to work provided he is offered a job to work away from his current supervisor. He would benefit from a phased return to work and regular support and review". He confirmed that the Claimant had been taking a mild sleeping tablet and a very small dose of Diazepam; and *"once his work issues are resolved and he is able to return to work under a different supervisor, then he would not need to take his anxiety medication and therefore this would not affect his cognition and his ability to work with machinery and at height"* (p.67–69).

13. In a letter dated 16 July 2018, the Respondent wrote to the Claimant confirming that two suitable alternative roles were available to him which would avoid him working with the colleagues he wished to avoid with the caveat that *"although the Company would not be able to guarantee that you would never work with or see the people you had concerns about"*. There were no other roles that could be offered to him at that time. The Respondent asked him to confirm his decision about a return to work by 23 July 2018, but the Claimant rejected the roles (p.70–71).
14. On 23 July 2018, the Claimant e-mailed the Respondent saying he was currently at the point where he felt mentally, physically and emotionally unable to cope with the situation but that because he was no longer in receipt of statutory sick pay, he would be taking annual leave (p.74). However, he was no longer under his GP's care, nor did he have a medical certificate certifying him as unfit to work. At this point he was medically fit to return to work. He gave evidence that if the Respondent had found him a role to his liking, he *"would have gone back 100% ...I would have gone back after a month"*.
15. The Claimant was subsequently invited to a meeting on 7 August 2018 at which he was dismissed (p.75–76). The letter confirming the outcome of the meeting stated: *"As you aware, you were medically certified absent from work for stress/anxiety from the afternoon of 04 January 2018 until 23 July 2018 when you were considered fit to return and subsequently following your request and as agreed by the Company, you have been on annual leave since 24 July 2018 to the date of the hearing"*. The letter described the measures taken by the Respondent to secure a return to work for the Claimant in alternative roles which the Claimant had declined and confirmed: *"Therefore, the situation remains that despite you are now well enough to work, you feel unable or are unwilling to return to your previous role"*. The letter offered the Claimant the right to appeal, which he duly did, but which was not upheld.

The law

16. Section 6 of the EQA provides:
 - (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.
17. Section 212 provides that substantial means 'more than minor or trivial'.

18. When considering whether a Claimant is disabled within the meaning of the EQA, the Tribunal must take into account the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) (“the Guidance”) issued by the Secretary of State which appears to it to be relevant.
19. Schedule 1, paragraph 2 of the Equality Act 2010 states:-
- (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.
20. Schedule 1, paragraph 5 provides:-
- (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –
 - (a) measures are being taken to treat or correct it, and
 - (b) but for that, it would be likely to have that effect”.
 - (2) “Measures” include, in particular, medical treatment and the use of a prosthesis or other aid”.
21. In **Goodwin v Patent Office [1999] IRLR 4(EAT)**: a Tribunal considering the question of disability should ensure that each of the following four steps is considered separately and sequentially:
- (i) does the person have a physical or mental impairment?
 - (ii) does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
 - (iii) is that effect substantial?
 - (iv) is that effect long-term?
- The EAT recommended that it would be good practice for Tribunals to adopt an inquisitorial approach when assessing and determining disability.
22. In **J v DLA Piper UK LLP EAT/0263/09/RN** the EAT drew a distinction between symptoms arising from on the one hand ‘clinical depression’, which would be an impairment, and on the other hand a possible ‘medicalisation of employment problems’ which would not. The second is not characterised as a mental

condition at all but simply as a reaction to adverse circumstances (such as problems at work) or ‘adverse life events’.

23. In **Herry v Dudley Metropolitan Council EAT/0100/16/LA** at paragraph 56 it states that *“unhappiness with a decision or a colleague, a tendency to nurse grievances or a refusal to compromise if these or similar findings are made by an Employment Tribunal are not of themselves mental impairments. They may simply reflect a person’s character or personality”*.

Conclusions

24. I have considered the four essential questions that I am required to address: did the Claimant have an impairment, did that impairment have an adverse effect on his ability to carry out normal day to day activities, was that effect substantial and was that effect long term?
25. Turning to the first question as to whether the Claimant had an impairment. I am satisfied that he did by reason of anxiety and depression. This impairment is clearly documented in the GP notes and the occupational health report. The medical evidence reflects, and the Claimant has affirmed that, the impairment has been caused by events at work, but I am not obliged to consider the trigger or the cause. I must consider the effect of the impairment. I considered the cases of **Herry v Dudley Metropolitan Council EAT/0100/16/LA** and **J v DLA Piper UK LLP EAT/0263/09/RN** referred to by Mr Barker. However, having regard to the Claimant’s statement and his medical notes, I am satisfied that the Claimant had an impairment at the material time.
26. Did the impairment have an adverse effect on his ability to carry out normal day-to-day activities? I have considered Mr Barker’s submission that the Claimant’s statement was written in the present tense and does nothing to address the impact on his ability to carry out day-to-day activities at the material time. However, I am satisfied that the statement was meant to address the impact at the time, and I have cross referenced it to the medical notes, particularly at page 88 of the bundle. The GP notes confirm that the Claimant explained he was not going to the gym and how the impairment was affecting other elements of his day-to-day life. Accordingly, I am satisfied that the impairment had an adverse effect on his ability to carry out normal day-to-day activities
27. Moving to whether the effect was substantial, substantial means more than minor or trivial which is a relatively low standard. I have had regard to the Appendix to the Guidance which sets out a non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day to day activities. These include:
- Persistent general low motivation or loss of interest in everyday activities;
 - Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder;
 - Persistent distractibility or difficulty concentrating.

Considering the effect the Claimant has described in his statement and oral evidence, I am satisfied that it was substantial.

28. Did the impairment have a long-term adverse effect? Long term is if an impairment has lasted for 12 months, is likely to last for 12 months or likely to last for the rest of the person's life. Likely in this context means 'could well happen' but, importantly, likelihood must be assessed at the date of the act of discrimination. **Latchman v Reed Business Information [2002] ICR 1453**, confirms that "*the likelihood falls to be judged as it currently was or would have seen to have been at the point when the discriminatory behaviour occurred. It is not what has actually later occurred but what could earlier have been expected to occur which is to be judged*". When assessing likelihood, the assessment should be based on the circumstances known to the employer at the time of the alleged discriminatory treatment - **McDougall v Richmond Adult Community College [2008] ICR 431**. The Guidance states at paragraph C4:

"In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age)."

29. In deliberating the fourth limb, I considered the documentary evidence and the oral evidence given by the Claimant today. I am satisfied that by 23 July 2018, he was fit to return to work which he communicated to the Respondent. He had not obtained any further medical certificates signing him as unfit to work and, importantly, he was fit to return despite his issues at work not being resolved to his satisfaction.
30. The GP report in May 2018 confirmed the Claimant should be able to return to work and would not need to take his medication provided he was offered a job to work away from his current supervisor. The Claimant also gave clear evidence that had an alternative role been available, he would have returned to work '*one hundred per cent*'. I am satisfied that the Respondent offered two such roles to the Claimant away from his supervisor/colleagues and that Claimant chose not to take them.
31. The Occupational Health doctor did not consider the Claimant to be a disabled person in May 2018, and, whilst she did say that this may change, I am satisfied that he was recovered by July 2018.
32. Turning to whether it was likely that the effects of the impairment would be long term, I am satisfied that, at the material time, they were not likely to be long term, nor were they likely to recur. In reaching this conclusion, I have taken into account the fact that the Claimant was no longer obtaining FIT notes, despite his work issues not being resolved, and that he told the Respondent he was fit

to return. He has no history of anxiety and depression and I am satisfied that this was a short-term reaction to issues at work. It is not for me to decide in this hearing if the alternative roles offered by the Respondent amounted to reasonable adjustments. However, I am satisfied that they were appropriate roles for the Claimant to undertake.

33. Having considered the evidence and supporting documents, I am satisfied that at the material time the Claimant's impairment was not long term or likely to be long term and, therefore, this limb is not satisfied. Accordingly, I find that the Claimant was not a disabled person for the purposes of Section 6 of the Equality Act at the material time. If I were required to consider the position at the date of the hearing my finding may well have been different, but this is not what I am required to do.

Employment Judge Victoria Butler

Date: 27 November 2019

Sent to the parties on:

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For the Tribunal:

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