



EMPLOYMENT TRIBUNALS

Claimant: Mrs K de Herder

Respondent: Saint-Gobain Construction Products Limited
t/a Artex

Heard at: Nottingham **On:** Thursday 7 November 2019

Before: Employment Judge Hutchinson (sitting alone)

Representatives

Claimant: In person

Respondent: Mr T Perry of Counsel

JUDGMENT

The Employment Judge gave judgment as follows: -

The Claimant did suffer from a disability as defined in section 6 Of the Equality Act 2010 at the relevant time.

REASONS

Background to this hearing

1. The Claimant presented her claim to the Tribunal on 6 February 2019. She had been employed by the Respondents as a desk based Account Manager from 27 July 2015 until 25 October 2018 when she resigned from her employment.

2. She claims: -

- Constructive unfair dismissal
- Disability discrimination

3. She said that she suffered from the following conditions namely: -

- Attention Deficit Disorder (“ADD”)
- Anxiety

4. She says that she was diagnosed with these conditions over twenty years ago.

5. Her claims of disability discrimination are: -

- Failure to make reasonable adjustments
- Discrimination arising from disability

6. The Respondents did not accept that at the relevant time the Claimant satisfied the definition of section 6 of the Equality Act 2010. They acknowledged that the Claimant suffers from ADD and anxiety and that this is a long-term condition. What they say is that the impairments do not have a substantial effect on her normal day to day activities.

7. The matter last came before the Tribunal on 31 October 2019 when my colleague Employment Judge Batten ordered that this Preliminary Hearing should take place for me to determine the disability issue. If I determine that the Claimant does suffer from a disability at the relevant time I should go on to identify the claims and make case management orders.

The evidence

8. I heard evidence from the Claimant and was satisfied with the truthfulness of her evidence. There is also a bundle of documents produced by the Respondents and where I referred to page numbers it is from that bundle.

The facts

9. The Claimant suffers from two conditions namely ADD and anxiety.

10. ADD is a term used for a presentation of Attention Deficit Hyperactivity Disorder (ADHD) but without the stereotypically impulsive, disruptive or high energy presentation of ADHD. It is a predominantly inattentive presentation with active and high traffic environments exacerbating the inherent distraction of the condition.

11. Ms Herder had been diagnosed with the condition at an early age. Evidence of this is at page 50-2 when she consulted the Mount Pleasant Family Practice while she lived in the USA.

12. The Claimant explained to me that she has developed an array of coping strategies to mitigate the effects of the disability on her day to day life. These included detailed plans/to do lists, clocks in every room at home, timers/alarms on her phone and multiple reminders for calendar events.

13. The condition comes and goes as she described in her e-mail of 28 October 2019 (pages 48-9).

14. The Claimant takes medication namely Setraline. She was taking 50 mg per day and has been taking this since 7 April 2017. Over the course of her employment she has had to increase the dosage and is now taking 150 mg a day.

15. I have seen two occupational health reports produced by the Respondent dated 19 May 2017 (page 55) and 19 March 2018 (page 57-8).

16. The second report deals with a number of issues that the Claimant has and in particular:

- “Feeling restless or worried
- Having trouble concentrating or sleeping
- Dizziness or heart palpitations”

17 The report made various recommendations in respect of adjustments that could be considered relating to the Claimant’s condition.

18. During her employment the Claimant was absent for two substantial periods suffering from stress and anxiety, namely from 27 March 2017 to 25 July 2017 and from 7 September 2018 until the termination of her employment on 25 October 2018.

19. The Claimant described to me several substantial effects on normal day to day activities. These are set out in an e-mail of 28 October 2019 (page 48-9) and I discussed these with the Claimant. The particulars matters I considered to be relevant were:-

19.1 The Claimant can be overwhelmed by cleaning the house when multiple jobs require her attention at one time. This leads to her feeling paralysed because she cannot find a clear place to start.

19.2 Cooking and baking takes her twice as long as normal because she gets distracted and often forgets that she has placed items in the oven which can cause items to be burnt.

19.3 Shopping takes her significantly longer due to being distracted even when she has a list.

19.4 Social activities are a problem because she often has issues with time keeping and so she is late getting to meetings. This in turn causes her to be anxious and she struggles with going to events partly because of this.

19.5 She also feels extremely anxious meeting people that she does not know or if she is in a crowded environment. This means that she avoids these circumstances wherever possible.

19.6 The conditions also give her poor sleep and she has regular and recurring nightmares.

19.7 Travel to work can be a problem especially where public transport is busy because she finds difficulty in coping in these environments.

The law

20. I reminded myself that the definition of disability is as set out in section 6 of the Equality Act 2010 (EQA).

That says:

- “(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.”

21. I also referred myself to the “guidance on matters to be considered in determining questions relating to the definition of disability (2011)” which was issued by the Secretary of State under the EQA. It deals there with the meaning of “substantial adverse effect” and says as follows:

“b(i) The requirement that an adverse effect on normal day to day activities should be a substantial one, reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.”

22. It then goes on to describe the issue of the time taken to carry out an activity and says:

“b(ii) the time taken by a person with an impairment to carry out normal day to day activity should be considered when addressing whether the effect of that impairment is substantial. It should be compared with the time it might take a person who did not have the impairment to complete an activity.”

23. It then also goes on to deal with the way in which an activity is carried out and says:

“b(iii) another factor to be considered when assessing whether an effect of an impairment is substantial is the way in which a person with the impairment carries out a normal day to day activity. The comparison should be with the way that the person might be expected to carry out the activity compared with someone who does not have the impairment.”

24. The guidance also deals with the effects of treatment. Paragraph b(vii):

“The act provides that where an impairment is subject to treatment or correction, the impairment is to be treated having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context “likely” should be interpreted as meaning “could well happen”. The practical effect of this position is that the impairment should be treated as having the effect that it would have without the measures in question (SCH1, para 5(i)). The act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment... In this context medical treatment would include treatment such as counselling, the need to follow a particular diet, and therapies, in addition to treatment with drugs...”

My conclusions

25. In this case it is not in dispute that the Claimant has suffered for a long period of time and certainly at the relevant time from conditions which amount to a mental impairment namely ADD and anxiety. The only matter for me to determine is whether they have a long term substantial effect on normal day to day activities.

26. I have no hesitation in this case in determining that when I consider as I should, the effects of treatment in effect by considering the effect without treatment, that there is a substantial adverse effect on the Claimant's normal day to day activities. I have described above in particular the effect on: -

- Cooking
- Shopping
- Sleeping
- Travelling
- Socialising
- Getting to and from work

27. I am satisfied that in respect of all these conditions the Claimant at the relevant time suffered from a disability as defined in the EQA.

Case management summary

28. The next part of the hearing was in identifying the claims and the issues in those claims.

Failure to make reasonable adjustments

29. I identified the following provisions, criteria or practices (PCP's): -

- 29.1 The requirement to work in the office and not at home.
- 29.2 The requirement to work in the administrative office near the door.
- 29.3 The requirement to attend work punctually.

30. The Claimant says that the PCP's put the Claimant at a substantial disadvantage in comparison with persons who did not suffer a disability at the relevant time in that: -

- 30.1 She was not able to undertake her work.
- 30.2 It led to her being absent.
- 30.3 She was disciplined.

31. The Claimant says that the Respondent knew and could have reasonably been expected to know that she was placed at such a disadvantage once they had obtained the occupational health reports.

32. The steps that could have been taken were: -

32.1 Allowing her to work from home and/or;

32.2 allowing her to work in a quieter environment;

32.3 not disciplining her in accordance with their own policies and procedures.

Discrimination arising from disability

33. The Claimant says that the following things arise in consequence of her disability: -

33.1 She was disciplined for lateness.

33.2 She was disciplined for absence related to her disability.

33.3 The outcome of her grievance was not fair.

33.4 The outcome of her grievance appeal hearing was not fair.

34. The Claimant says that the above amounted to unfavourable treatment and that these were because of the things that arose out of her disability.

35. The Claimant says that her treatment was not a proportionate means of achieving a legitimate aim and that the Respondents knew about or should have been expected to know about her disability.

Direct discrimination because of her disability

36. The Claimant says that she was subjected to the following treatment namely: -

36.1 Comments made by the Chair of the appeal panel.

36.2 Discriminatory language in an advertisement.

36.3 The Claimant says that this amounted to less favourable treatment than the Respondent would treat other hypothetical comparators ie people who did not suffer from her disability. She says that the treatment was because of her disability and not for any other reason.

Unfair dismissal claim

37. The Claimant resigned and claims constructive unfair dismissal. She says that the Respondents committed a fundamental breach of her contract of employment entitling her to resign without notice. Matters complained of are: -

37.1 The discriminatory acts.

37.2 The attitude of her colleagues.

37.3 The outcomes of the grievance and the appeal hearing and the way that they were dealt with.

The final hearing

38. The final hearing remains listed for 5 days commencing on **Monday 15 June 2020 at the Tribunal Hearing Centre, 50 Carrington Street, Nottingham NG1 7FG at 10:00 am** at each day or as soon thereafter as is practicable. The first two hours will be reading time and the parties are to attend on the first day to start the hearing promptly at 12 noon.

Judicial Mediation

39. I raised the issue again of Judicial Mediation and the parties will let me know in writing within 14 days if they are interested. If they are then I will convene a further telephone case management Preliminary Hearing to make the appropriate arrangements.

Employment Judge Hutchinson

Date 23 December 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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