



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms H Newsome

v

Bluestone Leasing Limited

PRELIMINARY HEARING BY SKYPE

Heard at: Remotely

On: 18 May 2020

Before: Employment Judge Davies

Appearances:

For the Claimant: Mr Clay (solicitor)

For the Respondent: Mr Sadiq (counsel)

JUDGMENT having been sent to the parties on 19 May 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

Technology

1. This hearing was conducted by Skype (V- video). The parties did not object. A face to face hearing was not held because it was not practicable and all the issues could be dealt with by video.

Introduction and issues

2. This was a preliminary hearing in public, held by Skype, to decide whether the claimant, Ms Newsome, met the definition of disability in the Equality Act 2010 at the time of the events in this claim. The claimant was represented by Mr Clay (solicitor) and the respondent was represented by Mr Sadiq (counsel). I had in front of me the agreed preliminary hearing file of documents and the claimant's impact statement. The claimant did not have hard copies of all those documents, but she was able to access them. I heard evidence from her and she was cross-examined by Mr Sadiq.
3. The issues were:
 - 3.1 At the time of the events the claim is about, did the claimant have a mental impairment (stress/anxiety/depression)?

- 3.2 If so, did it have a substantial adverse effect on her ability to carry out day-to-day activities?
- 3.3 If not, did the claimant take medication or have other treatment?
- 3.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment?
- 3.5 If so, had the effects lasted 12 months or were they likely to?
- 3.6 If not, were they likely to recur?

Findings of fact

4. The claimant's impact statement did not clearly separate out the different impacts that she has experienced at different times and did not say very clearly what the impact of her mental ill health was and when. Rather it tended just to give a description of what things are like for her at their worst. However, the claimant gave evidence in person and I found her evidence entirely honest. I accept that she was doing her best to give me an accurate account of her experience with her mental health over time. I was also provided with copies of her GP records and those supported the evidence that she gave. My findings are based on the claimant's oral evidence, coupled with the GP records, recognising that the claimant's impact statement describes the most severe impact on her and that she acknowledges that it is not like this for her every day. I also find that the GP records are likely to be an under-representation of what was going on. I accept the claimant's evidence that she is reluctant to go to the GP and often only goes when her symptoms become so severe that a family member forces her along. In addition, because she has had a history of being on antidepressant medication, she has some "stockpiled" at home and there are occasions when she simply starts taking it, rather than going back to the GP.
5. On that basis I make the following findings. The claimant has suffered with poor mental health on and off since 2007. There are aspects of low mood or depression and aspects of anxiety. Mental health issues have always been there in the background since then. The claimant tells me and I accept that there are occasions when she experiences very severe impact. She always struggles with sleeping and if her mental health is particularly poor, she struggles to get out of bed in the morning. Sometimes her ability to care for herself deteriorates. She might have to go to her mother's house for a meal because she cannot motivate herself to prepare a meal and clear up. There have been times when her mother has washed her hair for her because she cannot bring herself to engage in those aspects of self-care or to put make-up on. Her concentration and focus can be very badly affected, partly because of being exhausted and partly because if she is anxious about something intrusive thoughts of anxiety prevent her from focussing on anything else. Eventually, she might go to the GP or start taking medication and when she sees an improvement in those symptoms she will stop taking the medication.
6. That account is supported by the Claimant's GP records. The history of medication in the GP records reflects episodes when the Claimant has been prescribed Fluoxetine. For each episode, the GP records list the last time when Fluoxetine was prescribed. There were episodes when Fluoxetine was prescribed in at least July 2007, February 2013, June 2014 and January 2015, leading up to more recent episodes in 2018 and 2019.

7. The entries in the GP records about consultations with the GP can be read alongside the medication history. These show that the GP recorded a mild to moderate depressive episode between about January and May 2007. By July 2007 the claimant was starting to reduce her medication. There was another episode in January 2012. The GP refers to this as being “stress-related” in the heading, but in the underlying notes the GP records that the claimant cannot sleep or concentrate or eat, that she is “at the end of her tether”, and that she is down, depressed and tearful. Clearly, although the heading refers to a “stress-related” condition, the underlying notes record symptoms and descriptions overlapping with low mood or depression and anxiety. The GP records show another episode in 2014. The claimant described feeling that she was slipping back again and being anxious or tearful with low mood. That lasted until at least June 2014. The Claimant went to the GP again in January 2015, with low mood. She restarted Fluoxetine and said she had stopped taking it in August the previous year. There was an episode from February to May 2018. The GP described the claimant as feeling “more stressed than depressed” on that occasion.
8. That is a summary of the background to a further episode of poor mental health and the events of August 2019, which this claim is about. The claimant’s evidence, which I accept, is that things started going downhill for her in February or March of 2019. She did not go to the GP, because she is generally reluctant to do so. She had a couple of days off in May, but she always tries to keep her absence from work to a minimum because the routine of going to work and getting away from the things that might be causing her mental health difficulties is really important to her. She says that colleagues noticed a change in her at that time and that is consistent with the respondent’s account of what happened. The claimant says she was tearful when people asked her questions about it. By August she was experiencing poor sleep. That had an impact on her ability to concentrate. She was again struggling with self-care and by that stage she was going to her mother’s house every day after work for a meal, otherwise she would have just gone home and gone straight to bed and not eaten. She was not really looking after herself properly. She washed her hair once a week and otherwise she just piled it up on her head. She could not be bothered to put make-up on, although that was usually something particularly important to her. She went to the GP in August 2019 and was prescribed Propranolol and Amitriptyline.
9. In accepting the claimant’s evidence, I have noted that it is consistent with the entry made by her GP. The GP described her as having low mood at that time, said that it had been ongoing for 6 months and referred to her poor concentration.
10. In the light of this evidence, I find that in August 2019 the claimant was experiencing an episode of low mood or depression which, by that stage, had lasted about six months. It had been gradually getting worse and she was suffering from very poor sleep, problems with concentration, and problems with self-care, in particular eating and personal hygiene.

Legal principles

11. Claims of discrimination are governed by the Equality Act 2010, s 4 of which provides that disability is a protected characteristic. By virtue of s 6, a person has a disability if she has a mental impairment that has a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. Section 6 is supplemented by schedule 1 of the Equality Act 2010, and by Guidance made by the Secretary of State pursuant to those provisions: “Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)” (“the Guidance”). The Tribunal is obliged to take the Guidance into account.
12. A substantial adverse effect is one that is more than minor or trivial. The Guidance makes clear that the Tribunal should focus on what the person cannot do or can only do with difficulty: see also *Goodwin v Patent Office* [1999] ICR 302, EAT. Schedule 1 provides that an adverse effect is “long-term” if it has lasted twelve months, or is likely to do so. “Likely” in that context means it “could well happen”: see paragraph C3 of the Guidance and the decision in *SCA Packaging Ltd v Boyle* [2009] ICR 1056, HL. This is to be judged at the date of the alleged discriminatory act and not at the date of the Tribunal hearing. 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 the effect is likely to recur. Again, likely means it “could well happen”.

Application of the law to the facts

13. Applying those legal principles to the findings of fact I have reached the following conclusions.
14. In August 2019 the claimant did have a mental impairment. It is not necessary to identify a precise label or for it to be a clinically well-recognised condition. The mental impairment was a combination of low mood or depression and anxiety. The GP notes for August 2019 only refer to low mood but taking into account the whole background, the fact that the GP might give one label but make an entry in the records that describes a range of symptoms, and the fact that the claimant has diagnoses of both low mood or depression and anxiety during the period from 2007 onwards, I find that the mental impairment was low mood or depression and anxiety.
15. In August 2019 the mental impairment did have a substantial adverse impact on claimant’s ability to do normal day to day activities. Substantial means more than minor or trivial and I have to focus on what the claimant could not do or could only do with difficulty, not on what she could do. The fact that she was attending work and was keen to attend work does not mean that she cannot have been suffering from substantial adverse impact on her ability to do normal day to day activities, particularly as attending work was important for her to try and keep her mental health on track. The findings of fact above make clear that the claimant was struggling to sleep, she was struggling to care for herself by preparing meals and washing and she was struggling to concentrate and focus on work

tasks. These impacts were more than minor or trivial, and that does not take into account the effects of any anti-depressant medication the claimant had been taking.

16. In August 2019 the substantial adverse impacts in this episode of poor mental health had not lasted 12 months. This particular episode had lasted about six months and there had been a deterioration over time. The substantial adverse effects I have identified had therefore lasted something less than 6 months on this occasion. However, I have no hesitation in finding that the substantial adverse effects were likely to recur. The question is whether that “could well happen.” I have referred to a history of mental health issues dating back to 2007 at least. The claimant had experienced at least five significant episodes of low mood or depression and anxiety during that period, each of which lasted a number of months and was treated with anti-depressant medication. Against that history it seems to me indisputable as of August 2019 that it could well happen again.
17. That means all the elements of the definition of disability were satisfied. The claimant had a disability at the time of the events in this claim, August 2019.

**Employment Judge Davies
12 June 2020**

Sent to the parties on:
16 June 2020