



EMPLOYMENT TRIBUNALS

Claimant:

Mrs C Tennant

Respondent:

Tesco Stores Limited

v

Heard at:

Reading

On: 19 December 2018

Before:

Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant: Mr P Linstead (Counsel)

For the Respondent: Mr D Massarella (Counsel)

RESERVED JUDGMENT ON HEARING OF A PRELIMINARY ISSUE

The claimant is a disabled person within the meaning of section 6 Equality Act 2010.

REASONS

1. The preliminary issue that I have to decide is whether at the relevant time, September 2016 until September 2017, the claimant was a disabled person within the meaning of section 6 Equality Act 2010.
2. The claimant contends that she is a disabled person by reason of depression. The claimant says that she began to become "quite unwell as a result of the issues at work in July 2016." The claimant describes being tearful, starting to avoid situations and people, having mood swings, being confused about what she was doing, struggling with concentration, feeling tired, getting headaches and physically sick.
3. The claimant's GP records show that she complained of stress at work in September 2016, there is reference to the claimant suffering from low mood and anhedonia: she was unfit to work and was given a fit note document that signed her off work from 23 September 2016 to 7 October 2016.
4. In this period the claimant was able to take holiday in Ireland. The claimant informed occupational health that her absence at this time was due to a breakdown in working relationships with her Lead Manager and that her capability at work was not an issue. The claimant told occupational health that she felt unmotivated to get out of bed and she is able to carry out daily activities

without assistance. The occupational health opinion at that time was that the effect of the health condition is not substantial.

5. In September 2016 the claimant was prescribed citalopram. The claimant was reviewed by her GP on the 11 October 2016 for her low mood, her medication of citalopram was increased from 10mg per day to 20mg per day. A further fit note was issued signing her off as unfit to work from 7 October 2016 to 25 October 2016.
6. The claimant returned to work at the beginning of November 2016. In this period the claimant describes her concentration as bad and says that she was struggling with things she once could do "without thinking about it". She would shake uncontrollably and panic.
7. On 21 November 2016 the claimant saw her GP for review of her low mood she continued to complain of ongoing stress at work. In December 2016 the claimant was diagnosed with depression. She was issued with a further fit note which signed her off unfit to work from 25 November 2016 to 5 January 2017.
8. The claimant had a telephone referral to occupational health in December 2016. The claimant told occupational health that she was absent from work at this time because she felt pressure to achieve objectives which she had not agreed or been consulted on. The claimant mentioned that her condition affects her personal life but did not want to describe it in detail. Occupational health described the condition as going on since July 2016 and stated that the longer the issue (work issues) remain unresolved the longer the health condition will be affected.
9. In the period from March 2017 onwards the claimant describes how she lost interest in all things she used to enjoy. She describes previously having an active social life involving her family, her work colleagues and her church. From about the time she put in her second grievance the claimant complains that she could not control her sleep pattern. The claimant goes from sleeping a lot to not being able to sleep for days. The claimant explains that if she makes plans she would cancel at the last minute. The claimant describes a panic attack when she went for a walk to the shop. By this time the claimant no longer cooks, cleans, does ironing, or goes shopping. The claimant cannot drive more than short distances. Her concentration is bad. The claimant had some counselling which helped a little.
10. The claimant makes a supplemental statement. The claimant points out that she started to experience issues at work relating to concentration and memory from July 2016. She suffered lethargy and anhedonia since September 2016. She puts these effects down to her depression. The claimant's inability to perform household chores and look after her own appearance she points to at the period from November 2016.

11. The claimant's GP provides a brief report, dated 28 August 2018, in which she states that: "Mrs Tennant has been seen regularly for review at her GP Surgery at least for the last 12 months as she was diagnosed with anxiety and depression in September 2017, which was thought to be as a consequence of stress at work." This conflicts with the GP records which show the first reference to depression from the GP in December 2016. A more detailed report was provided by the claimant's GP on 10 October 2018 (p119CC) in response to a request from the claimant's solicitor (p119Z).
12. The claimant was cross examined about the differences in her evidence as set out in the impact statement (p119O) and as set out in the supplemental statement (p269C). The claimant denied that there was any significant conflict but accepted that the supplemental statement provided more detail about significant symptoms. The cross examination pointed to the GP records and the claimant's impact statement making no reference to the depression or symptoms of depression in the period between July and 5 September 2016. No reference to problems with concentration in the first report from the GP (p119X) and no reference to memory or concentration in the second medical report (p119CC) in the period July to September 2016. The claimant's condition as set out in the supplemental statement and in her evidence in cross examination was said to be shifting her later condition to the period July to September 2016, the claimant insisted that she has suffered as described throughout the period, but that it was not until September 2016 that she went to see the GP. It was also put to the claimant that the description that she gives to her condition as set out in impact statement at paragraph 8 (corrected by the supplemental statement) suggesting that the claimant was incapacitated (in the way set out in the letter from the claimant's solicitor to the claimant's GP (p119AA)) by about November 2016, was not an accurate reflection of her condition as the claimant was able to raise a grievance and attend a grievance hearing in November 2016. It was said that in maintaining the grievance, the claimant showed an excellent memory for detail. The claimant's response was that it took her long time to do it, it was hard and that her husband had to assist her by checking over it.
13. Section 6 Equality Act 2010 provides that a person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
14. An impairment is substantial if it is more than minor or trivial.
15. The effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected.
16. The time at which to assess the disability (i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the

date of the alleged discriminatory act. This is also the material time when determining whether the impairment has a long-term effect.

17. An employment tribunal is entitled to infer, on the basis of the evidence presented to it, that an impairment found to have existed by a medical expert at the date of a medical examination was also in existence at the time of the alleged act of discrimination.
18. I must not ask what is presented about claimant's disability at the time of the hearing, but what did the employer know or ought to have known of the employee's disability at the relevant time. As I understand the position, today it is accepted (or may be accepted) that the claimant is a disabled person within the definition in section 6: it is not accepted that at the relevant time the claimant was disabled.

Parties submissions

19. The respondent says that there is an evidential lacuna in the claimant's case. There is no evidence of prognosis, there is no evidence of the impairment lasting twelve months. There is no evidence of impairment from the period after June 2016 until September 2016. The GP records do not show an impairment and the second GP report (p119CC) is criticised on the basis that the GP must be reliant on his own records and her own records and her records do not show an impairment in this period. The claimant's evidence of an impairment in the period July to September 2016 is questioned in respect of her credibility; there are no GP visits; there is the difference in the content of the claimant's impact statement and the supplemental statement. The respondent criticised the claimant's evidence as set out in paragraph 8 of the impact statement. The claimant clarified in the supplemental statement that the matters referred to in paragraph 8 refer to the period from November 2016. The respondent questioned the credibility of the claimant's evidence on this because the claimant raised her grievance in November 2016 and attend a grievance hearing: showing that she was not incapacitated at the time as suggested on her behalf. The respondent says that the first reference to depression on the GP records is on 1 December 2016. The respondent says that the claimant failed to show that she was disabled at the relevant time because she refers to a time period which is March 2017 to March 2018 and not the relevant period in her evidence.
20. I have been provided with a written submission from the claimant which were amplified with further oral submissions.

Conclusions

21. The claimant has from the evidence been able to show that she has suffered from depression or low mood for period at least since September 2016. I reject

the contention that there is any evidence of a mental impairment in the period prior to September 2016. I take into account the clear evidence of an impairment by December 2016 to infer that when the claimant is complaining of low mood in September 2016, she in fact was referring to the same malaise which is referred to as depression in 1 December 2016. The claimant has in my view established that she had a mental impairment within the meaning of section 6.

22. The claimant has in my view also been able to show on the evidence that the mental impairment causes her to suffer substantial adverse effects in her ability to carry out normal day to day activities. I recognise the criticism made by the respondent of the way that the claimant's evidence has been presented in the impact statement and the supplemental statement. The effect of that criticism leaves me to conclude that when considering the claimant's description of the effect that mental impairment had on her is that it waxes and wanes: the claimant will have good days and bad days. I am satisfied that the claimant accurately describes the effect of the depression on her ability to carry out day to day activities, but this is not a constant state that is being described by the claimant. I am satisfied however that while presenting the grievance she would have been in a better able to cope but I accept her evidence that the effects were still present and she worked around them by getting assistance from her husband and adopting other coping strategy she described in her evidence when cross examined about her condition at the time of the grievance.
23. The issue that has given me the most cause for concern in the question whether the claimant's effect of the impairment was a long-term. The relevant period for the purposes of this case is from September 2016 until 11 September 2017. The effect of an impairment is long term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected.
24. There is no evidence from which I am able to conclude that the effect of the impairment is likely to last the rest of the life if the claimant. There is as the respondent pointed out no evidence of prognosis at the relevant time. The issue was simply not addressed on the evidence presented before me.
25. Does the evidence show that the relevant time the effect of the impairment has lasted 12 months? I am satisfied that the evidence does show that the effect of the impairment had lasted 12 months, and the claimant is a disabled person. The evidence shows from GP records that on 6 September 2016 the claimant presented to her GP with a problem of stress at work. The notes under history record:
"building up for a few mths since move to new Tesco store – manager- feels being accused of issues which aren't true – feels is doing a good job, and fulfilling all requirements but new management do not see it that way. Finds herself tearful a lot. Supportive husband. Has d/w HR and management but not

really getting anywhere. Signed herself off late last week – has told them its work related . Feels achieving all goals and has no idea what the problem is no thought dsh but anhedonia, lethargy etc. tearful.”

26. The claimant was signed off work with a diagnosis of stress at work. I am satisfied that the claimant's description of the effects of the depression she describes apply to her on 6 September 2016. The claimant's account to occupational health on 28 September 2016 resulted in occupational health making the following record: Although Catherine says there are days when she feels unmotivated to get out of bed, she is able to carry daily activities without assistance” and “in my opinion the effect of the health condition is currently not substantial” (p77). I note that the claimant in her evidence has dealt with this when she stated that in this interview, she stated that she thought she was referring to basic household chores such as cooking and cleaning which she was able to do at that time. I accept that explanation given by the claimant it appears credible to me. I also note that the claimant's approach towards her discussions about her personal life with occupational health was “not to want to describe them in detail.” In addition, I accept as likely to be correct the claimant's explanation that she understated her condition in her original impact statement.
27. The claimant's condition has continued until today and was subsisting on the 11 September 2017. At the relevant time the effect of the impairment had lasted for at least 12 months and so was long term.
28. The claimant is a disabled person within the meaning of section 6 Equality Act 2010.

Employment Judge Gumbiti-Zimuto

Date: 31 December 2018

Sent to the parties on:

.....
For the Tribunals Office