



EMPLOYMENT TRIBUNALS

Claimant Mr S Cummings
Represented by Ms E Sherratt (solicitor)

Respondents London United Busways
Represented by Mr E Nuttman (solicitor)

Before: Employment Judge Cheetham QC

**22 September 2020 at
London South Employment Tribunal by Cloud Video Platform**

JUDGMENT

1. The Claimant was disabled within the meaning of the Equality Act 2010.
2. The application to amend the claim is allowed as follows:
 - (i) to add a complaint of failing to provide employment particulars (Employment Act 2002 s.38).

REASONS

1. *This has been a remote hearing on the papers, which the parties have not objected to. The form of remote hearing was: V - video. A face to face hearing was not held because it was not practicable and the issue of the future determination of the claim could not be resolved from the papers. The documents that I received were the witness statements, skeleton arguments, the agreed hearing bundle, as well as those in the tribunal file.*
2. This is a claim that was brought on 23 October 2018 and it arises from the Claimant's employment between 18 February 2008 and 10 July 2018. It was previously before EJ Sage at a Preliminary Hearing held on 8 April

2019, when she listed this claim for a 4 day full merits hearing. As the Judge said, the claim was essentially about the Claimant's requests to be taken off night shifts, which he alleged adversely affected his depression. In her Order, EJ Sage carefully defined the issues, which covered unfair constructive dismissal, wrongful dismissal and a failure to make reasonable adjustments.

3. EJ Sage gave directions, including directions relating to disability and whether the Respondent accepted that the Claimant was disabled. She also recorded that: "*The Claimant was strongly advised to seek legal advice and assistance in the preparation of his case including assistance in preparing his disability impact statement, his statement for the hearing and with the presentation of his case before the Tribunal. There are many organisations who may be able to assist, including Citizen's Advice, the Free Representation Unit and the Pro bono Unit.*"
4. This hearing was determining whether the Claimant was disabled within the meaning of the Equality Act 2010 and was also considering the application to amend.

The Claimant's disability.

5. The law. Under the Equality Act 2010 s.6(1): "*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*".
6. The tribunal must ask itself four questions:
 - (i) did the claimant have a mental and/or physical impairment;
 - (ii) did the impairment affect the claimant's ability to carry out normal day-to-day activities;
 - (iii) was the adverse effect substantial; and
 - (iv) was the adverse effect long term?
7. It was agreed at the outset of the hearing that the essential issue was not whether the Claimant's depression amounted to a mental impairment that was long-term, but whether it had an adverse effect on his ability to carry out normal day-to-day activities that was substantial.
8. The Equality Act 2010 Guidance states: "*In general, the day-to-day activities are things people do on a regular basis, and examples include shopping, reading and writing, having a conversation or using a 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*" (Paragraph D3).
9. Ms Sherratt referred me to a number of authorities. In ***Aderemi v London and South Eastern Railway Ltd*** [2013] ICR 591, the EAT commented on the definition of 'substantial' stating that—

'the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.'

10. Mr Nuttman also referred me to a number of authorities, including ***Morgan v Staffordshire University*** [2002] ICR 475, which is a case under the previous legislation. In that case, the EAT stated that a claimant should obtain in writing a diagnosis from a suitably qualified medical practitioner of a mental illness, although in many cases where the illness was sufficiently marked, a letter from the claimant's general practitioner will suffice.
11. In ***Royal Bank of Scotland Plc v Morris*** UKEAT/0436/10, the EAT reiterated the importance of expert medical evidence where an alleged disability takes the form of "*depression or cognate medical impairment*". In Paragraph 55, the EAT stated that, in such cases, the issues will often be too subtle to allow a tribunal to make proper findings without expert assistance. The EAT thought that a statement in ***Morgan*** (above) that "*the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion*" was still valid, and did not relate specifically to the now defunct requirement that a mental impairment be "clinically well-recognised".
12. Findings of fact. I heard evidence from the Claimant, who had prepared an impact statement, and also from his mother and made the following findings of fact.
13. The Claimant was first diagnosed with depression in 2011. It is recorded in the GP records for the first time on 24 May 2011 and the notes refer to symptoms such as "*not sleeping well, very tearful, feeling bad about himself*". He was prescribed Citalopram 10 mg. He was off sick from work for one week. This occurred after someone walked in front of his bus and, unsurprisingly, the Claimant found this event traumatic.
14. However, neither he nor his employer notified the DVLA that he was not fit to drive a bus on his return. Notifying the DVLA is a legal obligation, as the Claimant accepted, where a driver's mental health impacts on their ability to drive. This suggests that neither the Claimant nor his employer considered this to be the case on his return to work. The DVLA guidance requires notification, unless the anxiety and depression is "mild to moderate".
15. The next relevant reference to depression in the GP records is on 13 August 2012, where the notes refer to the Claimant finding out about his girlfriend's miscarriage. A further entry on 28 December 2012 refers to "reactive depression". In other words, on this occasion, the Claimant was suffering depression as a reaction to something very unpleasant happening in his life.

16. The next narrative entry regarding depression is in July 2014, where the entry records the Claimant feeling depressed following the death of (as he described him to me) his best friend. Again, it is noticeable that the Claimant was reacting to what is sometimes called “a life event”. He had a month off work and continued to be on medication. In fact, he has remained on medication throughout the relevant period, his dosage being increased to 40mg at the start of 2016.
17. The Claimant was a very frequent attender at his GP surgery and had various illnesses and conditions. However, the next relevant entry is December 2015, when the GP recorded, “*feels a bit down at this time of year, some work issues and his nan passed away at this time*”. He was absent from work for 2 weeks and then worked for about 15 months without any relevant sickness absences.
18. In May 2017, he told the GP that he was depressed: “*son broke his arm and wife going through hard time so all making him down*”. He was signed off work for 10 days, but then worked a further 5 months without absence.
19. An entry on 15 January 2018 contains what is described as, “depression interim review”. It refers to the medication not working and describes his low mood and that he was sleeping a lot. He was referred to the primary care mental health team. He was absent from work for about 5 or 6 weeks.
20. A letter from a Primary Care Mental Health Nurse dated 20 February 2018, describes the Claimant presenting as, “*somewhat stressed and depressed. Has been depressed on and off for 6 years mainly since the death of his grandmother and unhappiness at work*”. He was referred to an organisation called ICOPE and a GP note on 28 February 2018 described him as, “getting better”. There is then no further reference in the GP records to depression and, as noted above, the Claimant’s employment ended in July 2018.
21. In cross-examination, the Claimant accepted that his extended absences from work could be linked to stressful life events, although he said he would have been off sick without them. He said that his condition was made worse by life events and agreed that there was a close correlation between most of his sickness absences through depression and these stressful life events. However, that does not appear to be the case for the lengthy absence at the start of 2018.
22. In his impact statement, the Claimant provided a detailed description of how his depression has affected him over a lengthy period. This includes sleep problems (which are referenced several times in the GP records), a lack of energy and difficulty concentrating. He also described himself as being emotionally vulnerable when in a depressive state. The impact on his daily life is that he will isolate himself and avoid social interaction, he will fail to manage menial tasks (such as washing himself) or to complete what he had started. This impact can properly be described as substantial.

23. One of the issues he had was with late shifts, in part because of the amount of time he had to spend between waking up and starting work. Late shifts also adversely affected his already disturbed sleep patterns. I accept the Claimant's evidence about his symptoms and about how they affect him. He gave his evidence in a clear and unexaggerated way and his self-description is supported by the medical records. I accept his evidence that, "*The effects on my ability to carry out these activities have lasted from May 2011, when I was first diagnosed with having depression, until now and still continuing*".
24. Submissions. I shall summarise both sets of submissions, although both representatives provided detailed and helpful arguments and references to the relevant authorities. In his submissions (which were supported by written submissions) Mr Nuttman said that there was no diagnosis of a depressive disorder. Depression and anxiety are symptoms and he referred to the **Morgan** case. He emphasised that at no point had the Claimant or his employer notified the DVLA that he was not fit enough to drive. It followed, therefore, that when he drove, he was neither lacking sufficient concentration, nor was too tired.
25. In her oral and written submissions, Ms Sherratt made the point that there were 71 relevant entries from 2011 and every year he had suffered some relevant sickness absence. It is a feature of a depressive condition that it will vary over time. Although there is one reference to reactive depression, it is otherwise "NOS" or Not Otherwise Specified. The Claimant has suffered from various symptoms and he meets the description of having had moderate depressive episodes.
26. Conclusion on disability. First, I accept that the Claimant did not consider his condition such that he needed to inform the DVLA, although – rather obviously - when the Claimant was absent from work as a result of depression, he was not able to drive. However, based upon my findings of fact, the Claimant's symptoms did have an impact on his day-to-day activities and I would consider that impact as significant.
27. Secondly, those were symptoms of depression. I accept that there is no diagnosis by – for example – a treating consultant of a diagnosed depressive condition. However, there are multiple and repeated references to "depression" by GPs over a 7 year period, as well as a referral to the mental health team for depression and the prescription of anti-depressive medication from 2011. It is clear from the medical records that the Claimant suffered from depression and that at times it was serious enough to cause him to be absent from work.
28. Thirdly, there is – as Mr Nuttman submits - a correlation between stressful life events and most (but not all) of the Claimant's absences through depression. However, the Claimant did not suffer from depression only at the times that there were stressful life events, by reference to the GP records and his ongoing medication. Nor were those the only times when his mental

impairment was significantly affecting his ability to carry out day-to-day activities, even if he was able to attend work and to drive.

29. Therefore, on balance, I am satisfied that the Claimant has proved that he was disabled at the relevant time, because his mental impairment had an adverse effect on his ability to carry out normal day-to-day activities that was substantial.

The application to amend

30. There was no dispute over the applicable legal principles and, in particular, the well-established guidance provided *in Selkent Bus Co Ltd v Moore* [1996] ICR 836. Mummery LJ referred to the relevant circumstances as including the nature of the amendment, the applicability of time limits and the timing and manner of the application.

31. On 29 November 2019, therefore some 7 months after the Preliminary Hearing, the Claimant applied to amend his claim by filing new particulars of claim. He had by this stage managed to arrange the assistance of Ms Sherratt, who is a solicitor at the Kent Law Clinic, which is a free legal advice and representation service provided by teacher-practitioners and students of the law school of the University of Kent.

32. That detailed application set out why the Claimant had delayed obtaining representation, making the valid point that it can be very difficult to get help with case preparation from the services listed by EJ Sage (as opposed to representation) and that, for someone without sufficient means, legal representation is simply not feasible. Ms Sherratt was undoubtedly correct in saying that.

33. As to the application itself, it may be helpful if I set out first what the application sought to add and the Respondent's response on each point.

- (i) a failure to provide employment particulars (Employment Act 2002 s.38). The Respondent accepted that this claim could be added by way of amendment; as I would agree, there is nothing further to say on this issue.
- (ii) with respect to the claim for a failure to make reasonable adjustments, the application added two further PCPs; and
- (iii) a claim under the Equality Act 2010 s.15. This is a new claim and the Respondent objected to it.

34. With regard to the s.15 claim, Ms Sherratt submitted that the Claimant had done his best to put forward his claim. EJ Sage had tried to draw out the issues, but a s.15 claim had not been identified. However, she said, it arises from the same facts and had been previously raised in a grievance, which I was shown.

35. With regard to the PCPs, the PCP identified at the Preliminary Hearing was "*Requiring Drivers to work 5 days out of 7 with a mix of early, middle and*

late shifts". The new PCPs are: "that new requests for flexible working patterns be considered against the background of the company's financial interests, resource considerations and the numbers of employees already working under flexible hours" and "that new requests for flexible working patterns be refused if there were already". Ms Sherratt accepted that these were new but said it would be just and equitable to extend time to allow them to be added.

36. Mr Nuttman submitted that these amounted to substantial changes and I agree with him. They would potentially extend the case significantly and increase the amount of witness evidence. In her Order, EJ Sage said that the claim was essentially about the Claimant's requests to be taken off night shifts, which he said adversely affected his depression. The existing PCP reflects that and allows the Claimant's case to be heard. I do not think he is prejudiced by having his case limited to that PCP. On the other hand, I think the Respondent would suffer prejudice at this late stage, some two years after the claim was brought, if the amendments were allowed, both the additional PCPs and the s.15 claim.

37. The application is therefore refused, save with respect to the employment particulars.

38. I have set out directions in a separate Order.

Employment Judge S Cheetham QC
Dated 14 October 2020