



EMPLOYMENT TRIBUNALS

Claimant: Mr A Clark

Respondent: Motus Group (UK) Limited t/a Pentagon Group

HELD AT: Sheffield **ON:** 20 January 2020

BEFORE: Employment Judge Brain

REPRESENTATION:

Claimant: Mr T Draper, Solicitor

Respondent: Miss L Amartey of Counsel

JUDGMENT having been sent to the parties on 30 January 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. These reasons are provided at the request of the respondent's solicitor.
2. The claimant presented his claim form on 30 July 2019. He brings complaints of unfair dismissal and disability discrimination. The claims arise out of the claimant's employment with the respondent.
3. The claimant worked for the respondent between 13 July 2007 and 15 May 2019. From around May 2017 until the end of his employment the claimant occupied the post of general sales manager.
4. This matter benefited from a private preliminary hearing which came before Employment Judge Rogerson on 24 September 2019. It was clarified that the disability discrimination complaints were of: indirect discrimination; unfavourable treatment for something arising in consequence of disability; and

an alleged failure by the respondent to make reasonable adjustments. Further particulars of the claimant's claim were filed by the claimant's solicitor on 28 October 2019.

5. It was also clarified at the private preliminary hearing that the claimant relies upon two separate impairments which he says meet the requirements of section 6 of the Equality Act 2010. These are: a mental impairment of anxiety and depression; and a physical impairment of atrial fibrillation.
6. Employment Judge Rogerson recorded that the respondent did not concede the claimant to be a disabled person for the purposes of either of these conditions. The respondent's position has subsequently altered. Miss Amartey confirmed today that the physical impairment of atrial fibrillation is accepted to be a disability by the respondent. However, the respondent puts in issue the question of whether or not the claimant is a disabled person by reason of the mental impairment of anxiety and depression.
7. Employment Judge Rogerson directed that there should be a public preliminary hearing to decide upon the issue of disability. In light of the respondent's concession about the physical impairment, the issue for determination today is the question of whether the claimant's anxiety and depression constitutes a disability for the purposes of the 2010 Act.
8. Section 6 of the 2010 Act provides that a person has a disability for the purposes of the 2010 Act if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day to day activities.
9. This means that:
 - The person claiming to be disabled must have an impairment that is either physical or mental (in this case, of course, the issue is around a mental impairment).
 - The impairment must have adverse effects which are substantial.
 - The substantial adverse effects must be long-term; and
 - The long-term substantial adverse effects must be effects on normal day to day activities.
10. The term "*impairment*" should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established. Whether a person is disabled for the purposes of the 2010 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.
11. The impairment must have adverse effects which are substantial; in this context, '*substantial*' means '*more than minor or trivial*'. 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.
12. The substantial effects must be long-term. 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.

13. The meaning of the term “*likely*” when determining whether an impairment has a long-term effect should be interpreted as meaning that it could well happen. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time that the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. It was common ground between the parties that in this case the material time for the purposes of the discrimination complained of is between January and May 2019. Therefore, I must assess the likelihood of an effect lasting for 12 months by reference to that period of time.
14. The long-term substantial adverse effects must be effects on normal day to day activities. The term “*normal day to day activities*” is not defined by the 2010 Act. In general, day to day activities are things people do on a regular or daily basis. Paragraph D3 of the ‘*Guidance on matters to be taken into account in determining questions relating to the definition of disability*’ gives as examples of day to day activities, “*shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities.*”
15. The appendix to the guidance contains an illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day to day activities. This includes difficulties in getting dressed, for example, because of physical restrictions and persistent general low motivation or loss of interest in everyday activities.
16. Paragraph D15 says that, “*some of the examples in this section show how an adverse effect may arise from either a physical or a mental impairment. Where illustrations of both types of impairment have been given, this does not mean that only one type of impairment could result in that particular effect. **Physical impairments can result in mental effects and mental impairments can have physical manifestations***”.
(Bold emphasis contained within the guidance).
17. The Tribunal heard evidence from the claimant. In paragraph 3 of his witness statement (described as his ‘*disability impact statement*’) he said that he considered the physical and mental impairments “whether taken together or separately, [to] constitute a disability for the purpose of the Equality Act 2010. However, it is also important to note that there is a correlation between the two medical conditions as when the symptoms of one are severe, this can exacerbate the other”.
18. I shall not record the evidence given by the claimant about the atrial fibrillation given that the respondent conceded this to be a disability. The respondent talks about his anxiety in paragraphs 19 to 44 of his witness statement.
19. In paragraph 19 he says, “I began to suffer with the symptoms of anxiety in or around January 2018. This got progressively worse over the next six months to the point where I had a panic attack at work on 25 June 2018. As a result of this panic attack I needed to attend an emergency appointment with my GP the same day. My doctor mentioned a generalised anxiety disorder at this appointment and suggested that I be signed off work for two weeks. I was also offered medication for anxiety at the same time (page 15 [of the bundle]). I did

not think this was necessary at the time as I thought that I could cope with the situation without medical help but I did report the content of the meeting with my doctor to Danny Whitehead [of the respondent] when I returned to work”.

20. He goes on to say in paragraph 20 that, “my symptoms continued and as a result, I visited my GP again on 7 January 2019. A diagnosis of anxiety was confirmed at this appointment and I was placed on a course of medication. I was also signed off from work at this point (page 16)”.
21. The claimant then, in paragraph 21, lists the main symptoms of his anxiety. These are:
 - Low mood (page 17).
 - Excessive worrying (page 17).
 - Insomnia (pages 16 and 19).
 - Lack of energy (page 20).
 - Lack of motivation (page 17).
 - Loss of libido (pages 17 and 20).
 - Trembling (page 20).
 - Sweating (pages 16, 19 and 21).
 - OCD thoughts (page 20).
 - Difficulty socialising.
 - Panic attacks (page 18).
 - Feeling constantly on the verge of tears (page 16).
22. The claimant says in paragraph 22 of his witness statement that, “to treat my anxiety, I was placed on 10mg Propranolol, a beta blocker to be taken twice per day, on 8 January 2019 (page 16). I subsequently attended my GP again on 22 January 2019 and the dosage was increased to 40mg (page 17). Unfortunately, this medication did not help my symptoms and on 19 February 2019 I was prescribed 50mg Sertraline to supplement the Propranolol (page 17). This dosage was also subsequently increased by my GP on 23 April 2019 to 100mg (page 19) and again on 7 August 2019 to 150mg (page 20). I take both medicines concurrently and continue to take them today”.
23. Paragraphs 23 to 44 contain a detailed description by the claimant of the effects of the mental impairment upon his day to day activities. That said, a difficulty for the claimant is that all of this evidence describes the effect as at the date of the preliminary hearing. This evidence does not assist the Tribunal in addressing the question of whether the mental impairment had a substantial adverse effect upon the claimant’s normal day to day activities and which had lasted 12 months or from the time of first onset was likely to last at least 12 months at the material time: that is to say, what was the position as from January 2019 to May 2019?
24. The page numbers of the bundle referred to in the passages set out above in paragraphs 19 to 22 these reasons are to copies of the claimant’s general practitioner’s notes. Page 15 contains an entry dated 25 June 2018. This is the day upon which the claimant says (in paragraph 19 of his witness statement) that he had a panic attack at work. It will be recalled that the claimant said that he began to suffer with the symptoms of anxiety in or around January 2018. The GP records a history of palpitations. There is then recorded that the claimant has “not had palpitations for some time – but today has had them

persisting for several hours ... aware of skipped beats". It is then recorded that the claimant had been "finding himself worrying about things quite a lot – feels that this is generalised ... probably the events of last year with his heart did not help ... stressors at work". The claimant was diagnosed with a generalised anxiety disorder a score of 7. He was given a leaflet should he wish to self-refer to a therapy service.

25. The record shows that the claimant did not visit his GP again until 7 January 2019. The GP records the history (at pages 15 and 16 of the bundle) in these terms:

"Last few months increased anxiety symptoms, over last four weeks panic symptoms, felt like gasping for breath at times." It then records the claimant as suffering from poor sleep. The record confirms the claimant's evidence (given in paragraph 22 of his witness statement) about being prescribed Propranolol on 8 January 2019 and the increase in dosage on 22 January 2019. Upon the latter date, the claimant visited his GP. The history is recorded as including, "discussed mood, anxious, worried and low at times. Now about six months". (I refer to page 17 of the bundle).
26. Page 17 also corroborates the evidence given by the claimant that on 19 February 2019 he was prescribed Sertraline to supplement the Propranolol. Here, the GP records the history as including, "displaying other problems of low mood, early morning wakening, lack of motivation, snappy, down, loss of libido."
27. From the material within the bundle (in particular, the copy of the GP's notes and records at pages 15 to 17 inclusive) I conclude that there was an adverse effect upon the claimant's normal day to day activities. In particular, there was an effect upon sleep (as corroborated in the note of 7 January 2019) and difficulty with normal social interaction (in particular strained relationship with his wife because of him being snappy and his loss of libido). The mental impairment impacted upon the day to day activity of relations with the claimant's wife.
28. The effect of the mental impairment upon these day to day activities is substantial. This is a low bar. It means more than minor or trivial. Upon any view, disturbed sleep and adverse impact upon his marital relationship is more than minor trivial.
29. The next question therefore is whether the mental impairment was long-term. Therefore, at the material time it must have lasted at least 12 months or where the total period for which it lasts, from the time of first onset, is likely to be at least 12 months. In this context, the word "*likely*" should be interpreted as meaning that it could well happen.
30. I agree with Miss Amartey that the claimant has failed to show that as at January 2019 (and indeed for the entire material time to May 2019) the claimant has not shown that the mental impairment had lasted at least 12 months. According to the passages in the GP records which I have cited, the claimant had been suffering from low mood, anxiety and worry for about six months as at 22 January 2019. This fits with what he had told the GP on 25 June 2018 (at page 15). The claimant did not say, on 25 June 2018, that he had been suffering from anxiety from around January 2018 as he contends at paragraph 19 of his witness statement. Therefore, I have insufficient evidence upon which basis to conclude that as at January 2019 and from then until May 2019 the

mental impairment had lasted at least 12 months. In my judgment, the substantial adverse effect upon day to day activities began to manifest itself only in June 2018.

31. In my judgment however, the claimant has established that as at January 2019, it can be said that (when assessing matters at that time) the mental impairment could well be anticipated to last for at least 12 months. The claimant informed his GP on 22 January 2019 that he had been suffering from low mood, anxiety and worry for about six months. This is corroborated by the fact that he went to see the GP about these symptoms on 25 June 2018. Therefore, by January 2019 the symptoms had been going on for six months. It is significant, in my judgment, that the GP prescribed medication in January 2019. In June 2018 the claimant was offered medication (which he declined) but was diagnosed with generalised anxiety disorder and given information by his GP about making a self-referral to therapy services. The claimant's account of mental impairment symptoms lasting for six months from June 2018 to January 2019 is therefore entirely credible. On 8 January 2019 the claimant was suffering from anxiety symptoms. Again, the suggestion of therapy was made by the claimant's GP. He was given anti-depressant medication. This was increased on 22 January 2019 and the anxiety symptoms on that date were noted to have lasted for around six months.
32. Therefore, by January 2019 the claimant had been suffering mood anxiety for six months. Medication was prescribed on 8 January and significantly increased on 22 January 2019. The GP recommended therapy in June 2018 and repeated the suggestion in January 2019. From this, I conclude that the claimant's condition had not improved and had become chronic over a six month' period during the second half of 2018. Projecting forward from January 2019, therefore, it is difficult to conclude anything other than that in January 2019 it could well happen the claimant's condition would last for a further six months (making an impairment for 12 months in total and thus satisfying the requirements of the 2010 Act).
33. In the light of this conclusion, it is unnecessary for me to consider whether or not the claimant's mental impairment was a progressive condition within the meaning of paragraph 8 of schedule 1 to the 2010 Act. Without coming to any definitive conclusion, I am inclined to accept Miss Amartey's submission that the progressive condition provisions within the 2010 Act are not applicable to the kind of impairments suffered by the claimant. Paragraph B20 of the guidance gives examples of progressive conditions which include systemic lupus erythematosus, various types of dementia and Motor Neuron Disease. These seem to be of a different order to that of anxiety and depression which, as Miss Amartey submitted, can come and go (in contrast to the kinds of conditions mentioned in paragraph 8 of schedule 1 to the 2010 Act).
34. Each party sought to advance their respective cases upon the basis of the impact of the atrial fibrillation upon the claimant's mental impairment. I have already cited paragraph D15 of the guidance which says that "*physical impairments can result in mental effects and mental impairments can have physical manifestations*". There was some discussion about this during the course of the hearing but it was not clear to the Tribunal how the issue of the impact of the physical impairment upon the mental impairment (or *vica versa*) advanced either the claimant's or the respondent's case. In the final analysis,

it is not necessary to consider how an impairment is caused. In my judgment, whatever the cause of the mental impairment, the claimant has satisfied me that the mental impairment in question meets the definition of disability in section 6 of the 2010 Act.

35. In her submissions, Miss Amartey sought to argue that the claimant's mental condition was not long-term (as defined by the Act) upon the basis of what was recorded in the disciplinary and grievance appeal hearing notes commencing at page 178 of the bundle and in the claimant's statement for the disciplinary and grievance proceedings commencing at page 191. The point being made upon on behalf of the respondent was that the claimant's anxiety was a reaction to the disciplinary and grievance process. It was therefore not likely to last 12 months given that the domestic proceedings would take a shorter period than that to deal with. (The claimant in fact took issue with the accuracy of the disciplinary and grievance appeal hearing minutes. In particular, he disputed the entry at page 182 regarding his domestic circumstances. This may be something which is aired at the substantive hearing).
36. The disciplinary and grievance appeal hearing took place on 1 May 2019. The claimant's witness statement commencing at page 191 (for the purposes of the domestic proceedings) is dated 5 February 2019.
37. I have little doubt that the respondent is correct to submit that the internal processes were cause of anxiety for the claimant. However, in my judgment, this submission does not assist the respondent. In the final analysis, the claimant was complaining to his GP in January 2019 about mental impairment symptoms which had lasted for six months going back to the previous June. Again, it bears repeating that the Tribunal is not concerned with the cause of the impairment. The claimant's condition had lasted for six months as at January 2019 and, for the reasons that I have given, there appears to have been little improvement in his condition which had become chronic by January 2019 to the extent that it can be said that it could well last for a period of 12 months when looking at the position in January 2019.
38. Miss Amartey accepted that there was no issue about knowledge of either of the claimant's mental or physical impairments upon the claimant's complaints of a failure to make reasonable adjustments and unfavourable treatment for something arising in consequence of disability. For the avoidance of doubt, this concession does not, upon the reasonable adjustments claim, extend to the respondent's actual or constructive knowledge of what the claimant contends

to be the substantial disadvantages caused to him by reason of the application to him of the relevant provisions, criteria and practices because of the mental impairment of anxiety. It is therefore open to the respondent to seek to argue that they did not know and could not reasonably be expected to know of those disadvantages when the matter is heard.

Employment Judge Brain

Date 6 March 2020