



EMPLOYMENT TRIBUNALS

Claimant: Mr M Faulkner
Respondent: GI Group Recruitment Limited
Heard at: Reading **On: 5 May 2021**
Before: Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant: In Person
For the Respondent: Mr John Franklin, counsel

JUDGMENT

1. The claimant is not a disabled person.
2. The claimant's complaints of disability discrimination and unfair (constructive) dismissal have no reasonable prospect of success and are dismissed.
3. The application to amend the claim to include a complaint under the Agency Workers Regulations 2010 is refused.

REASONS

1. In a claim form presented on the 22 August 2019 the claimant made complaints of discrimination on the grounds of race and disability discrimination. The claimant's claim of race discrimination did not continue as that complaint related to a second respondent against whom the claim was not accepted because the claimant had not carried out the early conciliation process. At a preliminary hearing to the 27 May 2020 the claimant's complaints and the issues to be determined by the Tribunal were clarified. The claimant was making two complaints (i) disability discrimination (failure to make reasonable adjustments) and (ii) unfair (constructive) dismissal. The way that the unfair dismissal claim is put is set in paragraph (11) of the Record of Preliminary Hearing and Case Management Summary on 27 May 2020.
2. At the preliminary hearing the issues to be determined at this hearing were set out as being to consider, (a) whether the claimant was disabled at the relevant time;

and if not (b) whether the constructive dismissal claim should be struck out. There have since arisen two further issues to be determined by me today, firstly whether the claimant should be permitted to amend the claim to include a complaint under the Agency Workers Regulations 2010, and whether to make an order for a deposit. Due to my decision on the strike out application it is not necessary for me to consider a deposit application.

3. The claimant contends that he is a disabled person by reason of a general anxiety disorder and social anxiety. The respondent contends that the claimant is not a disabled person and further that the claimant's complaint of unfair dismissal has no reasonable prospect of success. The respondent objects to the claimant's application to amend the claim to include complaints under the Agency Workers Regulations 2010.
4. The claimant was employed by the respondent as a production operative from 21 June 2016 and assigned to work at BMW. The claimant resigned on 10 June 2019 without notice.

Disability

5. While employed by the respondent, the claimant says that he was suffering an extremely difficult period of general anxiety disorder and that he had suffered social anxiety which he believes started when he was a teenager. The claimant says that he was unable to make and maintain relationships like others, he would not make eye contact, he hid behind alternative personalities and he was not in a position where he felt comfortable to share his opinions.
6. The claimant states that he saw his GP requesting help in 2006. The GP disclosure shows that on 4 December 2006 Dr John referred the claimant for confidence courses for a "*Stress related problem*", recording-

Problem title: Stress related problem
History: low mood 2 years – College – stress with work / difficulty with relationships 'very quiet' behind in course work' – car was stolen 2 wks ago
sleep ok – difficulty getting occ cannabis
Comment: infor on stress mx/confidence courses
Refer counsellor
G: Depression
Stress related problem..."

7. The claimant says that he suffers "*massively from sweating excessively in stressful situations as a result of social anxiety*". The claimant explains that

this was reported to his GP in 2013, at the time this was not diagnosed as due to social anxiety, it was initially attributed to a thyroid function until this was discounted in 2019. The claimant now attributes this to being in stressful situations, such as being in a group of more than 3 people. There has been no diagnosis from a qualified medical practitioner to this effect.

8. In 2014, the claimant requested an Asperger's test, he did not test positive for Asperger's, but was only 1 point away from being placed on the scale.
9. The claimant says that general anxiety disorder and social anxiety disorder cause him to avoid day to day tasks such as visiting the shops or, going to the hairdressers.
10. The claimant says that *"I strongly dislike and cringe if anyone touches me unless they are a female I am in a relationship with or who I wish to have a relationship with. If a male colleague pats me on the back in a friendly way I would much rather they hadn't, but I would never have the confidence to tell them of this."*
11. The claimant says that his anxiety causes him to "over worry about germs" and that at work he was unable to join in with shared food due to these exaggerated fears. Further the claimant says that he is reluctant to eat in public becoming incredibly self-conscious if someone is watching him to the point where he may not be able to continue eating.
12. The claimant believed anxiety has an effect on his bowels and bladder. The claimant no longer attributes his bowel condition to anxiety but another condition not relevant for the question of disability.
13. Shortly before his start date, in April 2016 the claimant completed a health questionnaire in which he stated he was not Equality Act disabled, he confirmed he did not suffer from a depressive or nervous illness or any other illness, nor did he require any adjustments.
14. At work the claimant states that he was happily employed by the respondent, except when he was unable to work and would sit around the table with others who were actively watching him: he explained that he likes his personal space and feels uncomfortable when someone is within a metre of him or watching him.
15. During the summer of 2018 the claimant's partner was diagnosed with suspected idiopathic intracranial hypertension in July and spent two weeks in hospital; in August one of the claimant's uncles was diagnosed with a brain tumour; another uncle died in August; and also in August the claimant discovered long lost family abroad. The effect of all these events taking place in a short time resulted in the claimant suffering general anxiety which brought about a depressive episode, during which the claimant contemplated suicide.

16. On 4 September 2018, the claimant was prescribed diazepam and sertraline tablets. Then on 3 October 2018, the claimant spoke to a pharmacist who prescribed him with sertraline and diazepam. This was the first time that general anxiety and social anxiety were recorded in the GP notes, the diagnosis appears to have been made by the pharmacist. These medications helped the claimant manage his general anxiety and social anxiety. The claimant says he expects to remain on “*prescribed medication for the remainder of his life to assist with the mental impairments I suffer with*”. In April 2019 the GP notes make reference to a “*Minor: Anxiety disorder*”. The only other diagnosis made earlier are of “*work related stress*” with some references to anxiety symptoms.
17. On 2 May 2019 the claimant was signed off work with work related stress.
18. The relevant period for the purposes of determining disability is from 4 September 2018 to the claimant’s resignation 10 June 2019.
19. The claimant relies on the following day to day activities: (a) Throughout, not making eye contact impacting social relationships; (b) In the claimant’s teens, hiding behind alternative personalities impacting social relationships; (c) Throughout, feeling he could not express his opinions; (d) Occasional inability to successfully complete the technical ‘underbody area process’; (e) On 5 and 9 November 2018 impact on sleep; (f) Through the period sweating; (g) Avoiding tasks such as the doctor, shops or hairdresser; (h) A dislike of being touched by someone other than a romantic partner; (i) Avoidance of shared food due to worry concerning germs; (j) the claimant *believes* anxiety affected his continence citing regular bouts of diarrhoea & occasions where the claimant felt he needed to urinate often; (k) the claimant added during the hearing unspecified sexual problems.
20. 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.

Did the Claimant have An Impairment

21. The claimant relies on general anxiety disorder and social anxiety disorder. The claimant relies on his GP notes and his own evidence in support of his case. The references to these disorders are cited from 3 October 2018 to 18 April 2019.
22. The respondent submits that the references to ‘stress’ or ‘anxiety’ generally are more likely a situational reaction. In support of this submission the respondent relies on the following passage from *Herry v Dudley Metropolitan Council* [2017] ICR 610

“Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to

refer to the presentation of such an entrenched position as stress than as anxiety or depression. An employment tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an employment tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an employment tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the employment tribunal to assess." [paragraph 56]

I was also referred to the following passages taken from the IDS: Discrimination at Work where it states:

"It is not uncommon for employees who are absent from work to say that they are suffering from 'stress', 'work stress', 'anxiety', 'nervous debility' or 'depression. But this does not necessarily mean they are disabled for the purposes of the EqA stress does not itself constitute a disability..." [p123, para 6.47]

From the same source I was referred to the following passage

"In many cases... employees fail to establish that their depression is serious enough to constitute a disability. It may be their symptoms are not severe enough to amount to a physical or mental impairment; or that the depression does not have a substantial effect on their ability to carry out normal day-to-day activities; or that the illness does not last; or is not likely to last for at least 12 months. In J v DLA Piper UK LLP 2010 ICR 1052 EAT, the EAT said that, when considering the question of impairment in cases of alleged depression, tribunal should be aware of the distinction between clinical depression and a reaction to adverse circumstances...."

23. I am satisfied that the claimant's stated conditions are capable of being a mental impairment.

Did the impairment affect the claimant's ability to carry out normal day to day activities? Was the effect on those activities 'Substantial'?

24. The claimant relies on a number of activities, I deal with each in turn.

25. Eye Contact: the respondent contends that an aversion to eye contact could be a manifestation of a condition, it does not seem to be in and of itself a day-to-day activity as it is not a domestic activity such as cooking or cleaning. Whether or not this is capable of amounting to a relevant activity, the evidence provided does not show that the effect is substantial. The claimant states that when he was a teenager he was unable to make eye contact, that on his first day at work for the respondent he avoided eye contact when sat with new colleagues. A substantial effect is one that is more than minor or trivial the evidence presented does not allow me to conclude that this activity, if a relevant activity, is substantial.

26. Hiding behind alternative personalities: the respondent contends that it is doubtful whether this is a day-to-day activity. The respondent goes on to say that there is no evidence in the GP disclosure or the Asperger's assessment of the concerns that the claimant created alternative personas. In his witness statement the claimant refers to this in historical terms referring to his behaviour as teenager. The claimant's evidence does not point to this activity having a substantial effect on his ability to carry out normal day to day activities.
27. Feelings of inability to express opinions: The respondent contends that the claimant's case at its highest is that he regretted not being able to confront a member of staff when they burped. The respondent states that the claimant's ability to express opinion is clear as he was able to tell management they angered him and misspelling his name was rude. The respondent points out that inability to express opinions is not a feature in the medical disclosure. I am not satisfied that on the balance of probability the claimant has established this to the extent that I can conclude that is an activity that in the claimant's case was impaired. In any event I am not satisfied that it is substantial. The evidence showed that the claimant was able to express his opinions to an extent: this leads me to conclude that the extent he was not able to express his opinions was not substantial.
28. Occasional inability to successfully complete the technical underlay process : This is not a normal day to day activity. The Guidance on the definition of disability (2011) makes clear that a technical process is not a day-to-day activity and that tasks requiring delicate hand movements fall outside.
29. Sleep: There are two only occasions that the claimant has cited involving difficulty with sleep due to anxiety. The extent to which the claimant has referred to difficulty to sleep does not lead me to conclude that it is substantial. Sleep disturbance can occur in many different situations and for many different causes.
30. Sweating: There is no evidence other than the claimant's assertion of the inference that he has drawn that his sweating is impacted or caused by anxiety. Further this is not a day-to-day activity. The Guidance on the definition of disability states that there is no definition of day to day activities and provides some guidance as follows at paragraph D3: "*In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or 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 a shift pattern.*"
31. Avoiding tasks such as the doctor, shops or hairdresser: There is no support in the claimant's GP disclosure or Asperger's assessment of the claimant avoiding the doctor, shops or hairdresser. The respondent also relies on the fact that

the claimant in a previous role was successful as a fraud team call handler, a role which must involve the type of difficult conversations that the claimant sought to avoid by allegedly not going to the shops or the hairdresser in particular. The respondent points out that the claimant frequented his GP regularly. There is no evidence from any member of the claimant's family or friend that enables me to get a view of how the claimant's behaviours were viewed by those close to him who have the opportunity to observe him on a daily basis. On the evidence before me I am not able to accept that the claimant's case is proved on this issue. I reject the contention that he avoided going to the doctor. The claimant's requirement to attend the hairdresser was not placed in a special context so that I can conclude that to the extent there was avoidance (as the claimant did go to the hairdresser), or to the extent that the claimant's avoidance of going to the shops is established can be understood by me to be substantial. The claimant's ability to attend the GP in my view shows that there was no substantial avoidance of that.

32. A dislike of being touched: The absence of any evidence to support the claimant's assertions either in the form of a witness statement from a friend or family, the absence in the GP records of such entries means that the only evidence given is from the claimant. Additionally the respondent points out that "*It is particularly surprising this did not feature in the Asperger's assessment*". Additionally the respondent pointed out that the claimant's evidence indicates that he tolerates touching without adverse social reaction. I am satisfied that the evidence does not show that it is substantial.
33. Avoidance of shared food: The evidence presented by the claimant does not show that this is substantial. The claimant makes reference to work situations but does not give any idea of the extent to which this occurs or the impact it has on him when it does occur. The evidence in my view does not show that this is substantial.
34. Continence: There is no supporting medical evidence in support of the continence issues whether physiological or as being attributed to the anxiety disorders. The only evidence comes from the claimant. The claimant has not adduced evidence from which I can conclude that the issue is substantial. The claimant's evidence made specific reference to just one occasion.
35. Sexual problems: In his oral evidence the claimant made reference to unspecified sexual problems. He gave no indication of how long he has had problems or the extent of the problems. There is no mention of sexual problems in the claimant's GP notes. I am not satisfied that it has been established on a balance of probabilities that there was a substantial impact on the claimant's sexual activity arising from the impairment.

Long Term

36. The claimant's evidence refers to having suffered with general anxiety disorder and social anxiety disorder for a number of years. I have not been able to conclude that the evidence shows that the claimant has suffered impairments that have long term substantial effect on his ability to carry out normal day to day activities.

37. I have come to the conclusion that the claimant is not disabled within the meaning of section 6 Equality Act 2010. The claimant's complaints about of disability discrimination therefore cannot succeed.

The Constructive Dismissal Claim

38. I have come to the conclusion that the claimant's complaint of unfair dismissal has no reasonable prospect of success. The claimant's claim on this issue is put in the following way in the Case Management Summary at Paragraph (11)

"The claimant says that during the course of a disciplinary hearing on 28 March 2019 he asked the respondent's representative at the hearing to move him to a different production line away from his BMW manager, and that this request was refused. This was not said to be an act of disability discrimination, but the claimant relied on the failure to make reasonable adjustments and this later failure to move him as amounting to a breach of duty of trust and confidence, in respect of which he resigned. This gives rise to his claim of unfair (constructive) dismissal."

The breach of contract on which the claimant relies comes in two parts (i) the failure to make reasonable adjustments and the (ii) the failure to move the claimant.

39. The claimant's complaint about failure to make adjustments will not succeed because the claimant is not disabled.

40. The claimant's complaint about a failure to move him is not capable of being a fundamental breach of contract in the circumstances as they appear in this. There is no record of the claimant making the request to be moved in the record of the disciplinary hearing. The respondent's failure to move the claimant in any event is not on the face of the allegations a breach of contract, the claim of unfair (constructive) dismissal has no reasonable prospect of success.

Application to amend the claim

41. The claimant's application to amend the claim to include a complaint under the Agency Workers Regulations is refused. The claimant says he was not aware of the possibility of making such a claim until recently. As I understand it the claimant says he knew of neither the factual basis of the claim or the legal right on which such a claim is based. In the application the claimant has not set out the factual detail underpinning his application. The claim as set out in the amendment is totally distinct from the current claim, it stands alone and would succeed or fail independent of this unfair dismissal or disability discrimination case. The claim is not long out of time. To amend the claim now would mean that the respondent would have to make new enquires entirely unrelated to the current case. The hearing listed to take place on 27-28 May 2021 could not go

ahead. The claimant would have to set out the factual basis of his case specifying the comparators on whom he relies. Currently the new complaint is set out in the following way

“The Claimant believes that the Respondent fails to adhere to the terms and conditions within Sections 2 and 4 of the Agency Workers Regulations 2010. Section 4 of the Agency Workers Regulations 2010 states: “Having completed the 12 week qualifying period, the agency worker is entitled to the same basic terms and conditions that he or she would have received if recruited directly.” The Claimant states that after completing a 12 week probationary period he was not paid equally to those recruited directly by BMW. The Claimant wishes to claim for this disparity in pay.”

42. I am of the view that the amendment of the claim to add the complaint about Agency Workers is not in the interests of justice. It would put the respondent to additional expense in defending this case. The new complaint is presented well outside the time limit for presentation of the complaint. The further costs for the respondent are likely to be significant, I also bear in mind that this claim was issued on the 22 August 2019 and there have now been two preliminary hearings, three applications to change the basis of the claim and that the case in my view before allowing any amendment has no reasonable prospect of success. I also bear in mind that the claimant says he was unaware of the factual or legal basis of the claim until recently. Taking all the matters stated into account I am of the view that it is not in the interests of justice to allow the amendment to this claim so an extension of time to present the complaint of breach of the Agency Worker Regulations in these proceedings is not just and equitable.

Employment Judge Gumbiti-Zimuto

Date: 7 May 2021

Sent to the parties on: 13 May 21

For the Tribunals Office

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