



EMPLOYMENT TRIBUNALS

Claimant: Mr D Crowshaw
Respondent: Breasley (UK) Ltd

AT AN OPEN PRELIMINARY HEARING BY CVP

Heard at: Nottingham on: 26 August 2021

Before: Employment Judge Hutchinson (sitting alone)

Representation

Claimant: Mr Jeffrey Jupp, Counsel
Respondent: David Rushmere, Solicitor

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

The Employment Judge gave Judgment as follows; -

The Claimant had a disability at the relevant time as defined in Section 6 Equality Act 2010.

REASONS

Background to this Hearing

1. The Claimant presented his claim to the Tribunal on 5 February 2021. He had been employed by the Respondents from 5 June 2000 until his dismissal on 24 December 2020 as Managing Director.

2. His claims before the Tribunal are now; -

- Unfair dismissal.
- Disability discrimination.
- Non-payment of wages.

3. At a case management preliminary hearing conducted by me on 27 April 2021 I determined that there should be an open preliminary hearing to determine whether: -

1. At the relevant time the Claimant suffered from a disability.
2. Whether any of the claims of disability discrimination should be struck out on the grounds of having no reasonable prospect of success.
3. Whether any of the arguments or contentions made by the Claimant should be made subject to a deposit order.

4. The first part of the hearing was to determine that first issue. I had the following;

1. An agreed bundle of documents.
2. The Claimant's impact statement.
3. The Claimant's list of documents for the impact statement.
4. Written submissions from both parties.

5. At the hearing I also heard evidence from the Claimant and oral submissions from both Advocates.

6. I found the Claimant to be a credible witness. His evidence was consistent with the documentary evidence provided before me. He made concessions where it was appropriate to do so, and his explanations were credible.

Relevant Facts

7. At the time of his dismissal the Claimant was 42 years old. His father had set up the business in 1975 and the Claimant had taken over running the business with his brother approximately 5 years ago. They were Joint Managing Directors. At that time the Company was called Breasley Pillows Ltd. The Respondent Company is owned by Pomi Khan and Bob Badman.

8. From August 2019 there were severe problems with the business. They were legal disputes with customers and financial issues which caused the Claimant a great deal of stress.

9. In December 2019 he was referred through BUPA for consultation with a psychotherapist. He had several consultations with the psychotherapy counsellor, Caroline Foster over a period 3 months from January 2020. His first consultation took place on 10 January 2020 and he attended those consultations on a weekly basis. There was no formal diagnosis of any condition. The letter from. Caroline Foster dated 10 June 2021 at page 3 of the bundle. It confirms the reference to and the consultations

that took place.

10. The Company was placed in administrative receivership in April 2020 and it was bought out of administration in June 2020 by Mr Khan and Mr Badman. The Claimant remained in employment and his employment was transferred under the TUPE Regulations. He was now the Managing Director of the new company but without owning any shares in it.

11. There were disagreements immediately with the new owners that led to a grievance raised by him in September 2020.

12. There was a grievance meeting on 27 October 2020 concerning these issues.

13. On 2 November 2020 there was an online consultation review of the Claimant by Apple Tree Medical Practice for depression and anxiety. The record of this is shown at pages 4-6 of the Claimant's list of documents for the impact statement.

14. On 12 November 2020 he received the outcome of his grievance which rejected his various issues.

15. He appealed against this decision on 19 November 2020 and then on 23 November 2020 he was written to about allegations of potential gross misconduct.

16. He went off sick on 26 November 2020 and at pages 9-11 of his impact statement bundle is the record of his fitness for work statement which says that he was off for work for stress. This changed on the 1 December 2020 to "mixed anxiety and depressive disorder". There had been no consultation with his GP or formal diagnosis of his condition. He was prescribed Serotonin and then remained off sick until his dismissal for alleged gross misconduct on 24 December 2020.

The Law

17. Section 6 of the Equality Act 2010 (EqA); -

"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....."

18. Section 12 provides that; -

"substantial" means more than minor or trivial"

19. I have also considered the Guidance on matters to be taken into account in determining questions related to Definition of Disability (2011). In particular I have considered the meaning of impairment referred to in paragraphs A3-A8. I have also

considered the meaning of substantial adverse effect in paragraph B1 and the effects of treatment in B12-B17. I have also considered the meaning of long-term effects in paragraphs C1-C4. I have also considered the meaning of normal day to day activities in paragraphs D2-D7.

20. Mr Jupp for the Claimant referred me to a number of cases and in particular; -

- ***Elliott v Dorset County Council unreported 4 February 2021***. In that case his Honour Judge Taylor restated the principles for determining the question of whether a Claimant was disabled within the meaning of Section 6 and conducted a review of the leading case law. As described by Mr Jupp the following principles apply; -

The Tribunal needs to look at the evidence by reference to 4 different conditions; -

1. The impairment condition. Does the Applicant have an impairment which is either mental or physical?
2. The adverse effect condition. Does the impairment affect the applicant's ability to carry out normal day-to-day activities... And does it have an adverse effect?
3. The substantial condition. Is the adverse effect (upon the applicant's ability) substantial?
4. The long-term condition. Is the adverse effect (upon the applicant's ability) long term?

21. Frequently there will be a complete overlap between conditions 3 and 4 but it will be as well to bear all 4 of them in mind.

22. The focus should be on what a disabled person can or cannot do and not what he can do. It is wrong to conduct a balancing exercise of what the person can do against what he cannot do.

23. There should be a comparison between the effect on the individual of the disability, this involves considering how he in fact carries out the activity compared with how he would do if he was not suffering the impairment.

24. Substantial means more than minor or trivial. Unless a matter can be classified as trivial or minor it must be treated as substantial.

25. The consideration of normal day to day activities include day to day activities which are relevant to participation in professional life.

26. In his submissions to me, Mr Rushmere referred me to the following cases; -

- ***Cruickshank v VAW Motorcast Ltd [2002] ICR729***
- ***McDougall v Richmond Adult Community College [2008] ICR431***
- ***C and others v A & another EAT0023/20***
- ***Wigginton v Cowie and others T/A Baxter International (A Partnership)***

EAT0322/09

- ***J v DLA Piper UK LLP [2010] ICR1052***
- ***Rugamer v Sony Music Entertainment UK Ltd & another [2002] ICR381***
- ***McNicol v Balfour Beatty Rail Maintenance Ltd [2002] ICR1498***
- ***Sussex Partnership NHS Foundation Trust v Norris EAT 0031 /12***
- ***Boyle v SCA Packaging Ltd (Equality and Human Rights Commission Intervened) [2009] ICR10596***
- ***Aderemi v London and South Eastern Railway Ltd [2013] ICR591***
- ***Paterson v Commissioner of Police of the Metropolis [2007] ICR1522***
- ***Lawson v Virgin Atlantic Airways Ltd EAT0192/19***
- ***Swift v Chief Constable of Wiltshire Constabulary [2004] ICR909***

27. In his submissions to me Mr Rushmere submitted that the Claimant had an impairment but only for the period from 1 December 2020 to 10 January 2021. They say that for that period only he was suffering from mixed anxiety and depressive disorder.

28. He then submits that the Claimant has not adduced good evidence to show a causal link between the impairment and the substantial adverse effect.

29. He goes on to say that if the Claimant is able to establish any adverse effect then he has failed to adduce any evidence that demonstrates such effects were more than minor or trivial. He then also says that any effects that the Claimant experienced were not long-term. That he has not shown that there have been any adverse effects that spanned a period of 12 months nor was it likely that any effect would last for 12 months.

My Conclusions

30. I am satisfied that the relevant time in this case is the period leading up to the Claimant's dismissal in December 2020.

31. I am satisfied that since December 2019 and probably before this the Claimant has been suffering from a mental impairment namely anxiety and depression.

32. That impairment does have an effect on the Claimant's ability to carry out normal day to day activities. In particular I am satisfied that it has affected; -

- His concentration.
- Working under pressure.
- His sleep.
- His ability to undertake activities at home such as organising his social life because of tiredness and exhaustion.

33. I am satisfied with his evidence that the Claimant has suffered in his family life and his ability to cope with normal day to day activities at home.

34. I am satisfied that the adverse effects upon the Claimant's ability to undertake

the activities has been substantial i.e. more than trivial.

35. I am also satisfied that at the date of the alleged discriminatory act the adverse effect upon his ability to conduct normal day to day activities had been long-term in that it had already lasted at least 11 months and continued to last subsequent to that and was likely to last a considerably longer period of time and certainly more than 12 months.

36. For these reasons I am satisfied that at the relevant time the Claimant did suffer from a disability.

CASE MANAGEMENT ORDERS

Made pursuant to the Employment Tribunal Rules 2013

Listing the Hearing

1. It is agreed that 3 days is not sufficient to deal with the issues in this case including remedy. The case should be listed for **4 days** and will be heard by an Employment Judge sitting with Members by CVP on **30 August 2022, 31 August 2022, 1 September 2022 and 2 September 2022.**

Judicial Mediation

2. The Claimant is interested in judicial mediation. I explained to the parties of the benefit of it in terms of saving time and cost for both parties. The Respondent will consider their position and let me know within **14 days** if they are interested. If they are a further telephone discussion will take place to list a judicial mediation hearing.

3. The parties shall send each other a list of any documents they wish to rely on at the hearing or which are relevant to the case **by 15 October 2021.**

4. The Respondent will be responsible for the preparation of the bundle of documents and the Claimant will send a copy of any documents that are requested **by 29 October 2021.**

5. The Respondents shall then prepare a list of final agreed bundle of documents for the final hearing and will send a copy of that bundle to the Claimant **by 12 November 2021.** The file of documents shall be indexed. The documents shall be in logical order. All pages shall be numbered consecutively.

6. The Claimant and the Respondent shall prepare full written statements of the evidence they and their witnesses intend to give at the hearing. No additional witness evidence may be allowed at the hearing without permission of the Tribunal. The written statement shall have numbered paragraphs. The Claimant and the Respondent shall send the written statements of their witnesses to each other **by 25 February 2022.**

7. The Claimant shall provide an up to date schedule of loss to the Respondent **by**

1 August 2022.

8. The Respondent will forward to the Tribunal **4 days prior to the hearing 3 hard copies** of the bundle of documents and witness statements together with an **electronic version** of the same.

Employment Judge Hutchinson

Date: 3 September 2021

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