



EMPLOYMENT TRIBUNALS

Claimant: Miss A Digpal

Respondent: SLG Marketing Limited

Heard at: Manchester

On: 21 January 2020

Before: Employment Judge Phil Allen
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr A Sugarman, Counsel

JUDGMENT AT A PRELIMINARY HEARING

The judgment of the Employment Tribunal is that the claimant was not a disabled person in January 2019. Her claims of disability discrimination are therefore not well-founded and are dismissed.

REASONS

Introduction

1. The preliminary hearing was ordered by Employment Judge Franey at a preliminary hearing held on 27 September 2019. The preliminary hearing was to determine two issues as identified below, and if the case proceeded to make Case Management Orders.

2. The claimant was employed as a Senior Account Executive by the respondent from January 2018 until 21 January 2019. The respondent says she was dismissed because of a combination of concerns about her performance, conduct and absence record. The claimant alleges that she was a disabled person by reason of

depression and anxiety. She alleges that the dismissal amounted to discrimination arising from disability and that the respondent had failed to make reasonable adjustments.

The Issues

3. The issues to be determined at the preliminary hearing were as follows:
 - (1) Whether the claimant was in January 2019 a disabled person by reason of depression and anxiety; and
 - (2) If so, whether the respondent can prove that it did not know and could not reasonably have been expected to have known this.

Preparation for hearing

4. The claimant was unable to attend the previous preliminary hearing on 27 September 2019 as a result of her mother's ill health. She had not therefore been able to clarify her claim, nor had she been present when orders were made. Nonetheless a Case Management Order was sent to the parties which contained a case management summary and a series of Orders.

5. Paragraph 19 of the case management summary explained that the claimant would need to provide a witness statement setting out all the facts she relied upon in support of her contention that her anxiety and depression in January 2019 amounted to a mental impairment which had a substantial adverse effect upon her day-to-day activities which had already lasted for 12 months or which was likely to last for 12 months. It was also explained that she should also say in that statement how she said the respondent knew or ought reasonably to have been aware of this. What was required was confirmed at Order 3.2. There was also an Order made for disclosure of all medical records in her possession or control relevant to the issue.

6. The claimant did not prepare a statement of evidence or a witness statement written by her in advance of the preliminary hearing. The claimant relied upon three documents which contained medical evidence. One of these, a statement dated 13 December 2019, was written by a Ms Onwuemene, a psychotherapist. The claimant's position was that the statement of Ms Onwuemene was her witness statement and was the evidence upon which she wished to rely at the hearing.

The Hearing

7. The claimant represented herself throughout the hearing. The respondent was represented by Mr Sugarman of counsel.

8. The Tribunal considered an agreed bundle which ran to 126 pages. One additional page/document was produced by the respondent at lunchtime during the hearing and was added to the bundle.

9. The Tribunal heard evidence from the claimant. The claimant adopted the statement of Ms Onwuemene, referred to above, as her own witness statement. She was also cross examined and asked questions by the Tribunal.

10. The Tribunal also heard evidence from the following witnesses on behalf of the respondent: Mrs J Malone, the respondent's Managing Director; Mr R Jones, the respondent's Head of Client Services; Mr D McLeod, an Account Director with the respondent; and Miss C Henderson, someone who had previously been the claimant's line manager when she was employed by the respondent, but who was no longer employed by the respondent. Each of these witnesses were cross examined by the claimant.

11. At the conclusion of the evidence, each party made submissions (albeit the claimant had little to add to the evidence which had been presented). At the conclusion of submissions, there was insufficient time available on the day of hearing for judgment to be determined and delivered. The Tribunal did however make directions (the case had already been listed for a final hearing), so that the case could progress to final hearing if the claimant were to succeed in the preliminary issues. Judgment on the preliminary issues was reserved.

12. Based on the evidence heard and insofar as relevant to the issues that must be determined, the Tribunal makes the findings set out below.

Findings of Fact

Medical Evidence

13. The claimant provided three medical reports to the Tribunal.

14. A report of 28 February 2019 was prepared by Dr Elias, a GP (page 123). Dr Elias records that the claimant *"has been troubled with anxiety and depression since 2012"*. Dr Elias also records that the claimant has been seen regularly over the years, has been on antidepressants, and has recently had her dose of medication increased. The report confirms that the claimant has had counselling in the past and needs regular reviews.

15. The other two reports were prepared by Ms Onwuemene (a psychotherapist): one dated 11 March 2019 (122); and one dated 13 December 2019. These confirm that Ms Onwuemene had met regularly with the claimant since March 2017. The symptoms as at March 2017 are described as *"tearfulness, fearfulness and loss of motivation"*. The March 2019 report recounts the claimant's success in making steady progress and maintaining good mental health for long periods of time. The December 2019 report confirms that at the initial assessment in March 2017 the claimant was thought to be showing signs of clinical depression and generalised anxiety disorder. It goes on to recount the positive impact that support and counselling had had on the claimant's mental health issues. The claimant is described as previously having been prescribed a particular drug by her GP. What that report says about the impact of the claimant's condition on her in March 2017 was *"at that time [she] displayed symptoms of fearfulness, tearfulness a lack of appetite and a lack of hopefulness that negatively impacted on her life at that time"*.

The report contains no description of the impact of the claimant's condition upon her at the time of the report, save for describing that concurrent symptoms are ongoing.

The claimant's evidence about her condition

16. In the absence of any witness statement from the claimant, the only evidence prepared in advance of the hearing which she provided in relation to the impact that her impairment had upon her, was that recounted above. The respondent's representative did cross examine the claimant about her condition and the impact it had upon her. The claimant also answered questions from the Tribunal. The claimant confirmed that she had been taking the medication described for two or three years, and had continued to take it since it was first prescribed. She described how, on occasion when her prescription ran out for example, she would cease to take it for three or four days but that had not had any particular impact upon her. She confirmed in evidence that she believed that if she ceased to take it she would be a lot less functional. When asked what she meant by "*functional*" she described how it would be harder to do day-to-day things and consequently she would be tearful. The claimant gave no other evidence about any impact her condition had upon her.

The claimant's health leading up to January 2019

17. The Tribunal heard evidence about the claimant's time with the respondent. The respondent recorded that the claimant had had 28 days off work in her time with the respondent (106). The claimant disputed the respondent's records and contended that she had less time off than they recorded. What was not in contention was that, of those days of absence, ten were as a result of whiplash which resulted from a car crash, and the majority of the other days were for other miscellaneous issues unrelated to the alleged disability. The claimant confirmed that the only absence from work which resulted from the condition upon which she relied as being a disability, were 14 days between 13 and 31 August 2018. That absence was certificated by the claimant's GP as being by reason of anxiety and stress (71). The fit note recorded that the claimant was not fit to work in that period, but also stated that the GP did not need to assess the claimant's fitness for work again before she returned to work. It was not in dispute that, in fact, the claimant had contacted the respondent and asked to return to work before the fit note expired. There was no other absence related to the claimant's alleged disability prior to her dismissal on 21 January 2019.

The respondent's knowledge

18. The majority of the evidence heard by the Tribunal related to the respondent's knowledge of the claimant's ill health.

19. There was a dispute between the evidence of the claimant and the respondent's witnesses about what she had told them and whether they were aware of her having previously suffered from mental health issues. The claimant's evidence (in response to questions) was that she had informed Ms Henderson and Mr Jones about her previous mental health issues. Mr Jones, Mr McLeod and Ms Henderson all denied that the claimant had done so. The person who was most aware of issues about the claimant's health was Miss Henderson, for the reasons explained below.

20. In or around August 2018, the claimant was assaulted by someone known to her and, as a result, needed to move home. She was also concerned about being followed by the assailant. That issue preceded the claimant's period away from work due to anxiety and stress described above. The claimant informed the respondent about the event and the respondent endeavoured to assist her at the time. In particular, the claimant and Miss Henderson discussed the assault and the related issues.

21. At about the same time, the claimant texted Miss Henderson referring to the need to attend an appointment with her counsellor (a text which was shown to the Tribunal). Miss Henderson's evidence was that she understood the need for the claimant to see a counsellor followed the issues. Prior to the August incident there been a conversation between the claimant and Miss Henderson about the fact that the claimant had received counselling previously (as the claimant was recommending a particular counsellor to Miss Henderson). Miss Henderson's evidence was that she believed that the claimant's counselling had related to a previous issue with an ex-boyfriend rather than any significant underlying health issue. The claimant placed some emphasis upon this text, which she believed evidenced that the respondent was aware of her disability. What it evidenced was that the respondent was aware that the claimant was attending counselling.

22. The Tribunal heard some evidence about a return to work interview which was undertaken by telephone by Miss Henderson with the claimant. That telephone conversation appears to have focussed upon whether the claimant was fit enough and able to return to work following the incident and the events.

23. The Tribunal heard evidence that the claimant, on occasion, cried in the office following her return to work after the August events. Miss Henderson's evidence was that she thought this related to the events of August and she did not consider it to be surprising because of the events of which she was aware.

24. In common with the respondent's other witnesses, Mrs Malone's evidence was that while she was employed the claimant did not refer when speaking to her to any historic mental health issues. However, after the claimant was dismissed she appealed against the dismissal in writing in a letter dated 30 January 2019 (82). That letter explicitly relies upon disability discrimination. The claimant also alleges disability discrimination in a grievance she raised on the same date (84). Mrs Malone heard the appeal and grievance on 27 February 2019. There were notes available to the Tribunal which recorded what was said in that hearing (89-93). In that hearing the claimant stated that she had a disability, alleged that she was being discriminated against, and her trade union representative expressly refers to the days of sickness absence in this respect – with stress being mentioned. The statement of case for the grievance (97) explains that the absence was disability-related. Mrs Malone did not uphold the appeal or the grievance and her decision letter, dated 11 March (105-111), responds to the issues by stating that in Mrs Malone's view at no point were the respondent told nor could it have reasonably known that the claimant had a long term disability.

25. In terms of any points of dispute, the Tribunal prefers the evidence of the respondent's witnesses about what they knew about the claimant's mental health. The evidence of the respondent's witnesses was clear and recorded in their statements (supported by their answering of questions). The claimant had not prepared a statement which contained any reference whatsoever to what she had informed the respondent and her recollection about what she had told the respondent's employees in answering questions was vague and imprecise. In her answers the claimant placed great emphasis upon the text message referred to above which she asserted evidenced that the respondent's witnesses were aware of her having a history of mental health issues, when in fact all the text message evidenced was that the respondent was aware that the claimant was seeing a counsellor.

The Law

26. It is for the claimant to prove that she had a disability at the relevant time.

27. Section 6 of the Equality Act 2010 provides that:

"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."

28. Section 212 of the Equality Act 2010 defines "*Substantial*" as being more than minor or trivial.

29. Schedule 1 of the Equality Act 2010 also provides assistance in determining issues of disability. Section 2 of the Schedule describes what is a long-term effect:

"The effect of an impairment is long-term if –

(a) It has lasted for at least 12 months,

(b) It is likely to last for at least 12 months, or

(c) It is likely to last for the rest of the life of the person affected. "

30. Section 5 of the Schedule relates to the effect of medical treatment. That says:

"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."

31. The Employment Tribunal also took into account the guidance on matters to be taken into account in determining questions relating to the definition of disability issued by the Secretary of State.

32. The questions to be asked by the Tribunal are:
- a. whether the claimant has a physical or mental impairment;
 - b. whether the impairment affected the claimant's ability to carry out normal day-to-day activities;
 - c. whether the effect on such activities was substantial (that is more than minor or trivial); and
 - d. whether the effects are 'long term'.
33. If the claimant has not established that she has a disability when these questions are considered, the tribunal needs to go on and consider what would the position be if measures taken by the claimant were not being taken.
34. In relation to knowledge, the respondent bears the burden of proving that it did not know and could not reasonably be expected to know that the claimant had the disability.
35. In the course of the respondent's submissions, the Tribunal highlighted the case of *Baldeh v Churches Housing Association of Dudley & Districts Limited [EAT/02290/18]*. This is authority for the fact that the appeal decision is a part of an employer's overall decision to dismiss an individual. This was raised in relation to the respondent's knowledge. If the appeal is part of the (potentially discriminatory) decision to dismiss, then what the respondent knew (or reasonably ought to have known) at the time of the appeal must be relevant in considering whether the dismissal is discriminatory.
36. In response, the respondent's representative highlighted the terms of Employment Judge Franey's Order which had said that the issue of disability was to be determined as at January 2019, and that the Tribunal needed to consider the issue identified when determining whether the appeal was part of the relevant period. In reaching its decision, the Tribunal does not accept that it is constrained by the terms of the issues to be determined from making a finding in respect of the respondent's knowledge as at the time of the appeal, nor does it find that the identification of January 2019 in the first question to be determined (about when the claimant was a disabled person) restricts the ambit of the second question (on knowledge) which has no date identified within it. In any event there was no suggestion that the respondent's evidence would have been any different had it identified prior to the hearing that knowledge as at the appeal might be relevant.

Discussion and Analysis

37. The claimant clearly had an impairment. The medical evidence records that the claimant was showing signs of clinical depression and generalised anxiety disorder from 2012. The reports also record that the claimant has successfully maintained good mental health for long periods of time.

38. It is for the claimant to demonstrate that her impairment has had a substantial long-term adverse effect on her ability to undertake normal day-to-day activities. There is very little evidence before the Tribunal about this.

39. The claimant gave no evidence of any day to day activities which she was unable to undertake. The claimant's impairment had only impacted upon her ability to attend at and undertake work with the respondent for two weeks and this occurred after a particularly distressing event. The claimant provided no other evidence about occasions when she was unable to attend at or undertake work.

40. The statement which the claimant relied upon and the evidence she gave related that she has been tearful as a result of her condition. However tearfulness is not evidence of an inability to undertake normal day-to-day activities, and the claimant's evidence was not that this had a significant impact upon her. The evidence available was that the claimant was able to attend work without being tearful for approximately a year leading up to January 2019, save for a period shortly after the events of August 2018.

41. It is clear that the claimant had first been assessed in March 2017. The only evidence available about March 2017 was that the claimant was thought to be showing signs of more serious conditions and that she had symptoms of fearfulness, tearfulness and a lack of hopefulness. Beyond those descriptors there was no evidence presented to the Tribunal which evidenced that the claimant's condition had impacted upon her ability to undertake day to day activities. It is the effect of the impairment which must have been long-term, not just the fact that the claimant had seen a medical professional over a period of more than a year. There is no evidence of an impact on day-to-day activities in 2017.

42. There were 14 days (or at least the portion of them before she wished to return to work) when the claimant's condition's impact meant that she was unable to attend work, following the incident in August 2018.

43. There was simply no evidence before the Tribunal which showed that the claimant's impairment had a substantial adverse effect on her ability to undertake normal day-to-day activities which had lasted for at least a year. There was no evidence at all about the likely duration of any impact in the future, as at January 2019.

44. In terms of measures, the claimant did not present any evidence to the Tribunal which proved what the impact on her condition would have been if measures had not been taken. The claimant's own evidence about what had occurred when she had ceased to take medication (briefly) was that it had no impact. The respondent correctly submitted that there was no evidence upon which the Tribunal could find that without medication the claimant's condition would have had a substantial adverse effect on her ability to undertake normal day-to-day activities. Whilst counselling may also be a measure and counselling had clearly been of benefit to the claimant, there was also no evidence available to show what the impact on the claimant would have been likely to have been if counselling had not been undertaken.

45. It is for the claimant to prove that she had a disability and she has not done so.

46. It is therefore not necessary for the Tribunal to go on and determine the issue of knowledge. Indeed as the Tribunal has found that the claimant did not have a disability at the relevant time, the respondent could not have had knowledge of it. However, as the majority of the evidence which the Tribunal heard was about knowledge, it is appropriate to summarise what is found.

47. The Tribunal finds that the respondent did not know that the claimant had a disability during employment. As confirmed in relation to the facts above, the respondent did know that: the claimant had attended a counsellor (both historically and after the events of August 2018); that the claimant was unable to work for a short period due to anxiety and stress in August 2018 (after a particularly stressful life event); and that the claimant was tearful in the office following her return to work after that event. The respondent's contention was that the period of absence was unsurprising in the light of the assault the claimant had suffered, and that all of the respondent's witnesses thought they had supported the claimant at the time and considered her absence to relate to a one-off significant event. The claimant's awareness of the matters identified, does not mean that the respondent had knowledge of the claimant's disability (even had it been found to be a disability). An employer does not know that an employee has a disability simply as a result of being aware that they have undertaken counselling or are doing so. The evidence of the respondent's witnesses, which the Tribunal finds to be accurate and genuine, was that they did not know any more than is described about any historic health issues the claimant may have had.

48. In terms of whether the respondent could not have reasonably been expected to know that the claimant had a disability, the factors outlined (attending counselling, the fit note and absence, and the tearfulness) are all capable of supporting an argument that the respondent should have reasonably been expected to know about the disability in other circumstances. However the events of August 2018 and what the respondent knew of those events, provides an explanation for those things which may have otherwise been indicators which could have meant the respondent should have reasonably been aware. In the context of that event, the respondent could not have been reasonably expected to know about the claimant's disability from those matters.

49. However, in contrast to the position during her employment, the Tribunal does find that the respondent was aware that the claimant had more significant mental health issues by the time of the appeal/grievance, as she told the respondent about her condition in her documents raising her appeal and grievance, and at the hearing. Even were it to be the case that the claimant did not inform the respondent of the disability itself, the respondent could certainly have been reasonably expected to know that the claimant had a disability in considering an appeal/grievance in which she alleges that she has been discriminated against on the grounds of disability (if her impairment had been found to be a disability). Accordingly, the Tribunal would have found that the respondent had the requisite knowledge at the time of the appeal, if the Tribunal had found that the claimant had a disability.

Orders

50. As confirmed above, at the preliminary hearing Orders were made for steps to be undertaken to prepare the case for hearing. The case has been listed for a final hearing on 8-10 June 2020. As a result of the Tribunal's Judgment on the preliminary issues, this final hearing is no longer required and the claimant's claim is dismissed. The Orders made at the end of the preliminary hearing therefore do not need to be complied with, and the dates for which the case had been listed for hearing in June 2020 will be vacated.

Conclusion

51. For the reasons given above, the conclusion of the Tribunal is that the claimant has not proved that she had a disability at the relevant time within the meaning of section 6 of the Equality Act 2010. As a result, the claimant's claims for disability discrimination (being the only claims she was pursuing) are dismissed.

Employment Judge Phil Allen

Date: 6 February 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

12 February 2020

FOR THE TRIBUNAL OFFICE

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