



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs W Y Looi

v

Bard Pharmaceuticals Limited

Heard at: Bury St Edmunds

On: 9 and 10 September 2019

Before: Employment Judge Postle

Members: Mr R Allan and Mr B Smith

Appearances

For the Claimant: Mr Looi, Husband

For the Respondent: Mr B Uduje, Counsel

JUDGMENT on PRELIMINARY HEARING

The Claimant was not a disabled person within the meaning of Section 6 of the Equality Act 2010 and therefore her claims against the Respondent are dismissed.

REASONS

1. This is a Preliminary Hearing planned prior to a Full Merits Hearing to determine whether the Claimant has a disability which satisfies the definition under Section 6 of the Equality Act 2010. Namely, that a person has a disability if they have a physical or mental impairment and that impairment has a substantial and long term adverse effect on that person's ability to carry out normal day to day activities.
2. The burden of proof is on the Claimant to satisfy the Tribunal that they do have such a disability within the meaning of Section 6 and it is well trodden and stated law that there are four questions that the Tribunal should ask itself in determining the question of whether or not they do satisfy the definition.

- 2.1 The first one is: Did the Claimant have a mental and / or physical impairment?
 - 2.2 The second one is: Did the impairment affect the Claimant's ability to carry out normal day to day activities?
 - 2.3 The third is: Was the adverse condition substantial? And
 - 2.4 The fourth and final question is: Was the adverse condition long term?
3. It is important that those four questions should be posed sequentially and not together.
 4. The Tribunal has heard evidence from the Claimant through an impact statement and a prepared witness statement and there is also a report from her GP, two reports, the Tribunal also heard evidence from one of the Claimant's Line Managers, Mr K Webb again through a prepared witness statement. The Tribunal also had the benefit of three bundles of documents, one prepared for the Preliminary Hearing, one for the Full Merits Hearing and a further additional bundle provided by the Claimant.
 5. The Tribunal have also considered the Respondent's reply to the Claimant's medical evidence which is to be found at page 164 to page 166.

The Facts

6. The facts are that the Respondents manufacture prescription drugs used for a variety of conditions. The Claimant was employed as a Quality Control Analyst from 15 February 2016 until her dismissal on 15 January 2018. The nature of the Respondent's industry is such that it will be strictly regulated and carefully controlled requiring a high degree of accuracy by its analysts and will clearly have to be vigilant to ensure all employees are fit to carry out the work that they are employed to do.
7. It is clear from the outset, the Claimant found the work difficult and struggled to cope initially with the job. There were, it is true, clearly issues between the Claimant and one other member of staff. But apart from that there appears to be a relaxed working environment.
8. The Claimant's GP report confirms that there was no history of mental illness prior to working in her current job with the Respondents.
9. Following an incident at work where the Claimant had made a mistake and then misled her Manager, the Claimant was originally dismissed in November 2016. As a result of that dismissal, the Claimant saw her GP on 15 November 2016 and the GP writes the following,

“I discussed with her that she has work related stress and that this has impaired her judgment. I also told her that I believe her stress is on a background of depression from which she has now only just sought help.”

10. That was in part to assist with the Claimant’s Appeal. Her employment was reinstated and the reasons were given in a letter of 6 December 2016 by Mr Septon where he says that the original hearing did not sufficiently consider mental health and did not consider that stress can affect the decision making which contributed to the Claimant acting out of character, as evidenced in the meeting minutes. He acknowledged that stress may have played a part.
11. Secondly, there had been insufficient consideration as to the Claimant’s explanation as to the circumstances leading up to the dismissal and thirdly her previous disciplinary record was clear.
12. The Claimant was reinstated, but there were conditions. She was on a Final Written Warning and she was to be placed on a ‘Performance Improvement Plan’ to help with her skill gaps that she had. She was then referred to Occupational Health. Following the Occupational Health referral, we see that at page 41, she was confirmed as fit for work and the question was addressed,

“What effect will this health issue have on the Company’s member’s ability to carry out their role?”

The reply was,

“Amy presented in good relatively relaxed spirit and reported that she feels she is coping at work”.

To the question,

“Are there any roles or tasks that the Company member will be unable to undertake on their return?”

The reply was,

“Not applicable”.

To the question,

“Are there any work related modifications that will alleviate the health issue or facilitate rehabilitation?”

Here it talks about the ‘Performance Improvement Plan’ already in place.

To the question,

“Is the health issue likely to recur or have long term consequences?”

The reply was,

“I am hopeful not as Amy has no previous history of mental health and once she attends cognitive behavioural therapy, this will equip her with the skills she needs to enjoy a good emotional well being.”

Apparently, the Claimant did attend these well being cognitive therapy sessions which appeared to help.

13. The PIP reviews took place in April, there appears to have been two in June and it is noticeable that during this period, the Claimant is not seeing her GP or reporting that she has stress, depression or is anxious and continues to work throughout the period.
14. However, in September 2017, it is perceived by the Respondents the Claimant was not performing in her role and she was informed that her unsatisfactory performance would now be dealt with under the Company’s disciplinary process. It is to be noted that the following day, on 15 September 2017, the Claimant visits her GP and reports tearful, low in mood for a long time, not sleeping and anxiety is very high.
15. The Claimant then appears to raise two grievances and they are to be dealt with in accordance with the Company’s policy alongside the disciplinary process. The grievances were against the Performance Improvement Plan and a grievance against a colleague who the Claimant perceived was bullying and discriminating against her.
16. In the meantime, the Claimant is signed off by her GP, there is an Occupational Health appointment on 9 October 2017 and the results of that are at pages 80 – 82. In that, amongst other things, it is reported that,

“Amy anticipates she will be fit to return to work on the expiration of her current fit note. Amy is keen to move forwards with greater resolve, efficiency and making less errors. Amy felt that she had been progressing well since attending her course in April.” and various assessments were then to be made over her shift and work duties. She sees her GP on 22 November 2017 and she reports that she feels a bit anxious about her work situation but is hopeful that the grievance will help, she is keen to get back to work and her mental health is much improved.”
17. On 30 November 2017, the Claimant attends the combined grievance and disciplinary hearing and the outcome is communicated to her on 4 December 2017 and we see that at page 80 – 83. Basically, her PIP is extended by 4 weeks and the claim against her colleague in connection

with bullying is not upheld, although it is accepted there are issues between the two parties that need to be addressed.

18. The Claimant then attends her GP on 15 December 2017, reporting that her anxiety is high at work, she gets anxious and tired and her sleep is poor. She is signed off work for 8 weeks by her GP.
19. On 10 January 2018, the Claimant again visits her GP and he reports good days and bad days.
20. The Claimant attends the capability hearing on 15 January 2018, at which she is dismissed and attends her GP approximately one week later and reports, not surprisingly, that her anxiety is up, her mood is low and her sleep is poor.
21. What do the Tribunal conclude from all of this? Once again, we remind ourselves that the burden of proof is on the Claimant. It is clear, looking at the sequential questions that the Claimant has a mental impairment. However, where the Tribunal depart is, did the impairment affect the Claimant's ability to carry out normal day to day activities? Clearly, the Claimant continues to work in what is clearly a responsible job, she may not be performing to the best of her abilities, but she attends work throughout a long period and apart from the latter part of 2017, is not absent from work. If the Claimant is suffering to such an extent that her ability to carry out normal day to day activities are impaired, the Tribunal find it difficult to conclude she would be able to attend work on a daily basis and perform, albeit it at a lower standard.
22. It is clear that the impact on day to day activity must be more than trivial or minor. One accepts that intervening events would cause stress and anxiety. It appears, in the Claimant's case, that stress and anxiety only coincided with significant work events such as being placed on a PIP and the extension to it and the disciplinary process. But it is noticeable, between those intervening events, the Claimant does not seek help from her GP, or indeed report the fact that the matters she now raises in her impact statement, such as the ability to concentrate, fatigue and memory were affected in the intervening period. Particularly from October 2016 to September 2017 where there were no impending disciplinaries and no reference at all to the Claimant attending her GP, apart from one telephone appointment which was in August 2017. It appears that the Claimant only attends her GP to report matters of stress or anxiety when she is subject to some form of process.
23. The Tribunal therefore conclude that the impairment was not such that it affected the Claimant's ability to carry out her normal day to day activity. It was not an adverse condition and therefore the Claimant has not satisfied the test required under Section 6 of the Equality Act 2010. It has to be said that the Tribunal took the view that the Claimant had perhaps overemphasised the impact of her condition which at best, as described by the Clinicians, was a mild depressive illness.

24. For all those reasons the Claimant's claim against the Respondents cannot proceed as the Claimant has not satisfied the definition under Section 6 of the Equality Act 2010.

Employment Judge Postle

Date:2 December 2019.....

Sent to the parties on:

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For the Tribunal Office