



EMPLOYMENT TRIBUNALS

Claimant: Mr P Devine

Respondent: Chief Constable of Merseyside Police

Heard at: Liverpool

On: 7 September 2020

Before: Employment Judge Aspinall

Representation

Claimant: Mr Buckle, solicitor

Respondent: Mr Berry, counsel

RESERVED JUDGMENT

The judgment of the tribunal is that the claimant was not a disabled person for the purposes of section 6 Equality Act 2010 on 21 December 2018. His claims for disability discrimination stand dismissed.

The final hearing which had been listed for 7 and 8 December 2020 is vacated.

REASONS

Background to the claim

1. By a claim form dated 26 July 2019 the claimant brought claims for disability discrimination under sections 15, 19 and 20, 21 of the Equality Act 2010. The claimant relied on two conditions as disabilities. They were anxiety and depression and Post Traumatic Stress Disorder.

2. The claimant had been a serving police officer from 2005 until he was dismissed on 15 March 2019 for gross misconduct having been prosecuted and having pleaded guilty to drink-driving. It was his case that his mental health conditions caused him to make an error of judgment when drink-driving on 21 December 2018.

3. The respondent defended the claims in its response form served on 3 September 2019.
4. On 3 October 2019 Employment Judge Benson conducted a case management hearing and ordered a preliminary hearing to be listed on 3 February 2020 to decide whether the claimant was disabled for the purposes of the Equality Act 2010 or not.
5. The claimant disclosed a medical report in the form of a letter to the Criminal Injuries Compensation Authority from Chartered Clinical Psychologist Dr Ferdenzi (Dr Ferdenzi's letter) and served a disability impact statement dated 8 November 2019. The respondent instructed an independent expert Consultant Psychiatrist Dr O'Brien who produced a report dated 17 December 2019 (Dr O'Brien's first report). The claimant sought and was granted a postponement of the open preliminary hearing on 3 February 2020 to allow time for disclosure of occupational health records and to allow time for Dr O'Brien to review them
6. There was a case management hearing on 3 February 2020. Employment Judge Buzzard recorded "the parties confirmed to the tribunal that the claimant's status as a disabled person or otherwise after 21 December 2018 is not relevant to the claims pursued by the claimant". It was agreed that disability should be assessed as at the date of the index misconduct for which the claimant was subsequently dismissed, that is 21 December 2018. A preliminary hearing on disabled status was relisted for 31 March 2020. Dr O'Brien prepared a second report dated 27 February 2020.
7. The 31 March 2020 preliminary hearing was converted into a telephone hearing for case management purposes due to the restrictions in place caused by the COVID-19 pandemic. The preliminary hearing was relisted for 7 September 2020 and a final hearing was listed for 7 and 8 December 2020.

The hearing

8. I heard evidence from the claimant. He had clearly been through some difficult experiences both earlier in his life and in 2018. I find the effects of the impairment he was suffering from between up to and including 21 December 2018 were not so great as he stated them to be in his Disability Impact Statement and in his oral evidence. Otherwise, he was an open and helpful witness who did his best to answer the questions that were put to him, some of them about the most difficult events of his life.
9. I heard evidence from Dr O'Brien who gave his expert medical evidence in a straightforward and helpful way.
10. There was an agreed bundle of documents which included relevant GP records, the medical reports and Dr Ferdenzi's letter. The respondent had prepared and shared with the claimant prior to the hearing a Skeleton Argument and bundle of authorities.

The Facts

11. The claimant was a serving police officer with Merseyside police from 25 April 2005 until his dismissal by a special cases disciplinary panel for gross misconduct.

12. In February 2018 the claimant conducted a stop check of a vehicle. A female passenger swallowed some drugs and subsequently died. The claimant felt responsible and was troubled by negative thoughts which affected his sleep. He underwent counselling sessions through the police Federation until April 2018.

13. In April 2018 the claimant suffered an injury at work during a football match. A member of the public threw a smoke banger which hit him on the back causing damage to his ear. This incident caused him to feel anxious about working at football matches, attending football matches or working in crowds. Whilst playing football himself in an unrelated incident in April 2018 he injured his knee.

14. In July 2018 the claimant suffered bereavement. He had been close to his grandmother and had been her primary carer while she had dementia. He was away at the Harrogate Centre getting treatment for his knee injury when she died. He went back for the funeral. After her death he struggled to sleep sometimes and started to drink more than he had done previously. He continued to work and to carry on his life.

15. On 6 November 2018 the claimant was attacked in the course of his duties. It was a violent physical attack, he said he was thrown about like a rag doll, which left him feeling vulnerable. He suffered physical injury to his knee which exacerbated the pre-existing knee injury from April 2018. The incident triggered feelings of helplessness that he had first experienced due to traumatic events in his childhood. He was able to continue work although on reduced duties. He was working shorter shifts, only 4 – 6 hours and was feeling frustrated at not having enough to do. He was keen to get back to full duties.

16. He saw his GP on 7 November 2018 to report the knee injury. He had been to A & E and was booked to see a consultant on 3 December 2018. He was signed off sick for one week. He did not report any psychological symptoms to his GP. He had previously seen his GP about mental health issues (some years before) and about intimate personal issues.

17. On 14 November 2018 he was provided with a further sicknote for one week. On 22 November 2018 he saw his GP for a knee review. The notes record that pain can keep him awake at night. He did not report and the GP did not record any mental health condition or symptomatology.

18. On 3 December 2018 the claimant saw the consultant orthopaedic surgeon about his knee injury. They discussed his knee and the claimant reported that the knee was another stressor making him feel depressed. The consultant wrote to the GP following that meeting and recorded "he is otherwise fit and well with no significant past medical history". The consultant did record that the claimant was off sick from work and that this was "an extra factor to make him depressed". The consultant recorded that the claimant was "keen to get back to work".

19. On 18 December 2018 the claimant went for a GP review of his knee injury and the GP notes record "feels better in self". The claimant told the GP that he was having a risk assessment done at work and would like to go back to normal duties following that risk assessments. The claimant did not report, and the GP did not record, any mental health concerns.

20. Between 6 November 2018 and 21 December 2018 the claimant was feeling low. He was not sleeping well. He sometimes slept till 3pm. He was working shorter shifts and was keen to get back to his full working pattern as his work gave him job satisfaction and he enjoyed the camaraderie of his colleagues. He was still bereaved and troubled by the assault he had suffered and by the death of the female in the stop check he had conducted. He was drinking more than previously. He lived with his partner who was looking after him and cooking for him. He was driving and attending work.

21. On 21 December 2018 the claimant had been working. He had to drop a phone off to a colleague as part of his duties and was then going to meet friends for a meal in an Indian restaurant but was too late to go. He changed his plans and went to a pub and drank 3 or 4 pints of beer. He had planned to leave the car overnight in the pub car park but instead got in and drove. He was arrested for drink-driving by Cheshire police.

22. The next day the claimant visited his GP and the GP recorded an anxiety state. The GP reports for the first time the claimant has said "felt like not wanted to be here anymore, but no intentions/plans" the GP discussed safeguarding, occupational health, the Samaritans and the availability of support through friends. It was agreed that the GP would review the claimant the following week. The following week the claimant was prescribed medication for anxiety.

23. On 28 December 2018 the claimant saw occupational health professional Susanne Denner. He told her about the stressors he had faced in 2018 and she recorded that he has been experiencing "increased stress" and so had drunk more than usual. The notes of the meeting continue chronologically and as they talk about work and his drink driving. Ms Denner records "Tearful, says it is his own fault but doesn't know anything other than being a police officer which he loves. Feels he is going to lose everything – world crashing down around him"

24. The claimant was again seen by occupational health on 17 January 2019 (the notes wrongly record 2018). Ms Denner records "Paul continues to experience psychological symptoms attributable to his recent court case and pending hearing and thought of losing his job".

25. From June 2019 the claimant had counselling sessions with psychologist Dr Ferdenzi. He was diagnosed with PTSD and generalized anxiety and severe depression. He has been taking anti depressant Sertraline since November 2019. At some point after 4 September 2019 and before November 2019 Dr Ferdenzi wrote a letter to the Criminal Injuries Compensation Authority in support of the claimant's claim for a payment due to his knee injury and PTSD and depression and anxiety caused by the incident on 6 November 2018. Dr Ferdenzi answered questions the CICA had put to her. She diagnosed PTSD as a result of the assault on 6 November 2018. She

said “in my opinion these conditions began as a result of the Incident but have been further increased by events since the incident”

26. Dr O Brien saw the claimant on 5 November 2019 and did not get from the claimant a description of any significant impairment that the claimant suffered in December 2018. The claimant was not able to tell Dr O Brien what impact his condition had had then on his day to day functioning.

Relevant Law

27. The issue today is whether the claimant was disabled for the purposes of section 6 of the Equality Act 2010 on 21 December 2018.

Section 6 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 adverse effect on P’s ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.”

28. The Guidance on Matters to be taken into Account in Determining Questions relating to the Definition of Disability 2011 (“the 2011 Guidance) provides at paragraph A4 that a disability can arise from a wide range of impairments which can be:

- **“mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias or unshared perceptions; eating disorders; bipolar affective disorders; obsessive-compulsive disorders; personality disorders; post-traumatic stress disorder and some self harming behavior**
- **mental illnesses such as depression and schizophrenia”**

29. At paragraph A7 the 2011 Guidance states that what is important is to consider the effect of the impairment and not its cause.

30. Paragraph D3 of the 2011 Guidance provides guidance on the meaning on normal day to day activities:

“In general day-to-day activities of things people do on a regular or daily basis, and examples include shopping, reading and writing, and the conversational 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. Normal day-to-day activities can include general work-related activities, and study and education related activities such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents and keeping to a timetable or shift pattern.

31. The adverse effect on ability to carry out normal day to day activities must be both substantial and long term. The 2011 Guidance states at paragraph B1 that substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than minor or trivial. A determination of whether or not an adverse effect is substantial might take into account the time taken to carry out an activity, the way in which an activity is carried out, the cumulative effects of impairments and the effects of behavior and the effects of environment and treatment.

32. Long term means

**“(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, ...”**

33. In SCA Packaging Ltd v Boyle [2009] ICR 1056 HL Baroness Hale clarified that in considering whether something was likely, it must be asked whether it could well happen. The 2011 Guidance states at paragraph C3 that “‘likely’ should be interpreted as meaning that it could well happen” rather than it is more probable than not that it will happen.

34. As for what is relevant to the determination of disability, a broad view is to be taken of the symptoms and consequences of the disability as they appeared during the material time. The burden of proof in establishing that he is disabled rests with the claimant.

Submissions

35. The respondent submitted that the claimant was not disabled on the 21 December 2018 because any symptomatology that he was experiencing did not have a substantial adverse effect on his ability to carry out normal day-to-day activities. Alternately, the respondent submitted that the claimant’s degree of symptomatology did not have a long-term adverse effect on the claimant’s ability to carry out normal day-to-day activities in that it was not likely to exceed 12 months.

36. In the respondent’s submission the claimant did not produce any independent expert evidence to establish that he was disabled. The respondent submitted that Dr Ferdenzi’s letter should have little if any weight attached to it and that the evidence of Dr O’Brien should be preferred.

37. The claimant submitted that Dr O’Brien supported its contention that the claimant was a vulnerable person. The claimant submitted that he began to suffer the symptomatology of post-traumatic stress disorder in February 2018. The first stressor was the death of the female passenger. The next stressor was the smoke bomb, the 3rd stressor was the death of the claimant’s grandmother and the 4th stressor was the incident on 6 November 2018 when the claimant was attacked. It is the claimant’s case that he suffered anxiety and depression and PTSD symptomatology from February 2018 until after 20 December 2018. The claimant submitted that in matters

of mental condition the tribunal should adopt a liberal approach to the definition of disability.

Applying the law

What was the impairment ?

38. The claimant endured a series of stressful events during 2018. He suffered a mental impairment from February 2018 in that he had anxiety and post July 2018 suffered grief and struggled to sleep sometimes. He described himself as at the point of self destruction in July 2018 following bereavement but did not say in his Impact Statement evidence in chief nor when asked in cross examination what it was he could not do at this point. He did not consult his GP about mental health in July 2018 post bereavement and carried on working.

Did it have a substantial adverse effect on his ability to carry out his normal day-to-day activities ?

39. No. Whilst this was a difficult time for the claimant, the impact of the impairment on his ability to carry out his normal day to day activities was minor up to 6 November 2018. He was able to carry out his normal day to day activities fully and to work and derive job satisfaction from his working relationships and from the work he did.

40. The claimant overstated the impact of the impairment between July and November 2018. The claimant is someone who has consulted his GP about mental health issues in the past and about other intimate health issues. It's not plausible to suggest that he was suffering to the extent he described in his Disability Impact Statement and in his oral evidence between July and November 2018 and that he did not report this to his GP.

Did it become substantial after 6 November 2018 ?

41. I have separated my consideration of disabled status into two periods, pre and post 6 November 2018 as the claimant said that the events of 6 November 2018 were a "game changer" for him and Dr O'Brien conceded that the claimant should be seen, because of his history prior to 2018, as someone of increased vulnerability. I acknowledge the difficult life circumstances he faced in 2018.

42. On 6 November 2018 the claimant was attacked in the course of his duties. This triggered painful memories and feelings for him. He said he struggled with the simplest things. I asked the claimant what it was he could not do at that time and his response was that his sleep was disturbed, he didn't go to football matches even though he was a season ticket holder, he found it hard to go out and enjoy things. I set that against the fact that he was working 4 to 6 hours shifts and was keen to get back to full duties. He was able to drive and wanted to be allowed to perform his full role at work.

43. If the claimant had been suffering to the extent described in his impact statement, breaking down in tears at least twice per day, finding it difficult to speak

with friends, avoiding social situations reliving the death of the female passenger, reliving the attack from November, finding it difficult to concentrate, finding it difficult to retain information, feeling useless at work, suffering suicidal thoughts, turning to drink as a result of his feelings, feeling a complete shell, he would have reported this to his GP.

44. The claimant said the reason he did not report was that a) one possible option was medication and he did not want to take medication because he had seen the (negative) effect of medication on his father and b) another option was counselling but that the waiting list was so long that it would be useless to request counselling from his GP and c) he believed that getting back to work full-time would help him.

45. I do not accept that those were the reasons for not reporting his condition to his GP and or to his line manager and seeking a referral to occupational health or for further counselling either through management referral or Police Federation support. If the condition was as bad as the claimant described and given that he had presented with mental health issues to his GP before, I find it more likely than not that he would have presented those issues to his GP in November and December 2018.

46. His mental health was undoubtedly worsening during November and December 2018 but until his arrest not yet so bad as to have a substantial adverse impact on his ability to carry out his normal day to day activities. I make that finding because:

- a. By his own evidence he was keen to get back to full duties at that time, (corroborated by the consultant orthopaedic note on 3 December 2018 and GP record at that time) and
- b. He did nothing to report mental health concerns to his employer, GP or Police Federation at that time (despite saying in his Claim Form that he had made his employer aware) and
- c. He had previously had counselling through the Police Federation but did not request support in November or December 2018
- d. The contemporaneous notes of his GP make no mention whatsoever of any mental health difficulties at that time. It did not seem credible to me that his symptoms could have been as bad as he claimed and him not report them to the GP and
- e. The GP saw him three times during that period and on 18 December 2018 reported "feels better in self". There is nothing to suggest that the GP noticed any mental health issues.
- f. On 21 December 2018 he was well enough to drop a phone off to a colleague, be planning to go to join friends for a meal and to have a drink in a pub.

47. I accept the respondent's submission that the claimant does not establish that he was disabled on 21 December 2018 for the purposes of Section 6 Equality Act 2010. The claimant does not need medical expert evidence to establish his disability. It could be enough for his oral evidence to satisfy the tribunal that he met the test. It did not. I found he overstated the impact any impairment was having on him. He said he was suicidal but he was arguing to get back to full duties and not mentioning his mental state to his GP who reported "feels better in self" on 18 December 2018. I find the contemporaneous record of the GP (and the claimant's oral evidence that he

wanted to get back to full duties) more reliable than his subsequent Disability Impact Statement and evidence to tribunal.

48. Things undoubtedly got worse for the claimant after his arrest and he became very ill. He lost his job, his income and the camaraderie and satisfaction he derived from his work and he lost his identity as a police officer.

Was the impairment likely to last 12 months ?

49. It is not necessary for me to decide whether the condition or impairment that he was suffering from, from 6 November 2018 to 20 December 2018 was likely, in the sense of could well happen, to last 12 months because I have already concluded that it was not substantial and so does not meet the definition of disability within Section 6. However, I accept Dr O'Brien's expert evidence that the majority of people who suffer PTSD recover within 6 months. Dr O'Brien took care to point out that it is impossible to predict how and when any one person will recover. The claimant was someone who had recovered from other traumatic events in his life through the use of medication and counselling. He was keen to keep working, had good support from his partner, good relationships at work and derived great job satisfaction from his work. Events overtook him on 21 December 2018.

Does it matter for the purposes of Section 6 what caused the impairment ?

50. It is not necessary for me to look at the cause of the impairment the claimant was suffering from on 21 December 2018. I focus on the effect. Dr Ferdenzi's letter addresses cause and links subsequent PTSD and depression and anxiety to the incident of 6 November 2018. It does not assist me in assessing the extent of adverse effect on ability to carry out day to day activities at 21 December 2018. It describes the claimant's condition in 2019, she first saw him in June 2019. For those reasons I have attached little weight to her letter.

Conclusion

51. The task before me was very specific, to apply the definition of disability in the Equality Act 2010. I looked at the effect of the impairment as at 21 December 2018. Whilst he subsequently became very ill, on 21 December 2018 the claimant was not suffering a substantial adverse effect on his ability to carry out his normal day to day activities due to his anxiety and depression and or his post traumatic stress disorder symptomatology within the meaning of the Act.

52. For the reasons above, the claimant was not disabled at the relevant time for the purposes of Section 6 Equality Act 2010 and his claims stand dismissed.

Employment Judge Aspinall
Date 9 September 2020

**Case number 2410325-19
in person hearing**

RESERVED JUDGMENT & REASONS SENT TO THE
PARTIES ON

15 September 2020

FOR EMPLOYMENT TRIBUNALS