



EMPLOYMENT TRIBUNALS

At an Open Attended Preliminary Hearing by Cloud Video Platform

Claimant: Mr D Stevenson
Respondent: Marks & Spencer plc

Heard at: Nottingham by CVP
On: 9 December 2020 and 22 March 2021
Before: Employment Judge Britton (sitting alone)

Representation

Claimant: In person
Respondent: Mr J Bryan of Counsel

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT

1. The decision of the tribunal is that the Claimant was not a disabled person for the purposes of section 6 and schedule 1 of the Equality Act 2010 in that the condition had not lasted or was not likely to last for 12 months or more.
2. Directions are hereinafter set out in a separate document.

REASONS

Introduction

1. In accordance with the direction to that effect on 6 August 2020 at the case management hearing heard by her, Employment Judge Victoria Butler ordered that there should be a preliminary hearing to determine for the purposes of material events as to whether the Claimant was at the material time a disabled person.
2. I started to hear this matter on 9 December 2020 when I adjourned it out for the Claimant to get his full medical notes and provide an impact statement.
3. This he has now done and so I have that before me. Also a statement from the Claimant's partner (Grace Scott). I then have a bundle and inter alia a minute of

a welfare meeting that the Claimant had with his then line manager, Anthony Simms on 3 October 2019. I have then seen some other emails which contain clear statements of the Claimant's position on the shift issue and its impact on his mental health. The first of those from him is dated 18 January 2020 and was sent to Mr Simms. The second is 11 February 2020 him then emailing James Richardson who had by now become his line manager and which is relevant in terms of an adjustment made for him.

4. The disability relied upon is depression. I have heard the sworn evidence on the issue of the Claimant and Grace Scott. I have received the written submissions of Mr Bryan which are most helpful in that they set out the legal framework upon which I must make my decision; and I have heard additionally from him by way of further submissions and thence from the Claimant who of course has the burden of proof of establish before me that he was a disabled person at the material time.

The law

5. The law as I have already said is clearly set out by Mr Bryan but the fundamentals I shall now set out. Thus, section 6 of the Equality Act 2010 provides as follows:-

“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.”

6. In this context, substantial means more than minor or trivial – see s.212(1) of the Equality Act 2010 (the EqA). Paragraph 2 of schedule 1 of the EqA provides the definition of long-term:-

“(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.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

...”

7. Paragraph 5 of schedule 1 makes provision to the effect of medical treatment:-

- “5 (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
- (a) measures are being taken to treat or correct it, and
 - (b) but for that, it would be likely to have that effect.
- (2) “Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.”

8. So, as Mr Bryan set it out, there are four issues for me to determine, apropos **Goodwin v Patent Office [1999] ICR 302 EAT**, thus:-
- (a) Does the Claimant have a physical or mental impairment?
 - (b) Does that impairment have an adverse effect on his ability to carry out normal day to day activities?
 - (c) Is that effect substantial?
 - (d) Is that effect long-term?
9. Crucial, is that I have to make that decision as at the date of the alleged discriminatory act – see **Richmond Adult Community College v McDougal [2008] ICR 431 CA**. I have taken the trouble to read that authority myself this morning in its entirety.
10. The crucial point then is apropos recurrence, if it has not already lasted 12 months, in terms of likely to last for at least 12 months that likely means “*could well happen*” – **SCA Packing Ltd v Boyle [2009] ICR 1056**.
11. For reasons that I shall come to, the core issue in this case to me boils down to whether at the time of material events ending with his dismissal on 10 March 2020, the Claimant had a condition which was a disability which had lasted or was likely to last more than 12 months.
12. Against that background, I now set out my primary findings of fact.

Findings of fact

13. I will accept on the evidence of Grace Scott that when she came to know the Claimant and they began a relationship starting in August 2018, she had experience with depression inter alia because her sister so suffers. She thought as the months went by that the Claimant portrayed aspects of what might be depression but of course she is not an expert.
14. And as to the evidence of the Claimant the following applies. He had to cope with what is known as “adverse life circumstances”. He had gone through a difficult breakup of a relationship with his partner before Grace, and with

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ensuing problems in terms of seeing his children.

14. But, he is a person who had his own coping strategies; he was a keep fit fanatic and that was something whereby he could take out his feelings and cope with life.
15. He had never sought any form of medical attention.
16. Also, he was able to hold down a demanding job with Marks & Spencer's at their very large logistical warehouse where he worked; and he had been so employed from 15 February 2018.
17. Significant to me is that job up until a promotion which he sought meant that he only worked a shift pattern of nights and like many people who undertake nightshifts, he managed to do that successfully and balance it with his active life style.
18. He, as I say, sought promotion and early in 2019, that is to say late January early February, he successfully obtained the post of a Flow Room Shift Manager. The problem is that he would now work a fortnightly alternating shift pattern; that is to say for the first 2 weeks of a given month he would work days and that the next 2 weeks nights or vice versa. Again in my judicial experience, such a change can have significant impact on an employee. After all, their body clock has to change.
19. What I detect is that as the months went by in the new job, it increasingly had an impact on his sleep pattern. He had always had difficulty sleeping and according to Grace normally only managed 4 or 5 hours a night. But what was now happening is that he was finding it very difficult to sleep at all. That of course is bound to have an impact on a person's energy levels and for that also read that it can adversely impact upon mental health. That is a matter of common sense.
20. This then comes down to what I might almost call changing the clock back. That is to say was the Claimant, as he has maintained in his impact statement, in such a mental state by February 2019 as to be disabled by way of depression or not? The answer to that question is that this was a gradual thing. As the months went by and with the adverse impact upon his sleep, so his active lifestyle was the casualty. So, he stopped going to the gym every day and working out there, including boxing, and as a consequence put on weight. I am sure that would have been debilitating for his self-esteem apart from him becoming more and more exhausted. So, I am with Counsel that on the evidence the depression did not cause the sleeplessness, it was the shift pattern that did that for him. As to when he might be said to have tipped over the brink into a mental impairment, page 52 in the bundle is the most contemporaneous evidence of the position in terms of a clear statement of where he puts the start of his disability. So, he said to the Respondent in a "To whom it may concern" statement on 16 October 2020:

"... I have demonstrated that there has been a mental impairment for over 15 months that continues to impact my life on a daily basis. ..."

21. That of course would start the clock circa July 2019. That fits with his presentation to his doctor. The first medical entry in the GP notes is 5 August 2019:

“ ...

Here about mental health. Struggling last few years. “Depressed recently” ...”

22. It went on to set out why he was depressed and I noticed that this was not to do with work (not that it matters) it was the personal relationship. The Claimant says that is not an accurate note but, on the other hand, I can expect the GP to give an accurate summarisation, particularly if he is going to prescribe anti-depressants and which the GP did on that day. He prescribed the Claimant 15mg per day of the well-known anti-depressant, Mirtazapine. The Claimant had no follow up appointments until after his dismissal. He did have some private counselling but found it unhelpful.
23. On an aside and as to discounting the beneficial impact of an anti-depressant in terms of the construct for the purposes of the EqA, it does not really assist me because the Claimant did not get on well with the anti-depressant; that is corroborated by Grace Scott. The problem was that by taking the Mirtazapine, it meant that the Claimant was also sedated thus meaning increasing difficulty in being able to get up and be at work on time for in particular the early morning shift start at 4:30 am for the day shift. That in turn made him anxious and so he would not take the medication thus of course meaning that he did not sleep. So as an example at the end of 2019 he came in for one shift too early because he could not sleep; but he did not turn up the next day because he had misunderstood the rota. Forgetfulness or confusion could also be a sign of depression.
24. And during this period from latest July 2019 the Claimant ceased undertaking to all intents and purposes the normal day to day activities he enjoyed, ie going to the gym.
25. There are two letters from the GP headed “To whom it may concern”. The first is dated 12 May 2020, the second 1 October 2020. These start off with:
- “...been seeing us regarding his mental health since August 2019. At this point he was started on Mirtazapine 15mg for depression, although the record states he had been struggling for some time prior to this. ...”*
26. That is not what the GP note says, it uses the word “recently”. Also, these medical statements are not correct because he did not take the Mirtazapine throughout from its first prescription; because of the side effects, he stopped taking it. That remained the position throughout the material time I am dealing with. That is vital because as per **Richmond** to which I have referred previously, I cannot take account of medical or other related matters post the actual last material act, in this case this is of course the dismissal on 10 March 2020 when he was paid off in lieu of notice.

27. So, I have to deal with the medical evidence that I have prior thereto. I only have the one entry for the first prescription of Mirtazapine. No follow ups. And I know from what the Claimant said to his line manager on 3 October 2019 that he in fact had stopped taking it; so it was not a beneficial prescription that therefore assists me at all on the reconstruct.
28. The picture I have is a worsening state of mind, exacerbated by the shift pattern, which only tips over on the face of it into a more than minor or trivial impact on his ability to undertake day to day activities circa July 2019 hence the going to the doctor on 9 August 2019. But it then is present for the reasons I have now given for the rest of that year.
29. However, what is telling to me, and I am not without sympathy for the Claimant but on the other hand I have my judicial task to do and with the burden of proof upon him, is that when he saw Mr Richardson on 11 February 2020 and explaining the impact on his health of the shift pattern and with a desire to return to nights only, that he was granted that request. And in the period between then and his dismissal on 10 March 2020 he was “doing better”. It therefore means that we have about 8 months of the condition having tipped into disability se we have another 4 months to go for the Claimant to satisfy me that it had lasted or was likely to last for 12 months or more as at the effective date of termination. In that sense I have got the phrase “doing better”. So on the balance of probabilities the adjustment whereby he returned to just working night shifts restored his equilibrium meaning that he would be able to manage the personal issues with the coping strategy of in particular his fitness regime.

Conclusion

31. This has been a difficult decision where I fall back on the burden of proof and it is on the Claimant. Thus, I have concluded that for the reasons that I have now given, that I am unable to find that the Claimant was a disabled person by the time of the final material events such as to mean that the condition had lasted or was likely to last for 12 months or more.

Employment Judge Britton

Date: 15 April 2021

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