



EMPLOYMENT TRIBUNALS

Claimant: Mrs V James-Walker
Respondent: Novar Systems Ltd
Heard at: Leicester
On: 20 February 2020
Before: Employment Judge Ahmed (sitting alone)

Representation

Claimant: Mr N Bidnell-Edwards of Counsel
Respondent: Mr P Wilson of Counsel

JUDGMENT AT AN ATTENDED PRELIMINARY HEARING

The Claimant was at the material times a “disabled person” within the meaning of section 6 Equality Act 2010 and is therefore entitled to proceed with her complaints of disability discrimination.

REASONS

1. In these proceedings the Claimant brings complaints of disability discrimination. This decision concerns the issue of whether the Claimant was at the material times a disabled person by reason of anxiety and depression.

2. The facts of the case for present purposes are not largely disputed. The Claimant was employed for a relatively short period from 16 April 2018 to 13 December 2018 as a Customer Service Team Leader. She was dismissed by reason of incapability/ill health on 13 December 2013 following a record of poor attendance. She does not of course have the qualifying period of service to bring a complaint of unfair dismissal. She presented her claim form (ET1) to the Employment Tribunal on 25 April 2019. It is ACAS early conciliation compliant. The complaints of disability discrimination are of direct and indirect disability discrimination, discrimination arising from disability and a breach of the duty to make reasonable adjustments.

3. The Claimant has, in compliance with previous case management orders,

disclosed her medical records along with various correspondence from health practitioners. There is an unfortunate gap in the GP records supplied between September 2014 and March 2016 but I am satisfied that it makes no material difference to the outcome.

4. The issues for this hearing are very simple: The Respondent accepts that the Claimant has suffered from a mental impairment throughout the material times but disputes that the impairment was long term or that it had a substantial adverse effect on the Claimant's ability to carry out normal day to day activities. The material time is the period between 13 October 2018 and 15 January 2019 (which I shall refer to as the "relevant period") which is the act or acts of disability discrimination are said to have occurred. The relevant acts, apart from the dismissal itself, are not clear from the pleaded case but that again does not concern the issues in hand.

5. The Claimant gave oral evidence at the preliminary hearing and was cross-examined by Mr Wilson of counsel. No oral evidence was offered by the Respondent. The bundle for this hearing included the Claimant's GP records, an impact statement and various reports obtained by both claimant and respondent.

THE FACTS

6. In November 2003 Mrs James-Walker suffered a serious road traffic accident. She was subsequently informed by medical professionals that there may have been an undiagnosed condition of post-traumatic stress disorder. However, that is not the impairment in question being relied upon in these proceedings.

7. Mrs James-Walker first recalls experiencing severe panic attacks and anxieties in or around February 2012. She was initially prescribed anti-depressants by her GP in September 2013 when she was formally diagnosed as suffering from depression and anxiety. At various times since then she been prescribed antidepressant medication including Mirtazapine, Venlafaxine, Sertraline, Fluoxetine and Citalopram. The Claimant has not tolerated such medication well and has been to avoid taking anti-depressant medication which explains the gaps in medication.

8. Shortly after she was diagnosed the Claimant paid for private counselling sessions as long as she was able to afford it. She was then offered counselling through the NHS from at least November 2013 from an organisation called "2gether", a Foundation Trust in Gloucestershire. More recently she has had the benefit of counselling from "Good Thinking", an agency of the Leicestershire Partnership NHS Trust.

9. In May 2014, the Claimant was referred for cognitive and behavioural Psychotherapy. The GP records for September 2014 indicate the Claimant was suffering from "long standing physical and psychological symptoms".

10. In September 2018 the Claimant was issued with a sick note by her GP. The reason for the absence was 'depression'. The same reason was cited in sick notes issued for the Claimant's absences in October, November and December 2018.

11. The claimant's condition affects her ability to carry out normal day to day activities in a number of different ways. The Claimant gave evidence that are days when she cannot even bring herself to get out of bed. On such days she

does not cook, clean the house or undertake any of the usual household tasks. She relies heavily on the support of her husband. She finds it hard to leave the house on her own on such occasions and is only likely to do so in the company of her husband. When the condition flares she avoids social situations often cancelling prior arrangements with friends. The Claimant has difficulty concentrating. She watches television as a way of distracting herself from her thoughts and feelings. Her appetite fluctuates from day to day because there are times when she does not feel like eating as a result of the stress and anxiety and so her day to day activities in relation to normal eating are affected. At such times she fails to eat because of the stress and worrying. The knock-on effect of not eating properly impacts on added fatigue and low concentration, affecting her ability to function properly. She accepts that there are times when she is well and able to enjoy life and normal activities but the depression and anxiety are always there.

12. The Claimant was referred for a vocational rehabilitation assessment by the Respondent on 31 October 2018. The report of the specialist states, inter alia:

“Ms James-Walker explained that she has a history of depression/anxiety... She has previously accessed psychological support... She reported that she recently received a letter from her employers in relation to financial aspects which caused her some additional stress.”

13. The Claimant was also referred to occupational health by the Respondent. In an assessment undertaken on 13 November 2018 Ms Sonja Davies, Specialist Practitioner in Occupational Health, wrote:

“We discussed the triggers for her current psychological symptoms; she is very self-aware of her symptoms but is unsure of the exact causation; she notes personal/family issues recently. A major issue was her parents emigrating to France which has left her feeling emotional, vulnerable and with no significant support network. She also notes starting a new job, her current work role as a stressor too.

.....

She does note that she has been working at weekends/evenings and during her annual leave, although she has not been asked to do this by anyone, she was keen to make a positive impression in her new role but it appears that combined with her personal stresses that this has become overwhelming and may have contributed to her current psychological distress.

.....

It is likely that Mrs James-Walker’s psychological concern would fall within the remit of the Equality Act 2010 due to the substantial period of time and how this adversely affects her ability to carry out day to day activities. As you are aware this is a legal and not a medical decision.”

THE LAW

14. Section 6 of the Equality Act 2010 (“EA 2010”) defines disability as follows:

“(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.

15. Section 212(1) EA 2010 defines “substantial” as meaning more than minor or trivial.

16. Schedule 1, Paragraph 2 of EA 2010 defines “long-term” as follows:

- (1) 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.
- (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

17. In **SCA Packaging Limited v Boyle [2009] ICR 1056**, the Supreme Court made it clear that in considering whether something was "*likely*", it must be asked whether it "*could well happen*".

18. The assessment as to whether an impairment is likely to last at least 12 months, or its effect is likely to recur, requires the ET to make its decision on the basis of evidence as to the circumstances prevailing at the time of the relevant discriminatory act or decision, namely as to the then likelihood of recurrence (see **McDougall v Richmond Adult Community College [2008] ICR 431**).

19. The "*Guidance on matters to be taken into account in determining questions relating to the definition*" (at paragraph C5) states that:

"Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term'."

20. In **J v DLA Piper UK LLP [2010] UK EAT 0263/09/1506** drew a distinction between mental impairment and a reaction to adverse circumstances or adverse life events. The latter may not necessarily be categorised as a disability.

CONCLUSIONS

21. In coming to my decision I have taken into consideration the Claimant's oral evidence in conjunction with the medical evidence and her impact statement. I have also considered the "*Guidance*". I note that the burden of proof is establishing disability lies on the Claimant.

22. I am satisfied that the Claimant's evidence as to her ability to carry our normal day to day activities was given honestly and that she is a reliable and credible witness. There are no inherent contradictions and what she says is consistent throughout. I do not find that she has sought to exaggerate her condition or the effect it has on her ability to carry out normal day to day activities.

23. The cross examination of the claimant appeared to be directed towards establishing firstly, that what the claimant was really suffering from was adverse life events as described in **J v DLA Piper** (although Mr Wilson does not directly quote from the case nor does he refer to it in submissions) rather than a long-term impairment which had substantial adverse effects and secondly, that during the relevant period the Claimant suffered the effects these may have been flare-ups but were not sufficiently long term to amount to a disability.

24. I do not accept that the Claimant's condition was a reaction to adverse life events or simply flare ups for the following reasons:-

24.1 There have been a number of diagnoses of depression by GP's and

medical professionals for some considerable time which suggest the condition are long-term. This is not a case of the Claimant simply suffering from bouts of low mood due to any particular incident or event. The Claimant was referred by her GP for cognitive and behavioural psychotherapy sessions as long ago as May 2004. She was seen by cognitive behavioural psychotherapists in 2005. She has a history of anxiety and depression which has caused her to consult her GP on numerous occasions from at least 2013 through to and including the relevant period;

24.2 The Claimant has been different prescribed anti-depressant medication which suggests that it has been an ongoing problem. The claimant is not keen on taking such medication but has been willing to do when the problem has been severe. Not all of these situations have coincided with an adverse life event;

24.4 It cannot sensibly be said that there were merely flare-ups between October 2018 and January 2019. The reality is that the Claimant has had the condition since 2004 onwards but in the nature of a depressive condition it has manifested itself more severely on some occasions. I do not accept that the fact that the Claimant's parents decided to move abroad was a relevant factor – the Claimant was suffering from her conditions before then;

24.5 I do not accept, as suggested, that the fact that the Claimant sent a strongly worded e-mail to her employer on 31 October 2018 (about the fact that she had been incorrectly paid sick pay) was the cause of her anxiety at the time, as suggested. The reality is that the Claimant was already suffering from anxiety and depression and the e-mail adding to her state of anxiety but it was not the sole cause of it. It is telling that the Claimant did not discuss this matter with her GP which might be expected if that was a significant factor.

24.6 The Respondent's own Occupational Health specialist noted that the Claimant had a 15-year history of intermittent psychological problems requiring medication on and off. Having had these episodes over such a long period there was a strong possibility that they could well happen again.

25. I am satisfied that the adverse effects suffered by the Claimant were 'substantial' in that they were more than minor or trivial during the material times. I am also satisfied that the impairments were likely to recur (because they could well happen) and likely to last 12 months. They were therefore 'long-term' within the meaning of schedule 1, paragraph 2(1) (b) of EA 2010.

26. For the reasons given I find that the Claimant was a 'disabled person' within the meaning of section 6 of the Equality Act 2010 and is entitled to pursue her complaints of disability discrimination.

Employment Judge Ahmed

Date: 16 March 2020

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.