



EMPLOYMENT TRIBUNALS

Claimant: G

Respondents: 1. Leeds University Union
2. University of Leeds

Heard at: Leeds **On:** 20 November 2019

Before: Employment Judge Jones

REPRESENTATION:

Claimant: Mr Clark of Counsel
Respondent: Mr Lewis of Counsel

JUDGMENT having been given on 20 November 2019, sent to the parties on 22 November 2019 and written reasons having been requested by the claimant's representative by email of 21 November 2019, in accordance with Rule 62 of the Employment Tribunals Rules of Procedure 2013 the Tribunal provides the following

REASONS

1. G presents a complaint of disability discrimination and it is for the Tribunal to determine today the issues identified by Employment Judge Wade at a preliminary hearing, the record of which was sent to the parties on 29 August 2019. The issues are:

- (1) Whether the claimant had a mental impairment on or around 3 April 2019;
- (2) If so, did it have a substantial adverse effect on her ability to undertake normal day-to-day activities?
- (3) If so, was that effect long-term, in particular when did it start, had it lasted at least 12 months or was the effect likely to last at least 12 months; and
- (4) Were any measures being taken to treat or correct the impairment?

- (5) But for those measures, would the impairment be likely to have had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

2. I have heard evidence from the claimant who has produced a witness statement and I have a selection of her medical records from January 2014 to 10 September 2019. From the information contained in the claimant's medical records and her evidence, I find as follows:

- (1) On 17 June 2017 the claimant had a discussion with her GP, Dr Bartlett, in respect of a condition of low mood. There was discussion about illicit drug use and a suggestion that counselling may assist. The claimant explained that she had had a few years of episodes of feeling down and that they had been getting worse over the last six months. She informed Dr Bartlett that she had had occasions in the past six months when she had taken recreational drugs, but she also said she had episodes of low mood which were unrelated to drug use.
- (2) On 26 August 2017 the claimant disclosed greater material about her history. She told Dr McCormack that she had first self-harmed when 13 and had suffered low mood for a long time. She said it had been more consistently worse for the last few months and that she was self-harming on a daily basis. She had superficial cuts to the right arm. She said she had had suicidal thoughts most days, mainly thoughts of not wanting to be there. Two weeks before, she had started to write a suicide note and was thinking of taking overdose tablets but had been distracted by a housemate. She told Dr McCormack that she smoked a joint every other day and started to drink more alcohol as a coping mechanism.
- (3) On 5 September 2017 the claimant was prescribed citalopram which is an antidepressant drug. She was to take it daily. It was the average dose for an adult.
- (4) She attended at her GP on 20 September 2017 when she had been on citalopram for four weeks. She had been noticing some improvement and was not self-harming as often and had no real thoughts of suicide. She had just discovered that an old friend had died and that had knocked her back.
- (5) On 3 October 2017 the claimant saw Dr McCormack and was feeling much better. Her sleep and appetite were fine and she had reduced her alcohol intake. She still had occasional thoughts of suicide but less frequently and she was able to distract herself.
- (6) On 31 October 2017 the claimant attended at her GP and informed her doctor that she was trying not to think about the bereavement of her friend and had had no recent self-harm or suicidal thoughts. She continued to take citalopram.
- (7) On 31 March 2018 the claimant saw Dr Smith and discussed feelings relating to transgender status and her feelings about that. She had been put in touch with a group which was able to advise.

(8) The claimant ceased taking citalopram in August 2018, the last prescription having been given on 5 July 2018. She visited her GP several times thereafter but this related principally to drug prescriptions relating to gender transition. There was no reporting of low moods during that period.

3. I am satisfied from the evidence given by the claimant that she commenced self-harming when she was 13. She started to feel her overall mood getting worse when she moved to university and she felt very negative in 2014. In early 2015 she spoke to friends and thought that her condition might be one of depression. From June 2017 she went to see her GP who diagnosed her with the depressed mood and general anxiety disorder. She was prescribed citalopram. The condition worsened in December 2017 and the claimant hoarded large amounts of painkillers for use in a suicide attempt. She decided to leave university as she knew the stress was making her depression worse. In August 2018 the claimant stopped taking the medication. It was making her feel as if on autopilot. She had a period at Christmas 2018 when she felt stressed and uncomfortable and this led her to visiting her uncle in South Wales.

4. For a short period prior to the termination of her employment on 3 April the claimant was off work. In her witness statement she says she was suffering from a particularly intense episode and that it worsened after she was dismissed. The claimant was off work from 25 March to 3 April.

5. Section 6 of the Equality Act 2010 defines disability as a physical or mental impairment which has a substantial long-term and adverse effect on a person's ability to undertake normal day-to-day activities.

6. Paragraph 2 of Schedule 1 to the Act defines "long-term effect". An impairment will have been long-term if it lasted for at least 12 months or was likely to last for at least 12 months or was likely to last for the rest of the life of the person affected.

7. Paragraph 5 of Schedule 1 provides that 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 measures are being taken to treat or correct it and, but for that, it would be likely to have that effect.

8. I was referred to a number of authorities: **Morgan v Staffordshire University [2002] IRLR 190**; **RBS v Morris [2012] UKEAT/0436/10 MAA**; and **The Guinness Partnership v Szymoniak UKEAT/0065/17 DA** and **SCA Packaging v Boyle [2009] ICR 1056**.

9. The medical records establish to my mind that the claimant had a mental impairment relating to her moods and that this had a substantial adverse effect on her ability to undertake normal day to day activities. This had been described as depression. The General Practitioner had prescribed an antidepressant drug for a significant period. That is supportive of a mental impairment. It is reasonable to infer from the medical records that the claimant had enjoyed an improvement as a consequence of the prescription of that drug.

10. I am also satisfied that this condition was one which did not simply last for the period between 2017 and 2018 when the claimant was prescribed these drugs.

Episodes of self-harm referred to in the witness statements and related to the GP, including at the age of 13, imply this is a condition which had varied in severity and had had recurrent effects. It had arisen before 2017. It had lasted for more than 12 months and so had been substantial, by reference to the definition in Schedule 1.

11. The difficult issue in this case, however, is for me to determine whether at the material time, in April 2019, the claimant had a condition which satisfied section 6 of the Equality Act 2010 or that, by then, it was likely (or could well) recur. According to the records of her GP, there had been no reference to any low mood since August 2018.

12. According to the claimant she felt better after taking leave from university, but still experienced episodes of depression which were erratic and unpredictable. The only ones since August 2018 was an occasion when she visited her uncle on Christmas Day and the period immediately preceding her dismissal. I have no medical evidence to assist me as to whether or not what she describes were part and parcel of a mental impairment.

13. I am troubled by the contrast between paragraph 9 of the witness statement of the claimant, which addresses her sickness absence immediately before her dismissal, and the entry in her GP notes on 26 March 2019. She reported to her GP on that occasion that she was “feeling well” and was having no side effects. This was the second day of the claimant’s absence from work, a spell of absence which lasted until her dismissal on 3 April 2019. I recognise that the clinical practitioner who made the note had been discussing the use of hormone medication, and in that context the claimant reporting feeling well, but it is peculiar that there is no reference at all to the “intense episode” which the claimant says led to her reporting sick. It is difficult to imagine the claimant would be reporting as feeling well on this day, were that the case. This was 7 months after the claimant ceased to take antidepressant medication.

14. In the **RBS** case, Mr Justice Underhill said, at paragraph 61:

“We do not believe that it can be assumed that the statutory test was satisfied from October 2006 onwards. Of course it could be said that any improvement was only as a result of the medication the claimant was taking...; but there was no explicit evidence on this point, and we do not think safe inferences can be drawn from the fact that the claimant was told that he should continue with the medication for six months, which might only have been precautionary. This is just the kind of question on which a tribunal is very unlikely to be able to make safe findings without the benefit of medical evidence, and the same applies to potential reliance on paragraph 2(2) of Schedule 1... it would be very difficult for the Tribunal to assess the likelihood of risk or the severity of that if it eventuated without expert evidence.”

At paragraph 63, he said,

“We accordingly hold that it was not open to the tribunal on the evidence before it to find that the claimant was disabled during the relevant period. It might well be that the claimant could have filled the evidential gaps by agreeing to the suggestion made during the case management process that expert evidence be sought which directly address the questions which the

*contemporary reports did not cover. But he made a deliberate – and perfectly rational – choice not to do so: see paragraph 55 above. **The fact is that whilst in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert evidence. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted*** [Empasis added].

15. I have therefore had to assess what I make of the claimant's evidence about her ill health in the period immediately preceding the termination of her employment without the benefit of any medical comment or supporting documentation. I recognise that the claimant's own description of her symptoms, whilst they may be genuine in the sense that she now perceives that was how she felt at the time are, as Mr Lewis submits, a subjective retrospect.

16. I am hampered by the fact that there is no other evidence of absences from work. Nor is there any report of the absence immediately prior to the dismissal to her managers. Upon my enquiry I was told by the claimant that she had sent two or three emails in respect of this particular absence, but they were not produced in evidence. They may have thrown some light on the claimant's account and recollections of her state of health. Records of any other absence during the period from August 2018 until the termination of employment on 3 April 2019 might have assisted me with the short description of the claimant's health in paragraph 8 of her statement.

17. I am not assisted by the lack of detail in paragraphs 8 and 9 of the claimant's witness statement other than a general evaluation by her that these were parts of a continuing underlying condition of depression. Even if I accepted the description of how the claimant felt in April 2019, which is undermined by the medical note, there is no medical evidence before me that the symptoms were a recurrence of the mental impairment which had led to earlier thoughts of suicide or self-harm and what manifested as depression and a disability at an earlier phase in her life.

18. I have considered the statutory guidance on matters to be taken into account in determining questions of disability 2011, but they have not assisted me in this particular case.

19. Mr Clarke submitted that Mr Lewis had not challenged the claimant in cross examination on her medical history and so could not dispute its accuracy in submissions. I did not accept that submission for two reasons. Firstly, Mr Lewis had put to the claimant that she had exaggerated her account. I intervened to ask the evidential basis upon which this challenge was put and Mr Lewis did not develop it. Secondly, it was open to Mr Lewis to dispute the reliability of the case put forward by the claimant, in any event. The burden was on her to prove the issue. For the reasons I have set out the claimant did not satisfy me, on a balance of probabilities, that she had symptoms associated with the identified mental impairment of

depression, in April 2019. That was because of the undermining effect of her comment to her GP and the absence of any other objective confirmation of her condition at the time.

20. Nor I am able to find there was a likelihood of recurrence of that condition, notwithstanding its earlier lengthy history. Because of the complexities of understanding this particular medical condition and interpreting properly any symptoms, that is a matter upon which I would have needed some expert medical assistance. The medical records of themselves were insufficient.

Employment Judge D N Jones

Date: 17 December 2019

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