



EMPLOYMENT TRIBUNALS

Claimant: Mr D Smith

Respondent: Aqua Mundus Limited

Heard at: Croydon via CVP **On:** 7/9/2020

Before: Employment Judge Wright

Representation:

Claimant: In person

Respondent: Mr M Curtis - counsel

JUDGMENT – PRELIMINARY HEARING

It is the Judgment of the Tribunal that the claimant is not a disabled person for the purposes of the Equality Act 2010.

REASONS

1. On 1/10/2018 the claimant presented a claim to the Tribunal. He made a claim of unfair dismissal (which was subsequently struck out) and of disability discrimination contrary to the Equality Act 2010 (EQA). At a preliminary hearing on 15/6/2020, the case was listed for an open preliminary hearing to determine whether the condition of PTSD was a disability for the purposes of the EQA. The claimant was represented by

his solicitor at that hearing and it was agreed this hearing would be conducted via CVP.

2. The claimant represented himself at this hearing and he said that he was struggling with memory recall. Although Mr Curtis requested that oral judgment be given, so as to avoid delay, it was decided that in view of the statements made by the claimant regarding his anxiety and mental health problems during the course of the hearing, that it would be preferable for judgment to be reserved. This is in order that the claimant's advisers can consider the written reasons, rather than relying upon the claimant's recollection (which would probably result in a request for written reasons in any event).
3. The first matter which arose was clarifying the condition upon which the claimant relied as a disability. Despite the agreed list of issues (bearing in mind the claimant is legally represented) dated 6/7/2020 stating at paragraph 1.1 to the disability being PTSD (incorporating stress and/or anxiety) and the case management order dated 15/6/2020 at paragraph (2) stating the condition was PTSD and/or consequential stress and anxiety; the claimant contended that he also relied upon a hernia.
4. The basis of the claimant's claim was that he had referenced the hernia in his original claim form (presented at a time when he was unrepresented). The claimant was informed that, despite the reference to the hernia in the ET1, that only the PTSD was referred to in the list of issues and case management order. He was given an adjournment in order that he could seek advice and upon the resumption, the claimant stated that he was content to proceed with the disability as the PTSD.
5. The claimant relied upon his disability impact statement and he was cross-examined in that respect by Mr Curtis. There was a bundle of 91-pages, which was referred to. Both parties made closing submissions.
6. Not all matters referred to by the claimant will be considered or determined. The sole issue for consideration was whether or not the claimant was disabled by reference to s.6 and schd 1 EQA:

Section 6 Disability

(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.

SCHEDULE 1

Long-term effects

2 (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.

7. The allegations of discrimination cover the period September 2017 to the 20/7/2018. The EQA Guidance on matter to be taken into account in determining questions relating to the definition of disability at paragraph C4 provides:

In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).

8. The chronology is that the claimant was employed by the respondent from 23/8/2016 until his dismissal on 20/7/2018. On 14/8/2017 the claimant was attacked and assaulted by a group of youths whilst working for the respondent. This was the incident which led to the claimant's PTSD. In about December 2017 the claimant was referred for counselling. The counselling helped somewhat, but the claimant felt the respondent's management's attitude change from being supportive in 2017 to unsupportive in 2018.

9. The claimant was also off work from 18/12/2017 and returned in January 2018. At a return to work interview, the respondent suggested a referral to Occupational Health (OH), however, this did not take place until 23/3/2018, when the claimant consulted a Specialist Registrar in Occupational Medicine. The view of the Specialist Registrar was that the claimant felt he lacked management support. The report noted his condition was being monitored by his GP who was currently trying to arrange a further course of counselling. The report recorded:

'In the short term, his ability to work is likely to be impaired, but it is anticipated that with further support from the counselling service and the opportunity to address his perceived work concerns with management, he is likely to be able to work in due course, possibility within the next 6 weeks.

...

In my opinion, at this stage the EQA is not likely to apply although this is a legal decision.

...

In my opinion, his current level of impairment is temporary and he is receiving the appropriate support through his GP Practice.

In my opinion, he is currently not fit for work due to symptoms of stress and anxiety. He says he feels unsupported and treated unfairly by Management and it is recommended that Management discuss his concerns with him to see if there are any adjustments that may help to support him in the workplace. Dependent upon the outcome of this, the time frame for returning to work may be 6 weeks.

...

His condition does not affect his ability to communicate.'

10. The report recorded it was based upon the history obtained from the claimant and the management referral. Under the heading 'relevant medical history and current position', there was a reference to the attack, the counselling in December 2017 which 'helped, but he still reports residual symptoms'. It was noted the claimant had been absent from work due to 'anxiety' (presumably in December 2017) and reference to stress and anxiety. There was however no reference to PTSD in the OH report.
11. The respondent held a welfare meeting with the claimant on 10/5/2018 to discuss the OH report.
12. Although the OH report suggested the claimant take up to six weeks off work, he was unable to take the time off as the respondent would not pay him (the respondent's contractual position was only to pay SSP). He therefore continued to work until he was dismissed.
13. Besides the GP records, the only other contemporaneous document was a letter from MIND dated 20/6/2018, which recorded the claimant complained of symptoms of anxiety and depression. The assessment confirmed he had moderate symptoms of anxiety and moderate levels of overall psychological distress. He was offered six counselling sessions.

14. The claimant had produced a disability impact statement dated 11/2/2020. The statement referred to the attack and stated, 'ever since being assaulted my sleep is very patchy'. There is no reference sleep difficulties in either the OH report or the MIND letter.
15. The statement then referred to the claimant's difficulties in the present tense (I go to the shops, I find it very difficult, I do chores, in my current state). The statement does not refer to any substantial and long-term adverse effect on the claimant's ability to carry out day-to-day activities, at the relevant time.
16. It is fully accepted that the claimant may now be struggling such that at this time he may come within the definition of disability under the EQA and nothing in this judgment is intended to undermine the claimant's health issues (although the respondent does not conceded disability, it does accept his GP records say he is suffering from stress). At the relevant time however, the burden (the balance of probabilities) is for the claimant to show that not only was his condition likely to last for 12-months¹; but also that there was a substantial adverse effect upon his ability to carry out day-to-day tasks.
17. Unfortunately, the claimant has not discharged that burden. He continued to work and did not take the OH advice to take up to six weeks off. Apart from one reference to sleeping difficulties in the impact statement, there is no other mention of difficulties the claimant had in doing day-to-day tasks at the relevant time. It would be expected that if the claimant did have sleeping difficulties in the first part of 2018, he would have mentioned it at the OH meeting and to his GP and it is common sense that it would be recorded (as the claimant's other comments were noted). It is not credible that when the claimant recounted his relevant medical history and it was noted; that the Specialist Registrar (or for that matter the GP) would record some comments and not others. Sleep difficulties would be significant enough to be recorded.
18. As was submitted by the respondent, it was anticipated the claimant would be fit to return to work if he took up to six weeks off. The medical opinion at that time was optimistic and the view was that the claimant's difficulties were likely to resolve and certainly would not last for more than 12-months. That view was buttressed by the MIND discharge letter (which offered six counselling sessions). Also, the view was that the claimant's issues related to his work situation, rather than any underlying condition. The respondent submitted it must be borne in mind that the claimant's impact statement it at odds with the contemporaneous medical evidence and that it should be seen through the lens of now attempting to fit that evidence into the EQA definition of disability. It can be expected, if the

¹ Considering into account the OH report and prognosis.

claimant had those difficulties at the time, he would have mentioned them. The Tribunal was therefore invited to find that any difficulties the claimant did have, were not so substantial and adverse to lead him to mention them.

19. The conclusion is that whatever the claimant now invites the Tribunal to find, there is no record in the contemporaneous documents of any substantial and adverse effect on the claimant's ability to carry out normal day-to-day activities². Furthermore, the effect was not long-term as at the time, there was no indication the claimant's condition was likely to last for at least 12-months. At the time, it was expected the claimant would recover in the short-term.
20. Even taking into account the fact the claimant may now have memory recall problems, he is not assisted by the contemporaneous documents. Those documents do not record him saying he could not carry out normal day-to-day activities. At best, they record him saying he felt, in 2018 unsupported by his management at work. That is not enough to find he was disabled under the EQA.
21. It is therefore the judgment of the Tribunal at the preliminary hearing that the claimant was not, at the relevant time, a disabled person for the purposes of the EQA. As the claimant has failed to establish he has the protected characteristic of disability, his claims under the EQA fail and are dismissed. The hearing provisionally listed for three days commencing on 12/4/2021 is vacated.

Employment Judge Wright

8/9/2020

² Irrespective of whether that is now the case.

