



EMPLOYMENT TRIBUNALS

Claimant Ms N Perkins
Represented by in person

Respondents Ashford Oaks Primary School
Represented by Mr T Wilding (counsel)

Before: **Employment Judge Cheetham QC**

**Preliminary Hearing held on 5 July 2021 at
London South Employment Tribunal by Cloud Video Platform**

JUDGMENT

1. The Claimant was disabled within the meaning of the Equality Act 2010 at the relevant time.

REASONS

1. This is a claim that was brought by the Claimant on 20 January 2019, arising from her work as a Teaching Assistant Apprentice from 4 September 2017 until 1 February 2019. It is a claim for disability discrimination. In its grounds of Response, the Respondent did not accept that the Claimant was a disabled person for the purposes of the Equality Act 2010 at the material times.
2. At a case management hearing on 28 June 2019, the Claimant was required to provide further information about her impairments and supporting medical evidence. At a telephone hearing on 12 October 2020 (which the Claimant did not attend), it was noted that she had provided everything required and the case was set down, both for a Preliminary Hearing to consider the issue

of disability (on 29 January 2021) and a 3 day full merits hearing to commence today, 5 July 2021.

3. Unfortunately, the hearing on 29 January did not go ahead, owing to a lack of judicial resources, so this hearing was converted to a Preliminary Hearing to determine whether or not the Claimant was a disabled person at the material times.

The Law

4. Under the Equality Act 2010 s.6:

(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...

5. Paragraph 5 of Schedule 1 to the Act states:

(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 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.

6. S. 212(1) of the Act defines "substantial" as meaning "*more than minor or trivial.*"

7. Para. 12 of Schedule 1 provides that when determining whether a person is disabled, the Tribunal "*must take account of such guidance as it thinks is relevant*". The "Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability" (May 2011) was issued by the Secretary of State pursuant to s. 6(5) of the Act.

8. In **Goodwin v Patent Office [1999] I.C.R. 302**, Morison J (President), provided some guidance on the proper approach for the Tribunal to adopt when applying the provisions of the Disability Discrimination Act 1995. Morison J held that the following four questions should be answered, in order:

- a) Did the claimant have a mental or physical impairment? (the 'impairment condition');
- b) Did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition');
- c) Was the adverse condition substantial? (the 'substantial condition');
- d) And was the adverse condition long term? (the 'long-term condition').

9. The relevant point in time to be looked at by the Tribunal when evaluating whether the claimant is disabled under s. 6 is not the date of the hearing,

but the time of the alleged discriminatory act: **Cruickshank v Vaw Motorcast Ltd [2002] I.C.R. 729**. In this case, that is therefore September 2018 to January 2019.

10. Mr Wilding relied upon **Herry v Dudley MBC et al [2017] ICR 610**, in which the Employment Appeal Tribunal considered “reactionary stress”. In particular, at para. 56, HHJ Richardson said:

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.

11. He also provided copies of **Morgan v Staffordshire University [2002] IRLR 190, EAT**, and **Anwar v Tower Hamlets College UKEAT/0091/10**.

The evidence

12. The evidence was contained within an agreed bundle. I had not been sent this version of the bundle by the start of the hearing (through no fault of the parties), so it was forwarded to me by Mr Wilding and I then took time to read those documents I had not already seen.
13. The Claimant's GP notes first refer the Claimant being prescribed anti-depressant medication on 4 April 2018 and there is a diagnosis of “Anxiety with depression” on 12 April 2018 and further references in May 2018. There is then a reference to “endogenous depression” on 16 October 2018, when the Claimant was still taking medication.
14. An Occupational Health report dated 8 October 2019 said that there was “a good chance” her condition (described as “long-term”) would be covered by the Equality Act, but requested more information before being able to advise on her fitness to work. The report is low on detail and it does refer to the Claimant scoring “extremely low” on symptoms relating to her mental impairment.

15. There is a report from a consultant psychiatrist dated 29 March 2019, which diagnoses, "Adjustment Disorder Depressive Reaction, now in remission ICD10 F41". However, I note that the Claimant remained on medication at that point, despite the apparent remission. The report refers to the Claimant suffering a depressive episode at 16 (her year of birth was 1981, so she is now 40). It then says, "*In May 2018 she had a series of life events and losses*", which caused her to take time off work.
16. A report from "Think Action" referred to the Claimant experiencing symptoms of anxiety and low mood when she attended on 30 June 2019. The letter is dated 6 June, but that should presumably be 6 July.
17. The Claimant described the impact of her anxiety as affecting her time keeping, causing her to take longer to get washed and dressed. At work, she would get uncontrollable sweating and sometimes have a constant urge to go to the toilet. She told me that she remains on medication.

Submissions

18. Mr Wilding had produced a helpful skeleton argument, which he developed in oral argument. He did not challenge the Claimant's evidence as such, but suggested that the Claimant's depression and anxiety were underlying or reactionary. It was plain, he said, that her depression arose at a period in her life where there were serious adverse incidents happening outside work. There was a heightening of depression caused by what happened at work.
19. Mr Wilding submitted that everything said in the reports did not support that the impairment was long-term and had substantial adverse effects. The Claimant had failed to show that there was an impact on her day-to-day activities.
20. In her submissions, the Claimant essentially relied upon her impact statement and the documents referenced above.

Conclusion

21. The first question is whether the Claimant had (in this case) a mental impairment. Although Mr Wilding did not accept this to be the case, it is clear that she did. It was described by the psychiatrist as "Adjustment Disorder Depressive Reaction" and by the GP as "depression/anxiety".
22. Secondly, did the impairment affect the claimant's ability to carry out normal day-to-day activities? Again it seems clear to me that it did. The Claimant's self-description of the impact on her day-to-day life has not been challenged, but what she describes affected her ability to carry out normal day-to-day activities. If a person is taking longer to wash and dress, their time-keeping is affected, they have uncontrollable sweating and a constant urge to go to

the toilet, then they are fairly describing symptoms and conditions that have an adverse impact on their day-to-day activities.

23. Thirdly, was the adverse condition substantial? “Substantial” means more than minor trivial and I find that what the Claimant was describing was substantial. Apart from anything else, at one point it prevented her from working.
24. I shall deal here with the submission that this was “reactionary stress”. I do not think this is the type of the case that HHJ Richardson in **Herry** was describing, which had a very different set of facts. The evidence here does not show that the Claimant had, “*an entrenched reaction to circumstances perceived as adverse*”. It may well be the case that the cause of her mental impairment lay elsewhere than at work, but in **Herry** the claimant was held not to be suffering from a mental impairment. In that case, his stress was as a result of his unhappiness with work, whereas in this case the Claimant was already suffering from anxiety and depression when the incidents at work occurred.
25. Finally, was the adverse condition long term? At the time of the alleged discrimination, the impairment had not lasted 12 months, but I note that the OH report referred to it as “long-term” and it had been recorded by the GP in April, May and October 2018, with the Claimant on continuous medication. Therefore, it was likely (i.e. there was a real possibility) that it would last for at least 12 months.
26. My conclusion, therefore, is that the Claimant was disabled within the statutory definition at the relevant time.
27. A new hearing date and directions will be sent to the parties separately.

Employment Judge S Cheetham QC
Dated 15 July 2021