



EMPLOYMENT TRIBUNALS

Claimant: Mr R Tilley

Respondent: The De Ferrers Trust

Heard at: Leicester

On: 25 February 2020

Before: Employment Judge Butler (sitting alone)

Representation

Claimant: Mr A McMillan, Counsel

Respondent: Mr G Vials, Solicitor

JUDGMENT

The Judgment of the Tribunal is that the Claimant was disabled at the material time prior to his dismissal pursuant to section 6 of the Equality Act 2010 and the Respondent had knowledge of the Claimant's disability from 27 September 2018. The disability discrimination claims were made in time and it is not appropriate to strike them out or make a deposit order.

REASONS

Background

1. At a Closed telephone Preliminary Hearing on 18 November 2019, Employment Judge Hutchinson listed this matter for a Preliminary Hearing to determine:

- (i) whether the Claimant was suffering from a disability at the relevant time i.e. prior to his dismissal;
- (ii) whether any of the claims of disability discrimination are in time and whether it would be just and equitable to extend time if they are out of time;
- (iii) whether any of the claims of disability discrimination should be struck out because they have no reasonable prospects of success
- (iv) alternatively, whether the allegations or arguments relating to disability discrimination have little reasonable prospects of success and whether deposit orders should be made; and

(v) whether at the material time the Respondent had knowledge or could reasonably have been expected to know of the Claimant's disability.

The Law

2. Section 6 of the Equality Act 2010 ("EQA") provides:

(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 effect on P's ability to carry out normal day to day activities.

3. It is established law that 'long term' means that the impairment has lasted or is likely to last for 12 months or is likely to last for the rest of a person's life.

4. Pursuant to section 123(1) EQA, proceedings for disability discrimination must be brought before the end of

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

5. The mental impairment relied upon by the Claimant is anxiety and depression.

6. In relation to this hearing, I have had regard to the following case law:

Cruickshank v VAW Motorcast Limited 2002 ICR 729

Goodwin v Patent Office 1999 ICR 302 EAT

Wigginton v Cowrie UKEAT/ 0322/09

J v DLA Piper UK LLP 2010 ICR 1052

Morgan v Staffordshire University 2002 ICR 475

Royal Bank of Scotland plc v Morris UKEAT/0436/10

Patterson v Commissioner of Police of the Metropolis 2007 ICR 1522

Herry v Dudley Metropolitan Borough Council UKEAT/0100/16/LA

7. I also had regard to Schedule 1 of the EQA.

The Evidence

8. The Claimant produced an impact statement upon which he was cross-examined. There was an agreed bundle of documents and references to page numbers in this judgment are to page numbers in the bundle.

9. In considering the Claimant's oral evidence, I have summarised his evidence given only in relation to the issues before me.

The Factual Background

10. The Claimant said he was referred to the Respondent's Occupational Health Service ("OH") in 2017 after both of his grandfathers died within 10 days of each other following which he had glandular fever and panic attacks. He has not disclosed that OH report which followed the referral. He claims that the Respondent had knowledge of his disability from 18 February 2018 when he was signed off as unfit for work with anxiety and depression. The first fit note produced is dated 6 March 2018 (page 70). This followed a capability meeting on 14 February 2018 where he voiced his concerns as to how he had been

treated by the Principal, Joanne Kingswood, who, he says, bullied and criticised him without justification after her appointment in 2015. He was accompanied by his union representative, Mr T Allcott to this meeting. What seem to be Ms Kingswood's notes in preparation for this meeting are at page 67 and which the Claimant refers to as a total fabrication. In relation to his health she says, "... it's about supporting him to be effective and ensuring his health doesn't suffer as it has in the past .."

11. On 28 February 2018, the Claimant undertook a telephone assessment of his then current mental health needs with Miss H Anderson-Baker, a Mental Health Nurse with South Staffordshire and Shropshire Healthcare NHS Foundation Trust (page 66). This records that he was having private counseling and it was not advisable to combine this with other forms of therapy. There is no evidence that the Respondent saw this report before it was disclosed in these proceedings.

12. On 7 March 2018, the Claimant attended hospital with chest pains and palpitations but no treatment was necessary (page 73). There is no evidence before me that the Respondent saw this report during the Claimant's employment.

13. Asked why he had not provided his GP notes from before December 2017, the Claimant said he did not know why they were not in the bundle. He said he suffered sleep issues, low mood and panic attacks in late 2017 notwithstanding the lack of corroborating medical records. This does not assist in determining the state of his health before 2018. Similarly, at paragraph 7 of his statement, he talks of raised blood pressure and his heart pounding but this is not reflected in his medical notes.

14. The Claimant was not deemed to be fit to return to work until 10 April 2018. His Return to Work interview with Ms Harrison on 10 April confirms he was ready to get back to work and wanted to move on and move forward (page 78). His union representative had met with the Principal and Jo Harrison, the Respondent's HR Director, and he says he was told until the matter of his relationship with Ms Kingswood was sorted out, he was to work from home. He says he did not agree to this but was told he could not return to work at the school until he had apologised to her. He says he did not instigate settlement negotiations but this was something put to him by his union representative after a meeting on 10 April 2018 with Ms Kingswood and Ms Harrison before he returned to work.

15. I do not accept that evidence. After working from home until July 2018, when he self-certified as being unfit for work due to anxiety and depression with suicidal thoughts, the Claimant engaged in an email exchange with Ms Harrison in August 2018. This follows on from correspondence in July 2018 in which Ms Harrison wishes to refer the Claimant to Occupational Health. I note in particular that Ms Harrison refers to an "exit strategy" and notes that the Claimant himself told her he would be open to a settlement agreement if one was on offer by the Trust (page 138). Interestingly, the Claimant's response (page 139) does not deny the exit strategy idea or the reference to a settlement agreement, only that his union representative told him he could not return to the school until he apologised to Ms Kingswood for the comments he made to her in their meeting on 14 February 2018. If the Claimant had not been aware and complicit in

settlement negotiations, he struck me as the kind of person who would not hesitate to dispute this. He did not.

15. After taking into account the Claimant's amendments to the OH referral, this was sent and, at page 143, it notes, "Following his absence earlier this year, it was agreed, due to the issue raised between him and his line manager, that he would undertake work from home as an interim measure while an exit strategy was negotiated as requested by Richard and his union representative". Again, having made his own amendments to the referral, the Claimant did not dispute the commentary about the exit strategy.

16. An appointment with the Occupational Health Physician was then arranged for 26 September 2018 after the Claimant did not attend the first appointment on 29 August 2018. The report of Dr McIlroy at page 164. Inter alia, Dr McIlroy says the following:

Richard Tilley is suffering from anxiety and depression and in my opinion is impaired by low mood, reduced motivation and poor memory and concentration.

In terms of treatment he has had appropriate support from his GP and has been prescribed appropriate medication. His GP has also arranged appropriate counseling, particularly in terms of cognitive behavioural therapy.

It is therefore my opinion that your concerns about his capability and behaviours over the last few months are related to his illness.

I have considered his current illness and the previous illness in February 2018. I have also considered a previous episode from 2016. In my opinion his underlying condition would be considered to be long term in that it has lasted and is likely to last for more than 12 months. I have also considered the effect on his activities of daily living and in my opinion his underlying anxiety and depression has had a substantial impact on his activities of daily living. Therefore in my opinion it would be considered a disability in line with the Equality Act.

17. The final paragraph of this report confirms it has been sent to the Respondent.

18. The Claimant was then again signed off as unfit for work from 28 September to 31 October 2018. Ms Harrison arranged a meeting with the Claimant on 19 October. A Summary of Case was prepared by Ms Harrison (page 178) to which the Claimant, accompanied by his union representative, was invited to reply. The meeting resulted in the Claimant's dismissal.

19. Throughout the period from February to October 2018, the Claimant had been prescribed antidepressants by his GP. He also at various times undertook counseling and CBT. Throughout this period, he displayed an inability to accept any criticism by Ms Kingswood, dismissing any such criticisms as unfounded or a fabrication. By way of further illustration of his state of mind, he accused Ms Harrison of alleging he had stolen property from his school when he accessed the premises very one night to obtain information necessary for the project he was then working on from home (page 97). By any stretch of the imagination, Ms Harrison's letter did not even come close to accusing him of stealing. It expressed concern for his safety in being in the school alone and made clear that

her concern in him removing property from the school was due to data protection and safeguarding legislation.

20. As previously noted above, the Claimant can only rely on his own evidence as to his symptoms before February 2018 as he has not produced his GP records before then. There was also much evidence from him in his statement and oral evidence of his symptoms including palpitations, raised blood pressure, his heart pounding and having suicidal thoughts which are not all reflected in his GP's records. It was evident from observing the Claimant giving his evidence that he is a highly emotional individual. His evidence in relation to previous episodes of illness was that they occurred when his first marriage broke down and on the death of his grandfathers. At the end of his evidence he broke down in tears.

Submissions

21. I am grateful to both representatives for their well-reasoned submissions in relation to the issues before me. This was not an easy judgment to consider and their arguments assisted me greatly. I merely summarise the main points of the submissions but confirm that I considered them fully in making my decision.

22. Mr Vials' submissions on the question of disability concentrated on two main areas. Firstly, he argued that the medical evidence made numerous references to work related stress and there was no expert evidence to corroborate a diagnosis of clinical depression as opposed to the Claimant being stressed and anxious. What the Claimant experienced was an adverse reaction to adverse circumstances. Employment Judges, he said that Employment Judges only have a rudimentary knowledge of mental health issues and, therefore, need expert evidence to assist them and the Claimant had produced none. Secondly, the Claimant had produced no cogent evidence of the impact of his condition on his normal day to day activities. In relation to the knowledge of the Respondent about the Claimant's condition, at best, from the Claimant's perspective, this began with Dr McIroy's report of 27 September 2018. Mr Vials also made submissions on time limits, striking out the disability claim and ordering a deposit.

23. Mr McMillan argued that the disability claim was in time and this was not a case where the Tribunal found itself in strike out territory. The Claimant should be found to be disabled as there was evidence of the impact of his disability on his normal day to day activities. The decisive factor in this case was the longevity of the condition. The Claimant has remained very ill since February 2018 and if this was just a reaction to adverse circumstances he would have recovered by now. He argued it was not possible to ignore the medical evidence before me.

Conclusions

24. There was some merit in Mr Vials' argument that what the Claimant displayed was not clinical depression but a reaction to his circumstances at work. He undoubtedly had a poor relationship with Ms Kingswood and his interpretation of that relationship was that any criticisms of his work or work methods was unjustified or merely a fabrication. Certainly it is true that each episode of his illness in 2018 followed some event which took a course with which he disagreed. His response was an emotional one and he says these events made him ill. In DLA Piper, a diagnosed episode of clinical depression was contrasted with an employee who merely has an adverse reaction to what he considers are

adverse circumstances. Such circumstances were also discussed in Herry where it was considered that work related issues can amount to a mental impairment if the employee already suffers from anxiety and depression.

25. The Claimant may be considered to fall within the scope of the DLA Piper decision in that he was willing to work for the Respondent in the same role but at a different school. This suggests, put simply, that if his poor relationship with Ms Kingswood could no longer subsist, his symptoms will go away. On the other hand, was there an underlying condition of anxiety and depression of which his reaction to circumstances at work and to life events is symptomatic of a mental impairment?

26. The answer lies partly in the Claimant's GP records. Whilst he has done himself no favours by not producing medical records before 2018, the records produced note that he suffered from low mood "on and off since 2010" and was diagnosed with panic disorder in 2007 (page 64). Further, it is noted that, "He is now (as at 27 February 2018) having suicidal ideation and worsening of his mood". Further, his illness was also triggered by his divorce and the death of his grandfathers so it can be assumed his symptoms were not only related to stress in the work place.

27. In Morgan it was (accurately) noted that Employment Judges only have a rudimentary knowledge of mental health issues. Whilst I accept that the Claimant produced no expert report on his condition, it is clear to me that he was very susceptible to life and work events and his anxiety was made worse by them. In my view, therefore, there is clear evidence of a long term underlying condition which means I cannot accept that his symptoms were only triggered by adverse circumstances at work. I find that his reaction and bouts of illness were due to this underlying condition of anxiety and depression.

28. This is evidenced by the Occupational Health Report by Dr McIlroy who clearly considers in September 2018 that the Claimant meets the requirements of section 6 EQA. He also considers the mental impairment to be long term although gives no date as to when the impairment is said to have begun. What he does say, however, is that it has lasted and is likely to last for more than 12 months (page 165). This suggests, in the context of his report, that the Claimant suffered from this mental impairment from sometime in 2016.

29. Before making a finding of disability, however, I must address whether the mental impairment adversely affected his ability to carry out normal day to day activities. Mr Vials rightly raised the issue that Dr McIlroy's report does not set out precisely what normal day to day activities the Claimant has difficulty with. To a limited extent the answer also lies in Dr McIlroy's report where he describes the Claimant as being "impaired by low mood, reduced motivation and poor memory and concentration". These are matters which will inevitably affect the Claimant in carrying out normal day to day activities. In his evidence, the Claimant referred to problems sleeping, shopping and reduced sexual contact with his wife. That evidence was not fully challenged and, although I considered some of his evidence to be exaggerated, it was only challenged to the extent it may not have been recorded in his GP's notes. I therefore find his condition did have a substantial adverse effect on his ability to carry out normal day to day activities.

29. The Claimant argues that the Respondent had notice of his impairment from February 2018 when he went on sickness absence with anxiety and

depression after his meeting with Ms Kingswood on 14 February. I do not accept that evidence. In the absence of the Occupational Health Report of 2016 and GP records before 2018, there is insufficient evidence before me that the Respondent knew or should have known he was disabled for the purposes of the EQA from February 2018 or any earlier. Following the meeting with Ms Kingswood in February 2018 and the Claimant's subsequent absence through illness with anxiety and depression, all the Respondent had was a series of fit notes, a point well made by Mr Vials, together with emails in July to October from the Claimant to Ms Harrison saying he was unwell. Further, he returned to work in July albeit working from home. I have noted the Claimant's Return to Work Interview Record dated 10 April 2018 after his first absence (page 78) in which he described himself as "ready to work again" and "Thinking about moving forward and moving on". I do not consider this would have put the Respondent into the category of "ought reasonably to have known" he was disabled. Whilst it might be argued the Respondent could have made further enquiry of the Claimant through his GP, I suspect that any such action was put on hold due to the negotiations for an exit strategy. When they were unsuccessful, the Respondent, through Ms Harrison, sought a further referral to Occupational Health.

30. Whilst it is for the Tribunal to determine the question of disability, I take careful note of Dr McIroy's report dated 27 September 2018. It concludes that the Claimant's condition falls within the scope of the EQA and I agree with that conclusion. However, as far as the Respondent's knowledge of the disability is concerned, I find that actual knowledge began on 27 September 2018 and there was no basis upon which the Respondent ought to have known about it before then.

31. It follows that, insofar as the Claimant alleges his dismissal was an act of disability discrimination, the failure to make reasonable adjustments subsisted up until that dismissal, he suffered discrimination arising from his disability and indirect discrimination, the claim is in time. Further, the claim should not be struck out under rule 37 as having no reasonable prospect of success, nor should there be a deposit order under rule 39 because the claim has little reasonable prospect of success.

Employment Judge Butler

Date 15 April 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON
21/04/2020.....
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