



EMPLOYMENT TRIBUNALS

Claimant: Mr C Nwogbo

Respondent: Northern Life Care Limited t/a UBU

Heard at: Leeds (by Skype)

On: 15 May 2020

Before: Employment Judge Maidment

Representation

Claimant: In person

Respondent: Mr E Nuttman, Solicitor

JUDGMENT having been sent to the parties on 18 May 2020 and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. The preliminary hearing was listed to determine whether the Claimant was a disabled person by reason of anxiety and depression which he said had been diagnosed on 17 April 2019. The Claimant's complaints of disability discrimination relate to events leading up to and culminating in the termination of his employment with effect from 6 September 2019. The Tribunal's enquiries therefore were whether at any material time up to and including 6 September 2019 the Claimant satisfied the definition of a disabled person within Section 6 of the Equality Act 2010.
2. The preliminary hearing had also been listed to determine whether the Respondent had knowledge of the Claimant's disability (assuming he was disabled) at any material time.

Evidence

3. Given the lockdown caused by the coronavirus, this hearing was conducted by Skype. In advance of the hearing, the Tribunal had received the Claimant's impact statement, an agreed bundle of relevant documents numbering in excess of 228 pages and an additional bundle of further documents upon which the Claimant said he wished to rely. During the course of the hearing the Tribunal was further provided with a witness statement of Mrs Nadia Nwogbo, which it read during an adjournment prior to hearing her evidence.
4. The Tribunal heard firstly from the Claimant and then from his wife, Mrs Nadia Nwogbo. The Respondent did not call any witness evidence. The Tribunal then heard both parties' submissions and gave its Judgment after an adjournment following those submissions.
5. The Tribunal made the factual findings set out below on the basis of the evidence it heard and relevant documentation. These findings were made with reference to the aforementioned issues which the preliminary hearing was listed to determine. In particular, the Tribunal's findings regarding the events leading up to the termination of the Claimant's employment were in his narrow context and in circumstances where any Tribunal at a final hearing is likely to hear wider evidence, such that it should not be bound by the Tribunal's findings herein on separate issues, in particular regarding the nature of the communications between the Claimant and the Respondent prior to the termination of his employment.

Applicable law

6. The burden of showing disability status rests with the Claimant (**Kapadia v London Borough of Lambeth [2000] IRLR 699 (CA)**).
7. Section 6(1) of the Equality Act 2020 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 his ability to carry out normal day-to-day activities*". The reference to "substantial" in the Act means "*more than minor or trivial*". **Goodwin v Patent Office [1999] IRLR 4 (EAT)** gives guidance as to how a Tribunal should consider each separate step.
8. In **J v DLA Piper UK LLP UKEAT/0263/09**, the EAT confirmed that, particularly in cases where mental impairment is disputed, the focus of the Tribunal's enquiry should be on the effect the impairment has on an employee's day-to-day activities. If the Tribunal finds a long-term substantial adverse effect, it will, in most cases follow "*as a matter of common sense inference*" that the Claimant is suffering from an impairment which has produced that effect.

9. For an impairment to be long-term, it must have lasted or be likely to last 12 months. In this context, an event is likely to happen if it 'could well happen', i.e. there was a real possibility. The Claimant does not have to pass the higher hurdle of it being probable or 'more likely than not'. The Employment Appeal Tribunal confirmed in **Tesco Stores Limited v Tennant UKEAT/0167/19** that the test is applied at the time of the alleged discriminatory conduct, otherwise employers faced with someone suffering depression could "...if they were conscientious, to have some regard to the likely effects of the depression because of paragraph 2(1)(b) of Schedule 1. (and)... an employer who did the right thing would make the relevant assessment and may have come to the proper view at the beginning of the 12-month period that the adverse effects were not likely to last for 12 months but then, when in fact, it turned out that they did last 12 months, the employer would find himself liable for things that he had done or failed to do 12 months earlier."
10. 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 treated as continuing to have that effect if the effect is 'likely to recur'. The effects are to be treated as long-term if they are likely to recur beyond 12 months after the first occurrence. In assessing the likelihood of the Claimant's impairment recurring, the Tribunal should disregard events taking place after the alleged discriminatory act but prior to the Tribunal hearing -see **Richmond Adult Community College v McDougall 2008 ICR 431**.

Facts

11. The Claimant was employed as a healthcare worker. His health deteriorated from February 2019 as a result of workplace complaints made about him, his pursuance of a grievance process and disciplinary action then taken against him. The Claimant described the ongoing processes as having affected his mental health.
12. The Claimant had completed a medical screening form with the Respondent on 19 April 2018 where he signified that he did not suffer from any mental health impairment. The Claimant confirmed that he had never previously suffered from any mental health illness.
13. He described suffering great mental exhaustion from the Respondent's actions. He suffered difficulties in sleeping. He could easily lose his train of thought and found it hard to concentrate. He took no joy from ordinarily happy events in his life and had lost interest in social activities and interaction. Whilst he had commenced new employment as a nurse from the beginning of October 2019, after leaving the Respondent's employment

on 6 September, he now did things more slowly and struggled to make decisions. The Respondent did not challenge the Claimant's evidence as to how he felt other than the severity of the effects given his ability to work since 1 October and, for instance, to continue driving.

14. The Claimant's wife, Mrs Nadia Nwogbo, corroborated the Claimant's account of him suffering from a lack of sleep, saying that he also showed signs of anxiety and self-isolated in his room. She said that towards the end of June 2019 he completely closed up and isolated himself, having minimal interaction. He was interested, she said, only in tackling his issues with the Respondent
15. The Claimant, in terms of medical evidence, relied on a report dated 9 March 2020 from an advanced nurse practitioner at his GP practice. The Tribunal considers it to be clear from the report that the various entries and references are taken from the Claimant's medical records. The Claimant has not provided his medical records to the Respondent and they are not before the Tribunal.
16. The Claimant initially attended his GP on 17 April 2019 with work-related stress causing some sleep problems and low mood. The Claimant was given a 2 week fit note for stress related problems and commenced taking citalopram, an anti-depressant. He was not, however, at any time absent from work due to sickness – he had been suspended already from work on full pay.
17. On 1 May 2019 he was reviewed by his GP who noted that the Claimant's mood was stabilising and he was starting to feel better with time away from work. Nevertheless, a further 2 week fit note for stress related problems was issued and citalopram continued.
18. The Claimant was seen by the advanced nurse practitioner on 3 July, who recorded that the Claimant had stopped taking the citalopram due to side effects. He was described as presenting with ongoing stress, low mood, sleep disturbance and difficulty concentrating. At the time, the Claimant did not want any further antidepressants prescribed (due to the side effects) and was given a small dose and supply of zopiclone to aid with his sleeping. A further fit note for 2 weeks was issued citing low mood. He confirmed to the Tribunal that he ceased taking zopiclone after 2 weeks.
19. The Claimant attended a further review with his GP on 15 July where it was recorded that he was to commence taking the antidepressant, mirtazapine, and was issued with a fit note for a further 2 weeks citing mixed anxiety and depressive disorder. He was recorded as having no intrusive thoughts. Whilst the Claimant described himself to the Tribunal as feeling low, having a lack of self-worth and feeling like he had nothing to live for, he confirmed that he had not had any suicidal ideations. The Claimant described himself

as feeling battered by the whole disciplinary process he was going through and subsequently from there then being a DBS referral. He said that he just wanted to some form of closure.

20. The Claimant took mirtazapine for 3-4 weeks, but then stopped and decided not to go back to his doctors for a repeat prescription. He decided instead to explore other avenues. His doctor had given him a leaflet listing a number of places he could go to seek help. From that list the Claimant identified a local Andy Man's club which he had attended and felt was beneficial for him in giving him an outlet where he could talk about his feelings. He described this as "*talking therapy*". He confirmed that he had not been referred by his doctor for any specialist mental health treatment or counselling.
21. The Claimant submitted his Tribunal application on 7 October 2019. Whilst his claim was of disability discrimination, he ticked a box stating that he did not have a disability. The Claimant's explanation was that he thought this related to learning disabilities. The Respondent responded to that application stating, amongst other things, that it did not accept that the Claimant was a disabled person.
22. As already referred to, the Claimant started a new nursing position with an NHS Trust on 1 October 2019 (just over 3 weeks after leaving the Respondent), working 37.5 hours per week. He had previously worked typically 20 hours per week for the Respondent. The Claimant said that he was able to function in the performance of his duties in that new role but that those duties differed from day-to-day activities with which he struggled.
23. He said that he was able to continue to drive, saying that he could concentrate to a high degree - the issue was his mastery of locations and lack of familiarity with places he used to know. He said that whilst he could do his new job, he experienced great exhaustion.
24. The Claimant returned to his doctors for the first time after 15 July 2019 on 2 January 2020. The advanced nurse practitioner noted ongoing problems of depression and anxiety stemming from issues at work (with the Respondent) and discrimination. She noted an increased deterioration in mood, self-isolation from friends and family and disturbed sleep. She recorded the Claimant describing experiencing flashbacks of discriminatory events. He was tearful and emotional during the consultation. He had had intrusive thoughts of self-harm and suicide but had "*no plans*". The Claimant was re-prescribed mirtazapine, but did not want any time away from his new employment which was described by him as supportive.
25. The Claimant attended a review with his advanced nurse practitioner on 30 January 2020 his sleep pattern was noted as having improved as was his mood, albeit slowly. The Claimant was described as continuing to isolate himself from friends, but was more interactive with family. He was still

anxious but had fewer intrusive thoughts. His dosage of mirtazapine was doubled with a planned review in 4 weeks after an initial Tribunal hearing.

26. At a further review on 27 February, the Claimant was noted as sleeping better with increased interaction with family but remaining low in mood at times, with an equal number of good and bad days. He was described as self-critical, with low self-esteem, however slightly more positive at this particular review. There had been a reduction in suicidal intrusive thoughts albeit he never had any intent/plans. A review was planned for 7 weeks afterwards.
27. As at the date of the report provided for this hearing, the Claimant was said still to be under 1 – 2 monthly review and this was seen as likely to continue for the foreseeable future. Once his mood was back to near normal and he was functioning well, it was considered the Claimant would require medication for a further 3 – 6 months.
28. The Respondent's position was that the only fit note received from the Claimant had been the one dated 3 July 2019 referring to "*low mood*". This had been emailed to the Respondent. Whilst the Claimant had been able to evidence other documents sent to the Respondent during his employment, his position was that the other fit notes had been sent by post and he had no proof of postage.
29. The Claimant had written to the Respondent on 21 June 2019 by email. In that he referred to having constant headaches, poor sleep and his GP recognising very high stress levels. The Claimant accepted that this was the first reference he made in correspondence to the Respondent to not feeling well other than the sick notes (dated 17 April and 1 May) he said that he had sent (but which the Respondent said had not been received). He received a reply on 24 June from Lesley Rattigan asking him whether he was requesting a period of annual leave or reporting sickness absence. The Claimant responded saying that he was requesting annual leave as things had become overwhelming.
30. On 1 July 2019 the Claimant wrote to the Respondent with his written submission defending the allegations made against him saying simply that he was not in the best frame of mind and health to attend a disciplinary hearing arranged for 12 July.
31. The Claimant emailed the Respondent on 11 July to say he was not in the best of health to engage productively with the Respondent. The "*low mood*" fit note was provided (and received by the Respondent).
32. The Claimant's position was that the 15 July fit note referring to mixed anxiety and depressive order had been posted to the Respondent. The

Claimant was referred to his witness statement evidence which he had corrected to say that a recent sicknote had been attached to his written submission document of 12 July and another sicknote had been generated on 15 July (not on 5 August) referring to the mixed anxiety and depressive disorder. The reference to the submission was to a submission in fact dated 11 July for which the Claimant had provided to the Respondent proof of postage in response to a request from the Respondent to provide proof of postage of the sick note. The correspondence had been stamped as received by the Respondent on 12 July. Given that the sick note had not been produced until 15 July, it could not have been contained within this envelope.

33. Throughout the period, from indeed before 17 April 2019, the Claimant had in fact been away from the workplace due to his suspension on full pay. The Claimant confirmed to the Tribunal that he had not been absent in any of this period due to sickness.
34. The Tribunal has been taken to a letter from the Respondent to the Claimant dated 1 August 2019 in which it was said that the Claimant was no longer suspended from duty and seeking to arrange a meeting on 2 August to support the Claimant in his return to work. The Claimant was asked to contact the Respondent in respect of this meeting. The Claimant did not revert saying that he was sick. The Claimant said that he had spoken to an employee, Sarah Lindsay of Employment Welfare, to say that he did not feel safe to return to work. A further letter from Ms Lindsay on 2 August referred to a telephone conversation with the Claimant that morning and expressed disappointment that the Claimant was unable to attend the meeting that day, rearranging the meeting be held on 7 August. Reference was also made to further unsuccessful attempts made by her to contact the Claimant.
35. The Claimant responded by email on 6 August saying that "*only a fool*" would be engaging "*in this insolence of a return to work meeting*". The Claimant did not refer to any sickness or him being unfit to attend a meeting. The Claimant said that the correspondence itself was a depiction of his state of mind and that this communication was not in keeping with his normal communication style. When put to him that he said that he had been taking solicitors advice, he said that the communication was nevertheless a rant and that this "*displayed his mental presentation*".
36. The Claimant accepted that the 15 July fit note took him only up to 4 August and that no further fit notes had been obtained. The Claimant's view was that the Respondent had knowledge of his ill-health and was ignoring him and treated him with disdain.
37. The Respondent wrote to the Claimant again on 27 August, referring back to the previous letters and expressing that the Claimant was on unauthorised absence having failed to attend a scheduled return to work

meeting and failed to make contact to discuss his return or notify the Respondent of or arrange an authorised absence. He was invited therefore to attend a disciplinary hearing on 29 August.

38. When the Respondent wrote to the Claimant by letter of 6 September he was said to be being dismissed for unauthorised absence since 2 August after a disciplinary process had concluded on 1 August, as result which the Claimant had been issued with a final written warning. The letter referred to attempts to arrange a meeting to discuss the Claimant's unauthorised absence, to the Claimant failing to attend a return to work meeting, another meeting having been arranged and then the Claimant informing the Respondent by the email of 6 August that "*only a fool*" would engage in the return to work process. It noted that the Claimant had been written to again and warned that he was on unauthorised absence, but that he had failed to attend any hearing. The correspondence does not indicate any awareness on the Respondent's part of the Claimant being sick and/or absent from work due to sickness. The Claimant accepted that he did not respond to any communications from the Respondent to say he was sick.
39. The Claimant was referred to the note of Employment Judge O'Neill from the preliminary hearing on 25 February 2020 where she noted that the Claimant accepted at that hearing that in the period from 2 August 2019 he did not tell the Respondent that he was unfit to attend work or the disciplinary hearing because of his health. The Claimant that he did not recall accepting that. He thought that he had said that he was not fit to return to work because of unresolved concerns.

Conclusions

40. The Claimant may well have satisfied the definition of a disabled person as at the date of the March 2020 medical report and perhaps at the time of his reviews with the advanced nurse practitioner in January 2020. The Claimant's complaints are, however, of discrimination up to his dismissal on 6 September 2019.
41. The Tribunal considers that the earliest date at which the Claimant might arguably have satisfied the definition of disability was 15 July 2019. Prior to them, the evidence is more of a reaction to events at work which had upset him rather than of him suffering from a mental health impairment. However, on 15 July, he was considered by his doctor to be suffering from an anxiety and depressive disorder. Medication specifically aimed at combating depression was prescribed and the Tribunal can accept that the Claimant was suffering from substantial negative effects on his ability to carry out normal day-to-day activities. This included his inability to sleep, his difficulties in concentrating, his lack of desire to socialise, interact with others including close family and an inability to obtain enjoyment out of life.

42. Effects indeed need only be more than minor or trivial and Claimant, at that point, is able to surmount that hurdle.
43. However, by the time of the Claimant's dismissal those effects had not lasted for a year. The Claimant, therefore, needs to show that the effects were at some point up to his dismissal likely to last 12 months or more. That does not mean that they were more likely than not to last for a year. The Claimant just has to show that this 'could well happen'. Nevertheless, that is a test beyond there being a mere possibility. The Tribunal is not satisfied that this test was met at any point up to the termination of the Claimant's employment.
44. Whilst the Claimant visited his doctor on 15 July, he did not return to seek any medical assistance until January 2020. By early August, he had decided not to continue to take any medication. Up to and at the point of his dismissal he had no intention of seeing his doctor. The Claimant had not told the Respondent that he was unwell in this period or that he would not be able to return to work due to his mental health. His communications and style of communication with the Respondent did not indicate that the Claimant was labouring under any impairment. It was concerns with work which needed to be resolved to allow him to return to work.
45. The Claimant had not been referred to any mental health service or for any form of psychological therapy or counselling.
46. The Claimant's dismissal did not prompt a return to his GP, as might have been expected in the context of a continuing condition.
47. Whilst after the point of relevant consideration, the Claimant seeking and obtaining a full-time nursing role very soon after dismissal does not indicate a likelihood before dismissal of the effects of a condition which would last 12 months or more.
48. The Claimant's previous medical history does not assist in pointing to likely long-term effects. The Claimant's mental health was very much reactive to his problems at work. He had prior to February 2019 no previous instances of mental illness.
49. The Tribunal cannot conclude that, as at any point up to and including the Claimant's dismissal, the effects of his impairment were likely to last 12 months or more.
50. Nor is this a case of a disabling condition which was likely to recur. Again, there is no pre-existing history of illness and the Claimant's genuine health issues arose out of work issues in circumstances where he was no longer in the Respondent's employment. There is no medical evidence to support

an argument of likely recurrence and indeed the evidence shows in the period prior to dismissal some improvement and, whilst medication was subsequently prescribed, that the taking of medication was short lived with no anticipated return to the Claimant's doctor.

51. The Claimant's illness may, as now transpires, as a matter of fact have continued beyond his dismissal, but with triggers unanticipated including the stress of Employment Tribunal proceedings.
52. At the time of the Claimant's dismissal and at any point before it, he was not a disabled person within the meaning of Section 6 of the Equality Act 2010.
53. That determination may be academic however. The Tribunal concludes also that up to and as at the time of dismissal the Respondent was not aware and there is no basis for concluding that it ought reasonably to have been aware that the Claimant was a disabled person.
54. The Tribunal finds that the only sick note the Respondent received referred to "*low mood*" – the Respondent was, on the balance of the evidence, unaware of the others. There is no evidence that they were sent in circumstances where the Claimant had emailed the "*low mood*" fit note to the Respondent and would be expected to have used a similar means of communication for the others. It is clear from the correspondence that the Respondent recognised the potential implications of any notifications of sickness, but the lack of reference beyond what appears in the Respondent's communications to any sickness demonstrates a lack of awareness of any other fit notes. The Claimant did not need to send the fit notes in the sense that he was already absent from work due to a suspension on full pay. Had the Respondent been aware of any anxiety or depressive disorder it is more likely than not that it would have reacted to that awareness.
55. The Respondent was clearly unaware that sickness was a relevant factor in the Claimant's lack of a return to work. The Claimant's correspondence with the Respondent does not disclose any medical condition which was preventing a return to work. Nor was a mental health impairment to be inferred from the Claimant's style of communication.
56. Even if the Respondent had had the 2 earliest fit notes of work-related stress, they would have been insufficient to impute knowledge of disability. They added nothing material to its knowledge gained from the "*low mood*" fit note which in itself was not informative of a disabling impairment. Nor did it, in all the circumstance, put the Respondent on notice of one. Knowledge in a reasonable adjustments complaint requires a Respondent to know of the disability and the disadvantageous effects of it. The Respondent certainly he did not have that knowledge and was not on notice that it ought to look further to seek to obtain it.

Employment Judge Maidment

Date 27 May 2020

REASONS SENT TO THE PARTIES ON

Date 28 May 2020