EMPLOYMENT TRIBUNALS

Claimant: Mr E J Czerniak

Respondent: Broxtowe Borough Council

Heard at: **Nottingham** **On:** **13 January 2020**

Before: **Employment Judge Brewer**

Representation

Claimant: Mr Starcevic, Counsel
Respondent: Ms Niaz-Dickinson, Counsel

JUDGMENT

None of the Claimant's conditions of:

- Atrial Fibrillation;
- Stress/anxiety;
- Back issue;
- Transient Ischemic Attack

amount separately or together to a disability pursuant to section 6 of the Equality Act 2010.

REASONS

Introduction

1. By a claim form received at the Tribunal on 29 November 2019, the Claimant made claims of unfair dismissal, wrongful dismissal, disability discrimination and a failure to make reasonable adjustments. At a telephone preliminary hearing on 29 April 2019 the case was listed for a substantive hearing over 10 days commencing on 20 March 2020. Case management orders were made. The Respondent accepted that the Claimant is a disabled person by reason of cancer. However, it did not accept he is or was disabled by reason of any other alleged impairment. In the circumstances the Judge ordered that the Claimant

provide further particulars of each alleged disability, save for the cancer and ordered there to be a further preliminary hearing to consider the need for further case management orders to resolve the disability question should it remain in issue.

2. That further preliminary hearing took place on 3 September 2019. The Judge determined that the question of disability (again save in respect of cancer) should be considered at a 1-day hearing and that hearing came before me.

Issues

3. The issues to be determined at the hearing were as set out in the Record of a Preliminary Hearing held on 3 September 2019. The issues for me to determine are:

    a. To determine the extent and nature of the Claimant's disability, in particular whether the Claimant's circumstances met the further statutory definition of disability at the material time by virtue of any of the alleged physical and mental impairments;
    b. Whether all or any of the claims of disability discrimination should be struck out or a deposit order made on the grounds that they have no or little reasonable prospects of success.

4. The Claimant alleges that the following impairments are either each a disability or are cumulatively a disability:

    a. Atrial Fibrillation (AF);
    b. Stress and anxiety;
    c. Back injury;
    d. Transient Ischemic Attack (TIA).

The hearing

5. At the hearing I heard evidence from the Claimant who adopted his disability impact statement as his witness statement. I had an agreed bundle of documents and references below to page numbers are to page numbers in that agreed bundle. The Claimant confirmed at the outset that he did not require any adjustments to enable or assist him in giving his evidence although I stressed that should he need a break at any time he should let me know. I heard and considered the helpful submissions of both counsel and have also taken into account Mr Starcevic's written skeleton argument in reaching my decision.

The law

6. The issue of what is a disability starts with section 6(1) of the Equality Act 2010. This says:

    "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."

7. In the above definition, "long-term" means has lasted, or is likely to last for 12 months or the Claimant's entire life (and if the adverse effect ceases at any point then it is necessary to consider whether it is likely to recur) (see Schedule 2 to the 2010 Act), and "substantial" means more than minor trivial (section 212(1) of the 2010 Act). Normal day to day activities can include activities carried out at work.

8. The relevant point in time to be looked at by the Tribunal when evaluating whether the claimant is disabled under s. 6 is not the date of the hearing, but the time of the alleged discriminatory act: **Cruickshank v Vaw Motorcast Ltd [2002] I.C.R. 729**.

9. Some impairments are deemed to be a disability irrespective of any adverse effect, cancer being an example.

10. There is of course a wealth of case law on the issues in this case and I shall refer to that as necessary below.

Findings of fact

11. **Goodwin v Patent Office[1999] I.C.R.302** provided some guidance on the proper approach for the Tribunal to adopt when applying the provisions of what was then the Disability Discrimination Act 1995. Morison J held that the following four questions should be answered, in order:

    1 Did the claimant have a mental or physical impairment? (the 'impairment condition');
    2 Did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition');
    3 Was the adverse condition substantial? (the 'substantial condition');
    4 And was the adverse condition long term? (the 'long-term condition').

12. This seems to me to remain the case under the 2010 Act.

13. At this point it is necessary to turn to an issue which arose throughout the Claimant's cross-examination. Ms Niaz-Dickinson took the Claimant carefully through his medical notes (the GP notes run to some 248 pages from [144] to [402]) in relation to each alleged disability. It is fair to say that there were differences in the evidence given by the Claimant around how he felt before, and what he said to his GP during each consultation. The Claimant said that not everything he had said to his GP had been noted down in his records. The medical record for any given patient is the single most important document in respect of that patient. It is vital that the medical record is accurate and up to date for the obvious reasons that a) doctors are busy and cannot be, and indeed are not expected to recall every detail of every conversation they have with a patient and b) the medical record is accessed by anyone providing medical care to the patient (other doctors, nurses, occupational health providers, locums for example) and the key and only written record they have to

rely on is the written medical record. Thus, for present purposes I have taken the view that where there is a discrepancy between the Claimant's evidence and the written medical record, I prefer what is set out in the medical record.

Atrial Fibrillation (AF)

14. The Claimant was diagnosed with prostate cancer in 2010. In September 2016, as part of a routine well-man check at his GP surgery his heart rate was found to be high and caused some concern. After further checks he was diagnosed with AF. AF is essentially an irregular heartbeat. The Claimant was unaware of the AF as he was asymptomatic [180] although he did refer to past shortness of breath and 'fluttering' in his chest. Nevertheless, as at 13 September 2016 the AF was asymptomatic. The Claimant was given Atenolol, 1 50mg tablet to be taken each day.

15. The Claimant returned to his GP on 20 September 2016 [181]. The notes state "doing well on BB – no SE or concerns no CVS/RS sx". The reference to "BB" is to the Atenolol, a beta blocker, "SE" refers to side effects, "CVS" to cardio-vascular and "RS" to respiratory symptoms. In other words, the medical records show that the Claimant did not show any side effects of the Atenolol and had no other symptoms.

16. The Claimant had another GP consultation on 22 September [182]. At this consultation he noted that the Atenolol made him feel lethargic, so the plan altered to replace the Atenolol with a different drug, Bisoprolol, starting at a 2.5 mg dose and increasing as necessary.

17. The next consultation was on 29 September 2016 [182]. The notes indicate no issues with the Bisoprolol, that the Claimant was well and had lost some weight. There was a further consultation on 4 October 2016 [182] at which it is noted "doing well – no issues".

18. This pattern continues throughout. That is the Claimant has no symptoms noted as arising from the AF, no side effects of the Bisoprolol and is "well" throughout each consultation dealing with the AF. The Claimant's evidence is essentially that he agrees that the notes say what they say, he could hardly do otherwise, but that they do not say everything. In his witness statement the Claimant says that whilst on holiday in October 2016 he had shortness of breath, would sweat profusely, had a high heart rate and that he would lose the thread of conversations. However, it is noted at the consultation with his GP on 17 November 2016, so after his return from the holiday, "History: nil issues whilst away…slight ache" ([183]). I prefer the evidence in the medical notes to that in the Claimant's witness statement. I do not accept the Claimant's argument that he did mention the matters I have referred to but that his notes do not. The shortness of breath for example, is a known potential side effect of beta blockers and the Claimant had suffered when on Atenolol as a result of which his medication was switched. I find that if he had mentioned these issues the doctor would have noted them as medically significant and again sough ttio have altered the medication. I also find that had that not happened, the Claimant, who is clearly well-informed and articulate, would have specifically wanted to discuss the medication issue with his GP. In fact, as we noted at the

hearing, not only was the Bisoprolol not altered for another beta blocker, the dosage was in fact increased from which I conclude that the drug was being effective and not having the effects which the Claimant sets out in his witness statement. Further GP appointments regarding the AF took place on 16 December 23016 [184]: "nil issues", 16 March 2017 [185] "no episodes of palp since last time", 21 April 2017 [185] "nil CVS/rs sx no palp", 19 May 2017 [186] "doing well no issues" and 6 July 2017 [188] "doing well nil sx".

19. I also note that in his occupational health report of 29 March 2017 it is noted that the Claimant "reports that he is able to manage all his domestic activities without difficulty. He has no difficulty driving and keeps himself active by gardening and walking" [139].

Stress and anxiety

20. The Claimant says that he was under considerable work-related stress "at the time of my Atrial Fibrillation diagnosis in September 2016". The appellant was suspended from work in July 2017 and did not attend for work again.

21. There is no reference in the medical notes to stress until 16 March 2017 [185]. That refers only to the Claimant being offered counselling "due to stress" with nor reference to that being work-related. In an occupational health report prepared on 29 March 2017 it is noted that "Mr Czerniak is also experiencing some degree of work related stress as a result of an unsatisfactory relationship with one of his managers" [138].

22. At a further occupational health appointment on 5 January 2018 it was noted that the Claimant "describes work related stress relating to the original investigation" [141].

23. There are two other references to note from the medical records in relation to stress. These are a reference to "very busy/stressful job" [177], in August 2016, and to "problems at work" on 31 January 2018 [194].

24. It would not appear that the Claimant was prescribed any medication for stress. He says that he undertook some counselling sessions privately, but he has provided no evidence of these.

Back pain

25. The Claimant is a keen cyclist. Unfortunately, he was involved in an accident on 27 October 2017 and suffered a fractured lumbar spine, called a wedge fracture, for which he received treatment by way of vertebroplasty, a treatment that involves the injection of a type of acrylic cement, and a morphine-based painkiller. The Claimant was discharged from hospital care on 12 December 2017.

26. In his claim form the Claimant states that he continues to use morphine [17 at para 12] (so as at November 2019). However, his medical notes for 28 November 2018 show no pain, that the Claimant walks 5 to 6 miles per day and enjoys gardening and DIY [385/386]. In cross-examination the Claimant said

that he had not been tasking morphine since March 2018. I accept his evidence on that point.

TIA

27. The Claimant concedes that this impairment was not long term in that he had the TIA on 9 July 2017, received treatment and had no symptoms after 11 July 2017. He does not therefore pursue this as a separate disability, but it is to be considered in relation to 'cumulative' effects.

Discussion and conclusion

28. I am asked to determine whether the Claimant is disabled in relation to his AF, back pain or stress or cumulatively in relation to any combination of AF, back pain, stress and TIA. I shall deal first with each impairment separately.

29. I turn first to the question of what an impairment is. The EHRC Guidance on determining whether a person has an impairment reminds us that the definition of disability in s.6 of the 2010 Act requires that the effects which a person may experience must arise from a physical or mental impairment. It goes on to say:

> *The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects. Whether a person is disabled for the purposes of the Act is generally determined by reference to the* ***effect*** *that an impairment has on that person's ability to carry out normal day-to-day activities.*

30. In **Rugamer v Sony Music Entertainment UK Ltd [2001] IRLR 664**, the EAT defined *"impairment"* in the following way (at [34]):

> *"Impairment" for this purpose and in this context, has in our judgment to mean some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition. The phrase 'physical or mental impairment' refers to a person having (in everyday language) something wrong with them physically, or something wrong with them mentally."*

31. It seems to me therefore that it is not always necessary to consider the alleged effects of the purported impairments which the Claimant contends for before a decision can be made on whether the alleged impairments are indeed such. However, in some cases that will be necessary.

32. As to physical impairments, in **College of Ripon and York St John v Hobbs 2002 IRLR 185** it was held that a person has a physical impairment if he or she has "*something wrong with them physically*". As to a mental impairment, the Court of Appeal established that the term *"mental impairment"* should be given its *"natural and ordinary meaning",* and the Tribunal should use its *"good sense"* to make a decision whether the claimant is suffering from a mental impairment on the facts of each case (per Mummery J in **McNicol v Balfour Beatty Rail Maintenance Ltd [2002] EWCA Civ 1074**)**.** This is echoed in the EHRC Guidance, at paragraph A3.

33. I also note that I must take account of medical treatment in my analysis. Schedule 1, para 5(1) of the Act 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" includes, in particular, medical treatment and the use of a prosthesis or other aid.*

34. The guidance provides that this provision includes treatments such as counselling, the need to follow a particular diet and therapies in addition to drug treatments. This provision applies even if the treatment results in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment.

35. In relation to substantial adverse effect, the EHRC Guidance confirms as follows:

> *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. This is stated in the* ***Act at S212(1)****.*

36. Finally, in relation to whether the adverse effect is long-term, the EHRC Guidance says:

> ***The Act states*** *that, for the purpose of deciding whether a person is disabled, a long-term effect of an impairment is one:*
>
> - *which has lasted at least 12 months; or*

- *where the total period for which it lasts, from the time of the first onset, is likely to be at least 12 months; or*
- *which is likely to last for the rest of the life of the person affected*

*(**Sch1, Para 2**).*

Special provisions apply when determining whether the effects of an impairment that has fluctuating or recurring effects are long-term.

Back issue

37. As to effect, it is quite clear from the medical evidence that the Claimant's back issue had 'adverse effects' on his ability to carry out normal day to day activities. He had pain such that he had to take a strong painkiller and for a period his mobility was adversely affected. However, those effects ceased around March 2018. I note that the medical notes for 5 March 2018 [374] state that the Claimant was "active and keen to improve further" and had merely a lower back "ache". There is no further mention of the back issue until 28 November 2018. I accept that from time to time the Claimant continues to take paracetamol as a painkiller, however, as I set out above, his medical notes for 28 November 2018 show no pain in relation to his back, that the Claimant was then walking 5 to 6 miles per day and enjoyed gardening and DIY [385/386]. There is no mention of him having to use a stick or any other support for walking or that the walking was anything other than as normal. There is no suggestion that the gardening or the DIY was in any way limited. I appreciate that the Claimant says something different about this both in his claim form and witness statement, but as I have said above, where there is a conflict, I prefer what is contained in the medical evidence for the reasons I have given. I also appreciate that these were the things which the Claimant could do, and the focus is upon what the alleged disabled person cannot do. However, in this case those amount to the same thing since the Claimant was suspended his activities were by way of leisure and his evidence was that these were principally walking, gardening and DIY, all of which he could do. He did not refer in his evidence, and there is nothing in the medical notes to suggest that there was any normal day to day activities he could not do or only do with limitations.

38. Taking all of the above into account, I find that the Claimant's back issue was an impairment which had an adverse effect on his ability to carry out normal day to day activities for a period of around 4 to 5 months (October 2017 to March 2018). There is no evidence that activity-limiting pain is likely to recur or last for the rest of the Claimant's life and therefore in my judgment the back pain does not meet the definition of long-term required by s.6 of the Act and therefore the Claimant is not and never was disabled by reason of his back problem.

AF

39. As set out above, the AF has always been noted as asymptomatic, that is presenting no symptoms of disease. That does not of course mean that there is no disease and clearly the Claimant has and continues to have AF albeit now managed by beta blockers. I of course have to consider what the deduced effect is, i.e. if the medication was removed would there be an adverse effect on the Claimant's ability to carry out normal day to day activities?

40. The evidence was clear that the AF, whilst increasing the risk of, for example stroke, was asymptomatic and there is no suggestion that the AF limited the Claimant in any way before it was spotted at a routine medical appointment. It is possible that over time the AF may have become symptomatic, but there is no evidence from which I can conclude that and to do so would be mere assumption on my part. I conclude that the AF had no adverse effect on the Claimant's ability to carry out normal day to day activities and thus does not meet the definition of disability within s.6 of the 2010 Act.

Stress/anxiety

41. I should state first that there is no reference to anxiety in the medical evidence. There is some reference to stress as I have set out above.

42. The first reference to stress is on 16 March 2017, the last is on 5 January 2018. The Claimant says that notwithstanding his suspension from work in July 2017, his "work related stress", as he describes it, continued as his career was under threat. That is perhaps entirely understandable. I do not consider that the absence of references to stress in the medical notes is necessarily definitive. Unlike the back issue, the TIA and the AF, the doctors and nurses who regularly saw the Claimant were likely, it seems to me, to be surprised that the Claimant was stressed given his medical issues. The absence of medication specifically for stress is also unsurprising given he is already on a beta blocker. I consider it possible therefore that the Claimant has been suffering with stress from March 2017 and that if work-related, this continued until his employment terminated on 27 July 2018. Thus, he may have had an impairment throughout that period. The issue would be whether that stress had a substantial adverse effect on the Claimant's ability to carry out normal day to day activities. I have read carefully the Claimant's witness statement at paragraphs 19 to 38 where he deals with stress. Much of this is a narrative about what took place at work and why the Claimant says he was stressed as a result. There is almost nothing on the effect of the stress on normal day to day activities. The most the Claimant says is that his appetite "fell away" and he had some trouble sleeping (para 29, witness statement at [114]).

43. I note the cases of **J v DLA Piper [2010] ICR 1052** and **Herry v Dudley Metropolitan Council UKEAT/0100/16/LA**. In **J** there was said the EAT, a distinction between two states of affairs which can produce broadly similar symptoms of low mood and anxiety. The first described depression as a 'mental illness' or 'clinical depression,' which it was asserted is an impairment under the 2010 Act. The second, according to the EAT 'is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon be forgiven – "adverse life events"'. The

EAT in **Herry** took a similar approach to diagnoses of 'stress' as **J** had done to 'depression'.

44. As was the case is **Herry**, the Claimant here has given little or no evidence that his condition of stress had any impact on his day-to-day activities, other than his absence from work, his loss of appetite and some sleeplessness. In fact there is a dearth of information in the medical documents as to the nature of the "work related stress" the Claimant contends for although when he does refer to stress it is to stress which is work-related and to that end I find that such stress as there is in this case is to "adverse life events" including his work issues, and given that, given the lack of detail about the stress and about its effect, I find that the evidence falls far short of showing that the stress meets the definition of an impairment under the 2010 Act, or that if it did, there was any long term effect on the Claimant's ability to carry out normal day to day activities.

TIA

45. It is conceded that the TIA is not a disability in and of itself.

Cumulative effect

46. In relation to the cumulative effect the EHRC Guidance says as follows:

> *B4. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.*
>
> *B5. For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.*

47. I have considered this, but one thing permeates this case above all else which is that there is precious little evidence of any adverse effect on normal day to day activities save for the back problem for a relatively short period. I accept that the Claimant was affected adversely by the Atenolol, in that it made him lethargic, but first, that was for a very short period and, second it did not overlap with the back issue. Given my findings above I find that none of the impairments contended for amount separately or together to a disability for the purposes of s.6 of the Equality Act 2010.

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Employment Judge Brewer

Date__16 January 2020_____

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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