



EMPLOYMENT TRIBUNALS

Claimant: Mr R Allen

Respondents: (1) Allen Brothers (Fittings) Ltd
(2) Ms Elizabeth Adams

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 10, 11 February and 6 April 2021

Before: Employment Judge Elgot
Members: Ms J Houzer
Mr S Woodhouse

Representation

Claimant: In person
Respondents: Mr S Butler, Counsel

JUDGMENT on the question of disability having been sent to the parties on 18 February 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The Judgment sent to the parties on 18 February 2021 ('the disability judgment') determined the single issue as to whether the Claimant was, during the material time, a disabled person as defined by s 6 Equality Act 2010 ('the 2010 Act'). The Tribunal unanimously decided that he was not and consequently the complaints of disability discrimination including harassment are dismissed because a tribunal has no jurisdiction to hear them.
2. The remaining claims of unfair dismissal and victimisation (as defined by s 27 of the 2010 Act) together with the claim for failure to provide a written statement of employment particulars remain to be decided and judgment on liability has been reserved. The claim for accrued and unpaid holiday pay has been settled and the agreed outstanding amount has been paid. The complaint of age discrimination has been dismissed upon withdrawal by the Claimant.

3. The Claimant's request for reconsideration of the disability judgment has been refused.
4. The Tribunal's reasons for the disability judgment are as follows:-
5. The Claimant says that he has a mental health impairment of depression and anxiety amounting to a disability.
6. The disability judgment makes reference to the 'relevant period' (sometimes called the material time) which refers to the requirement that the Claimant must show that he was a disabled person at the time when the alleged discriminatory acts occurred. It is clear from the Grounds of Claim as summarised in both the Case Summary prepared by Employment Judge Crosfill, following a Preliminary Hearing on 6 March 2020, and in the List of Issues that the Claimant contends that the comments made by the Second Respondent during a meeting on 28 February 2019 were discriminatory acts and unlawful harassment. He was dismissed on 6 June 2019 with notice paid until 27 June 2019 and says that his dismissal was also an act of discrimination because of something arising from his disability (section 15 of the 2010 Act). The relevant period is therefore 28 February to 27 June 2019.
7. S6 of the 2010 Act states that 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 P's ability to carry out normal day to day activities'*.
8. There is statutory Guidance (brought into effect from 1 May 2011) on matters to be taken into account in determining questions relating to the definition of disability. The Tribunal has taken account of this important document.
9. In particular we have looked at the meaning of 'long term effects' (paragraph C1 of the Guidance) which states *'for the purposes of deciding whether a person is disabled, a long term effect of an impairment is one which has lasted at least 12 months; or where the total period for which it lasts, from the time of the first onset is likely to be at least twelve months; or which is likely to last for the rest of the life of the person affected'*.
10. It is therefore necessary to look closely not only at diagnosis but prognosis in relation to the length of time of the effects of an impairment. We are satisfied that the Claimant did not at the material time satisfy the long term requirement.
11. The Tribunal heard evidence from the Claimant himself in relation to the discrete issue of disability and he was cross examined by Mr Butler. There was an agreed bundle of documents for the Hearing including documents addressing the disability question. For the avoidance of doubt the Respondents agreed that they were content for us to utilise the transcript of the 28 February 2019 meeting commissioned by the Claimant and that is the document (pages 428-511 of the bundle) which we have looked at where relevant to the disability question.

12. It is for the Claimant to show that he was a disabled person, as defined by the 2010 Act, at the relevant time. He was reminded of this obligation in a letter dated 23 June 2020 dictated by Employment Judge Crosfill which states '*The Claimant should bear in mind that he bears the burden of showing that the effects of any impairment are long term*'.
13. The Claimant confirmed that he had obtained and disclosed the relevant documents to discharge this burden of proof. The documents he identified were his GP Patient Records and letters from other treating practitioners from 1 January 2015 to October 2019 together with fit notes. He also produced a Disability Impact Statement the latest version of which is at page 425. He referred to a number of emails written between him and the Second Respondent in 2017 which are at pages 100 A -104 of the bundle. That correspondence demonstrates the Claimant telling the Second Respondent about his difficulties in 2017.
14. The Claimant has produced no report or notes from his counsellor/therapist who he says he consulted in September 2018 on the Second Respondent's advice.
15. The Claimant's Statement of Case says that he became '*mentally unwell*' in 2017 as a result of the working and personal relationships between him, the Second Respondent (who is Managing Director of the First Respondent) and the Claimant's family. The Claimant and the Second Respondent are first cousins once removed. The First Respondent is a family run business selling and exporting sailing hardware. The Claimant's mother is a Director of the First Respondent and the Claimant and his brother Edward are shareholders.
16. He also began to suffer anxiety and stress as a result of conflict and dispute with his line manager. The Claimant communicated some of these problems, thoughts and feelings to the Second Respondent in emails.
17. The Claimant's GP records on page 6 of 49 in an entry dated 24 October 2017 record a diagnosis of '*anxiety disorder, unspecified*' and the Claimant was prescribed Propranolol, an anti-anxiety medicine on a 28 day prescription. The Claimant describes in his Impact Statement that there was no requirement to take this medication every day but '*to take three times a day if I was feeling stressed for an extended period or to take at the onset of stress if I had not had to take the tablets regularly*'. This is the first entry in the disclosed GP Notes which refers in any way to mental health disorder save for one earlier reference to the sad and sudden death of the Claimant's father (Kim Allen) in March 2015 when the Claimant was advised to undertake bereavement counselling and prescribed some medication to help him sleep.
18. There is no GP record of any further consultation with a doctor or therapist regarding this episode of anxiety and stress and no record of a repeat of the Propranolol prescription. The Claimant explored the option of private counselling which was also suggested to him by the Second Respondent. It is unclear whether this was taken up.

19. The Claimant did not visit his GP at any time after 24 October 2017 and at any time during 2018 save to complain of a small accidental wound to his elbow.
20. We conclude that this episode of anxiety and stress in 2017 did not have effects which are proven to have lasted for at least twelve months or were likely to last for at least twelve months. There was a short term discrete episode of compromised mental health but with no evidence of an underlying condition which was likely to recur beyond the twelve month period. The Claimant has shown no evidence from any medical or therapeutic source to support a continuing diagnosis or prognosis of a debilitating mental health problem throughout the rest of 2017 and all of 2018.
21. Thereafter the Claimant says that in January 2019 he had a '*severe mental breakdown*' and indeed he was absent from work from 16 January 2019 and never returned. He first reported to the Nurse at his GP practice on 30 January 2019 that he was feeling depressed and low in mood '*for the last few weeks, been longer but came to a head just recently*'. We find that this was a new episode of mental health difficulty separate from the episode of reactive anxiety which had occurred 14 months earlier.
22. The Claimant at first opted to '*start with self help*' and was given the telephone number to self-refer for counselling. He did set up a counselling start for Cognitive Behavioural Therapy (CBT) online using SilverCloud on 1 March 2019 from which he later withdrew and was discharged on 15 April 2019. Instead he wanted to undertake private counselling.
23. However by 13 February 2019 the Claimant's depression became debilitating as recorded by the Nurse at the GP Surgery on page 7 of 49 of the Patient record. She diagnosed multifactorial '*depressive disorder (new episode)*' and prescribed an anti-depressant called Sertraline at 50 mg per day for 28 days with a review timetabled for 13 March 2019. The Claimant was certified not fit for work for that period as a result of his diagnosis of depression. A fit note was issued (sometimes called a MED3 statement).
24. The Claimant did not actually begin to take the Sertraline until just before his 13 March 2019 review and felt no better. He was well enough to attend the meeting on 28 February 2019 with the Second Respondent, his mother and brother which he had convened to discuss his future direction within the business of the First Respondent. The Claimant himself anticipated, on advice, that his mental health would improve once his work and working relationship issues were resolved.
25. A further review was fixed for 3 April 2019 when the Claimant saw both the Nurse and a Clinical Practitioner Dr Rahman who signed a second fit note for the period 13 March until 7 April 2019.

26. The Nurse records the Claimant to be finding counselling helpful but he was 'very *anxious*'
27. The fit note obtained retrospectively on 3 April 2019 for the period 13 March 2019 to 7 April 2019 advises that the Claimant is not fit for work for that period because of depression. Doctor Rehman did not consider that the Claimant's condition of depression was likely to continue beyond 7 April 2019 because he writes '*I will not need to assess your fitness for work again at the end of this period*'. We conclude therefore that his prognosis was one of continuing improvement utilising Sertraline and counselling. Dr Rehman does not anticipate long term illness. The Claimant was able to continue with some exercise and hobbies, go on a skiing holiday in mid-March and take legal advice from more than one source.
28. The Claimant did not during the relevant period identified above thereafter consult his GP or any Nurse at the Practice to review or assist with his diagnosis of a depressive illness. He continued on Sertraline at the same dose having declined any alternatives. He explained that he had '*lost confidence*' in his GP Practice following the consultation with Dr Rehman which he regarded as insultingly quick and dismissive. He had on the same day however seen the Nurse for 13 minutes about the same problems.
29. In addition the Claimant broke his ankle in a skateboarding accident on 22 April 2019 and had surgery followed by rehabilitative physiotherapy. At page 409 of the bundle the only 'Active Problem' recorded in the GP Summary is his fractured ankle; there is no mention of continuing depression and/or anxiety because he did not consult his doctors about these problems. His ankle is recorded as having healed well and on page 11 of 49 when asked if he felt anxious or low in mood '*because of your joint or muscle symptoms in the past two weeks*' the Claimant's response was '*not at all*'. This is in contrast with his oral testimony when he maintained that his injury had exacerbated his depression.
30. We conclude that during the relevant period between 28 February 2019 and 27th June 2019 whereas the Claimant was depressed (as diagnosed) he has been unable to show a comprehensive evidential matrix to support the crucial component of the s 6 definition which requires him to prove that the effects of his mental health impairment were long term. There is no medical or other expert evidence that his depression had lasted twelve months or more. We find that his anxiety state in 2017 was a short term episode which did not continue through 2018 and 2019 to cover the relevant period.
31. We find that at the material time there was no prognosis that his depression was likely to last for twelve months or more. The Claimant's GP signed him unfit for work until 7 April 2019 and thereafter the Claimant did not consult his clinicians about any mental health problem again. Both he and his medical/therapeutic advisers appear to have believed that a resolution of his difficulties at work might considerably improve his mental health.

32. The Claimant has failed to discharge his burden of proof that he was at the material time a disabled person as defined by the 2010 Act. Accordingly the Tribunal has no jurisdiction to hear his claims of disability discrimination.

Employment Judge B Elgot
Date: 26 April 2021