



EMPLOYMENT TRIBUNALS

Claimant: Mr D Gazzard
Respondent: Natural Resources Wales
Heard at: By video (CVP) On: 27 July 2020
Before: Employment Judge RL Brace

Representation:

Claimant: In person
Respondent: Ms E Grace (Counsel)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that the claimant was not a disabled person within the meaning of the Equality Act 2010 at the material time.

The claims of disability discrimination contrary to the Equality Act 2010 are not well founded and are dismissed.

REASONS

Introduction and background

1. The claimant had been suspended on 12 January 2018 for alleged fraud and had been dismissed, following a disciplinary investigation on 18 February 2019. The claimant presented a claim to the Tribunal on 14 June 2019 and in the ET1 the claimant indicated that he was claiming unfair dismissal and disability discrimination.
2. In his ET1 claim form the claimant stated that he had 'for over a year or more' suffered from prolonged insomnia arising from clinical depression.

He indicated that this mental health 'spanned the period of alleged offences' and that his decision-making may have been affected by insufficient sleep and ill-health.

3. He claimed that he had been discriminated against throughout his suspension and throughout the disciplinary process. He stated that his main concern was the conduct during the disciplinary hearing and referred to the fact that he had been on crutches due to a back issue during his disciplinary hearing.
4. By its ET3 Response entered on 17 July 2019 the respondent indicated that it did not accept that the claimant was a disabled person at the time of the alleged discriminatory treatment however it was not clear to the respondent at that point what exactly the claimant was seeking by way of disability discrimination.
5. At the preliminary hearing that took place on 4 October 2019, the claimant confirmed that despite the concerns raised in his ET1, he was not relying on the back pain that he suffered during the disciplinary process, and that the impairment relied upon was solely his mental health, namely his depression and insomnia.
6. He relied on:
 - a. s.15 Equality Act 2010 ("EqA 2010"), in that he claimed that he had been dismissed due to his poor decision-making which had arisen out of his disability and had caused the misconduct; (para 10 and 18 order of 4 October 2019); and
 - b. s.20 and s.21 EqA 2010 in that he claimed that the respondent had failed to make a reasonable adjustment to the disciplinary procedure, including the sanction of dismissal, to take into account his depression and insomnia (para 10 and 19 of the order of 14 October 2019).
7. The parties were ordered to serve on each other copies of evidence relevant to the issue of whether the claimant was at all relevant times a person with a disability under s.6 EqA 2010 and the claimant was ordered to provide the respondent with an impact statement: identifying the physical or mental impairment relied on stating in relation to each impairment relied on, between which dates it was alleged the claimant was a person with a disability because of that impairment; any prescribed medication; the symptoms and effect of the impairment on the ability of the claimant to carry out normal day to day activities.

8. The parties were also referred to Sch 1 EqA 2010 on 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' issued in 2011 and the Presidential Guidance on General Case management.
9. The matter was listed for a full 3-day hearing on liability and quantum.
10. On 14 November 2019, following receipt of the medical evidence and Impact Statement, the respondent confirmed that it still did not accept that the claimant's stated conditions amounted to a disability and that it remained in issue.
11. Due to the coronavirus/Covid-19 pandemic, the full liability hearing was converted to a preliminary hearing by video on general case management, when it was determined by Judge Ryan that there would be a preliminary hearing on the issue of disability which would be conducted remotely by CVP.

The hearing and evidence

12. The parties had prepared an agreed bundle of documents (the 'Bundle'), which had been sent in electronically to the Tribunal in advance of the CVP preliminary hearing [1-164]. The Bundle contained a copy of the claimant's Impact Statement [131].
13. The respondent had the opportunity in the normal way to cross examine the claimant and did so.
14. The tribunal had received from the respondent a chronology and skeleton argument ahead of the CVP hearing which had also been copied to the claimant.
15. There were no connectivity issues with the CVP hearing and after allowing a short break after the claimant had been cross-examined, the hearing was completed within the 3 hours that had been allocated. As a result, a reserved judgment with reasons has been sent to the parties.
16. At the outset of the hearing, the respondent sought to clarify the period that the claimant relied on for his disability and the claimant confirmed that it related from 2016, possibly as early as 2015, until he was suspended in January 2018.

Findings of Fact

17. The claimant has been employed by the respondent since 1 April 2013, latterly as Analytical Services Manager.
18. The allegations that gave rise to the claimant's dismissal were first brought to the respondent's attention in or around November 2017 and related mainly to allegations that the claimant had received large quantities of red mud ("Red Mud") at work which the respondent was, at least initially, concerned had entered the country without complying with relevant regulations. The claimant was then suspended on 12 January 2018 as a result of those allegations. He was dismissed following a disciplinary investigation on 18 February 2019.
19. In his ET1 form [7] issued on 14 June 2019, the claimant stated that he believed his health was relevant to his case in that 'for over a year or more' he had suffered from prolonged insomnia arising from clinical depression for which he was under medical supervision. He stated that his mental health spanned the period of the alleged offences and that his decision-making 'may have been affected' by insufficient sleep and ill-health. I have no evidence before me to determine the period of time that it was alleged or believed by the respondent that the claimant had been receiving or dealing with the Red Mud.
20. In January 2012, the claimant was diagnosed by his GP with 'neurotic reactive depression' [76] and prescribed antidepressants and sleeping tablets.
21. By 4th August 2014, the claimant had discontinued his medication [70] but in September 2014, the claimant was again complaining of insomnia and pressure of work although he denied being depressed [69]. He was again prescribed sleeping tablets which he continued to receive until October 2014. He visited his GP again on 3 October 2014 but there was nothing to suggest recurrence of depression other than sleep disturbance. Sleeping tablets were again prescribed.
22. On the 11 February 2015, the claimant visited his GP again [69] complaining that he was "feeling low again" and was again prescribed antidepressants. The claimant stopped taking the prescribed antidepressants relatively quickly however as he believed his sleep was being impacted by that medication.
23. I have no evidence from the claimant as to the impact of these conditions on any of his day to day activities at this time.
24. In December of 2015 the claimant again visited his GP [68] reporting low mood and thoughts of self-harm and was referred to the community mental health team. That mental health team recommended a new anti-

depressant but, as the claimant had felt improvement and did not feel depressed, he indicated that he would consider medication if he did not continue to improve.

25. By June 2016 [66] the claimant's mental health had again deteriorated, and he was presenting with low mood, suicidal ideation and insomnia. The claimant was at this time suffering with the stress of the break-up of his marriage and divorce pending. The claimant indicated to his GP however that he was coping at work and he felt that being in work did help. He was prescribed anti-depressants again which the claimant did not respond well to and in September 2016, the claimant's GP changed the type of anti-depressant [65]. At that point the claimant's 'mood' was being impacted, but his 'functioning' had been 'OK'.
26. He was advised to continue with the anti-depressants which the claimant stopped taking. He was at that time offered by his employer time away from work but felt that being in work helped.
27. The claimant did not visit his GP again regarding either mental health or insomnia concerns for 14 months, until November 2017. Whilst he had attended the surgery in the interim, these had been for other non-relevant conditions and when he brought in an application for his shotgun license renewal in August 2017 [63].
28. On 17 November 2017 [63] the claimant attended his GP. He expressed that he was finding it hard to work in the day due to his insomnia. He was again prescribed the anti-depressant, Sertraline, but at a further appointment on 13 December 2017, the claimant's medication changed as he felt that the particular anti-depressant prescribed had not assisted and that he had developed suicidal ideation again.
29. The claimant was suspended in the following January 2018 and in March 2018 the claimant attended an occupational health assessment [102/103] where he reported stressful situation in work and had received face to face counselling. On 17 April 2018, the claimant had attended his GP requesting counselling. His shotgun and shotgun license were shortly thereafter removed from him by the police [62].
30. In May 2018, the claimant attended his GP practice on three occasions [61/62] and confirmed that he was feeling 'well'. Despite the claimant having been prescribed antidepressant medication in November and December 2017, he confirmed to his GP on 4 May 2018 [61] that he had not been taking the medication for around 5 months. From this I found that the claimant had not taken anti-depressant medication from around November/early December 2017.

31. By October 2018, at his next visit to his GP regarding his mental health [86], the claimant reported that he had developed a good resilience to stress and was on no regular medication.
32. On 15 June 2018 the claimant again attended occupational health [110] to assess fitness to attend a disciplinary interview where the claimant reported that the work was stressful and was exacerbating his symptoms of stress. It was reported that the claimant was fit to attend the disciplinary interview.
33. A further referral took place in November 2018 [114] which referred to the claimant experiencing symptoms of anxiety and depression over 12 months in relation to his work and personal life. The report focused on his back issues and confirmed that due to his back issues and associated pain he would not be able to ensure a disciplinary hearing at that time. Subsequent fit notes [123 and 130] relate to the claimant's lumbar condition.
34. In terms of the impact on his day to day activities, the claimant in his Impact Statement had indicated that his depression and insomnia had the following impact:
 - a. his decision-making and judgement were impaired; and
 - b. that his performance in work had been affected as:
 - i. he couldn't concentrate;
 - ii. missed meetings;
 - iii. generally struggled to remain focused and productive;
 - iv. used to sleep during his lunch hour due to tiredness.
35. The statement provided no further information and no specific examples or dates/periods of time when he alleged that his depression and/or insomnia had impacted on his normal day to day activities and provided no further information beyond that stated at paragraph 31 above.
36. Nowhere within the GP notes or occupational health reports was it recorded that the claimant had informed the GP and/or occupational health therapist that he felt that:
 - a. his decision-making and judgement were impaired; or
 - b. that his performance in work had been affected.
37. Whilst the claimant on cross-examination stated that the GP notes, were a 'snap-shot' only, and that both the GP notes and the consultations with the occupational health therapist [102/110/114] in March, June and November 2018 were not a verbatim note or commentary of how he expressed he

- was feeling and behaving, I consider it more likely than not, that had the claimant explained how he was feeling to his GP or occupational health therapist, and how any impairment was impacting on him, this would have, at some point, been reflected in at least one or both of the GP notes and/or occupational health assessments.
38. At best the GP notes reflected that in November 2017 the claimant had told his GP that he was '*finding it hard to work*' in the day' [63]. There was nothing further and I concluded that on balance the claimant had not articulated to any GP or the occupational health therapist such an adverse impact.
39. During cross-examination of the claimant on the impact of his depression and insomnia, the claimant was asked provide specific examples of where such impairments had impacted on his decision-making. He was unable to do so, responding that it had made him make '*rash decisions*' without saying what those particular 'decisions' had been.
40. The claimant was cross-examined on his decision-making in relation to the Red Mud project specifically and it was highlighted to him that he had not given a single example of a bad decision. He was unable to provide examples despite repeated questioning on cross-examination other than:
- a. to say that they were '*relatively minor*' and '*day to day*' decisions;
 - b. When pressed for examples the claimant restated that it did affect his decision-making but was again unable to explain how it had affected his decision-making;
 - c. When asked specifically *which* decisions he was referring to, only responded that they were decisions on '*day to day activity*'
41. He was also asked how specifically he considered his judgment had been impacted on projects outside of the specific Red Mud project. He was unable to say whether poor decision-making or judgement on his part had arisen at all, as told me that he hadn't been criticized for his work on other projects.
42. With regard to missed meetings, the claimant did rely on an interview note (as part of the disciplinary investigation) [94-97] with a co-worker who reported that the claimant could be a 'bit absent-minded', but again the claimant provided no examples of where he had missed meetings.
43. I was not satisfied on the evidence that had been presented to find that the claimant's performance had been impacted in the manner alleged or at all. He had provided no examples of where his decision-making had been poor or that his judgment had been impaired even though he had been provided with the opportunity, on cross-examination, to comment

specifically on each of the misconduct allegations set out in the ET3 (at paragraph 25 Amended Rider to ET3 [39]). He denied the alleged conduct had taken place at all. He could only say that he '*maybe had overstepped his authority*' in relation to changing terms and conditions (Amended Rider to ET3 para 25(iii)).

44. Whilst he had stated in his Impact Statement in general terms that he couldn't concentrate, that he missed meetings, that he generally struggled to remain focused and productive and used to sleep during his lunch hour due to tiredness, again he provided no examples of this impact despite having the opportunity to do so on cross-examination. I was not satisfied on the evidence before me that the claimant had demonstrated that such an impact.
45. The claimant did not rely on examples of impact on day to day activities outside of his work environment and I was provided with no evidence from him that any impairment had any impact on his normal day to day activities outside of that work environment at all or at any time from when he was first diagnosed with a neurotic reactive depression in 2012.

Submissions

46. As indicated, the respondent's counsel had presented written submissions in advance of the hearing comprising 7 pages (44 paragraphs) and I will not attempt to summarize those submissions but will incorporate them by reference. Additional oral submissions were made following completion of the evidence.
47. I also received oral submissions from the claimant rejecting that he suffered from reactive depression and maintaining that the condition had lasted years and that his insomnia and depression were separate impairments. He also submitted that he did a range of work, not just the Red Mud project, and that he had may have made poor decisions on other cases, but he had no way of proving such mistakes.

The Law

48. EQA defines a disabled person as a person who has a disability (s.6(2)). Section 6(1) provides that a person has a disability if he or she 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*'.
49. Supplementary provisions for determining whether a person has a disability is contained in Part 1 Sch 1 EqA which essentially raises four questions:

- a. Does the person have a physical or mental impairment?
- b. Does that impairment have an adverse effect on their ability to carry out normal day to day activities?
- c. Is that effect substantial?
- d. Is that effect long term?

50. Although these questions overlap to a certain degree, when considering the question of disability, a Tribunal should ensure that each step is considered separately and sequentially (Goodwin v Patent Office [1999] IRLR (EAT)).

51. Furthermore, a non-exhaustive list of how the effects of an impairment might manifest themselves in relation to these capacities is contained in the Appendix to the Guidance on matters to be taken into account in determining questions relating to the definition of disability. Whilst the Guidance does not impose any legal obligations, tribunals must take account of it where they consider it to be relevant.

52. The EqA 2010 Guidance states;

'In general, day to day activities are things people do on a regular or daily basis, and examples include 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' (D3).

53. The EqA 2010 states that 'substantial' means 'more than minor or trivial' and B1 of the EqA 2010 Guidance states that:

'The requirement than an adverse effect on normal day to day activities should be a substantial one reflects the general understanding of disability as a limitation beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than minor or trivial'.

54. In Paterson v Commissioner of Police of the Metropolis [2007 IRLR 763] the EAT held that *'when assessing the effect, the comparison is not with the population at large....what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired'*.

55. The EqA 2010 Guidance (D3) indicates that normal day-to-day activities can include 'general work. The EAT in Paterson also concluded that 'normal day-to-day activities' must be interpreted as including activities

relevant to professional life. It emphasized that the phrase is to be given a broad definition that can include irregular but predictable activities that occur in professional life.

56. Finally, the burden of proof is on the claimant to show she or she satisfied this definition. The time at which to assess the disability i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities, is the date of the alleged discriminatory act (Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT). This is also the material time when determining whether the impairment has a long-term effect

Conclusions

57. In this case, I concluded that the material time would be from 2015, when the claimant indicated that his 'depression deepened' to the date of termination of the claimant's employment on the 18 February 2019. Whilst the claimant had suggested that the period of his disability ended on his suspension, the material time for assessing disability is the date of the alleged discrimination i.e. the claimant alleges that at the disciplinary stage, including the dismissal decision, there had been treatment that he alleged was discriminatory. The material time would therefore have ended on his dismissal on 18 February 2019.
58. The respondent challenges that the claimant is suffering from the impairment of 'depression' and submits that the medical records show that the claimant was suffering from 'reactive depression'. They invite me to find that this, low mood and/or insomnia was simply a reaction to adverse circumstances, such as the claimant's divorce.
59. I have therefore started by making findings on whether the claimant's ability to carry out normal day to day activities was adversely effected on a long term basis and then have gone on to consider the question of the impairment in light of those findings.
60. I concluded that the claimant had been unable to demonstrate that his mental health, whether depression and/or low mood, or his insomnia (whether arising as a product of his depression or a stand-alone condition,) had any adverse effect on the Claimant's normal day to day activities
61. In coming to this conclusion, whilst I took into account that the threshold of what is substantial, is low; it is more than minor or trivial, where I failed to hear any evidence from the claimant, and failed to be persuaded by him, that the conditions he relied had more than a trivial impact on his work environment, I was in turn, not persuaded that the conditions had a substantial adverse impact on his day to day activities.

62. The claimant's argument was focussed only to work related matters. He gave no examples of how or sought to argue that his depression and/or insomnia impacted him outside of work in any way.
63. Whilst I accepted that general performance such as attending a meeting, how one spends one's time during a lunch and concentrating on work weren't exceptional or specialised activities, the claimant was unable to give any, did not state how often this arose or when this had happened to him, despite being asked repeatedly by the respondent to provide examples. I was not persuaded by the simple statements from the claimant that he '*missed meetings*', '*used to sleep during his lunch break*' and '*couldn't concentrate*'. This wasn't a case whereby the claimant before me was presenting verbal evidence of regularly being forgetful and missing meetings (or indeed being able to give an example of just one missed meeting,) fatigue on a continuous or significant basis, or how he had been unable to concentrate in work, and I was not persuaded that any missed meetings, sleeps during lunch break, or lapses in concentration, if that had happened at all, would have been more than minor or trivial.
64. The claimant focussed his evidence, on his contention that his decision-making and judgement had been impaired, with specific reference to the Red Mud project. He gave no example of how that had been impacted or gave any examples of actual decisions he made that were poor (whether in relation to the Red Mud project or otherwise). He suggested only that he believed that his medical conditions resulted in him making the poor decisions, which had resulted in the disciplinary action. There was, as the respondent's counsel submitted, no evidence that the claimant routinely made bad decisions. Even in that context, the claimant's evidence was contradictory, denying at the same time that he had made poor decisions and not explaining the 'rash' decision that he made (in answer to questioning from the respondent's counsel for an example).
65. I was therefore not persuaded that the claimant had demonstrated that any medical condition had any impact on his decision-making or judgement or general performance. It follows that I was not persuaded that the claimant had demonstrated that any medical impact had a substantial impact on the day to day activities relied upon.
66. Whilst I could not draw the conclusion that this was a case where a claimant was simply having an adverse reaction to an adverse life event, and was satisfied that the claimant had suffered from impairments of depression and insomnia for a period of 10 months from December 2015 through to September 2016, and again from November 2017 through to January 2018, I was not persuaded that the impact of those impairments had an adverse impact on his normal day to day activities.

67. Finally, for completeness, due to the time periods that the claimant suffered from his depression and/or insomnia, any impact on normal day to day activities would not in my mind have met the definition of 'long term' in any event. There had been a 'gap' of 14 months, between September 2016 and November 2017 when the claimant had not attended his GP. There was no evidence before me that the claimant had suffered the impairments of depression and/or insomnia during this period at all or that the impairments had impacted on his performance and decision-making during this period.

68. For these reasons, I have concluded that the claimant was unable to discharge the burden of proving that he was a disabled person at the material time and his claims under the Equality Act 2010 in relation to disability discrimination should be dismissed.

Employment Judge RL Brace
Dated: 6 August 2020

JUDGMENT SENT TO THE PARTIES ON 10 August 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS