



EMPLOYMENT TRIBUNALS

Claimant: Mr N Smith
Respondent: Royal Mail Group Ltd
Heard at: Watford Employment Tribunal (in public by video)
On: 17 August 2021
Before: Employment Judge Quill (Sitting Alone)

Appearances

For the Claimant: In Person
For the respondent: Mr R Chaudry, solicitor-advocate

JUDGMENT

The Claimant has been a “disabled person”, within the meaning of section 6(2) the Equality Act 2010, since no later than 6 March 2017.

REASONS

1. The judgment and reasons were given orally and written reasons were requested. These are those reasons.
2. Today’s hearing took place fully remotely by video (CVP). There were no connection problems. It was listed for 3 hours. In fact, the first 3 hours were only enough to give my oral decision and reasons, and so the parties kindly agreed to carry on for a further 45 minutes for a case management discussion (the details of which are sent out in a separate document).
3. I had received a 78 page pdf bundle from the Respondent's representative (which the Claimant also had) and initially both sides told me that it was complete. In fact, it was far from complete. The following items were added during the course of the hearing. I will mention that they were not all added in a single transaction, but more and more documents kept on being discovered during the hearing. With one exception (the Claimant’s GP records), both parties were already in possession of all the items, albeit they had not found their way to the tribunal file or to the hearing bundle. The Tribunal’s orders of 6 March 2021 (which was on file) was also not in the bundle, but both parties had the document. The documents which were added were:

- a. The Claimant's email of 23 March 2021, with attachments (including impact statement)
 - b. The Claimant's email of 23 March 2021, with attachment being GP letter of 18 March 2021
 - c. The Respondent's representative's email of 31 March 2021 (stating disability was disputed)
 - d. The Claimant's GP records (not previously sent to the tribunal or to the Respondent, notwithstanding the order of 6 March 2021).
4. The Claimant gave evidence using his impact statement and evidence in chief, and was cross-examined and answered my questions. The Claimant was re-examined by his wife. Each party made submissions, with the Claimant being assisted by his wife.

The law

5. Disability is a protected characteristic. Disability is defined by 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.
- (2) A reference to a disabled person is a reference to a person who has a disability.
- (3) In relation to the protected characteristic of disability—
 - (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
 - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
- (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—
 - (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
 - (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
- (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
- (6) Schedule 1 (disability: supplementary provision) has effect.

6. Thus, in this case, the claimant had to establish that he had at some stage prior to the alleged discrimination, a mental impairment that had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. A person who has been disabled retains the protected characteristic of disability by section 6(4) EA 2010.
7. The expression "normal day-to-day activities" can – in principle - include activities that the person only does when they are at work. It is the nature of the activities that is important, not the person's motivation for potentially performing them (or wanting to do so). Correspondingly, if a person is able to do all of their work activities, it does not necessarily follow that there are no "normal day-to-day activities" which are adversely affected by an impairment. There might be many "normal day-to-day activities" which do not form part of that person's job.

8. Section 212 EQA defines substantial as meaning more than minor or trivial.
9. Paragraph 2 of schedule 1 EQA provides (in part)

2 Long-term effects

- (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.

10. The long-term requirement relates to the effect of the impairment rather than merely the impairment itself. In other words, merely having an impairment which is long-term is not sufficient, unless it has a substantial adverse effect on day-to-day activities that is long-term.
11. Goodwin v The Patent Office [1999] ICR 302 set out four conditions that require consideration when assessing whether a person is disabled:

The words of the section require a tribunal to look at the evidence by reference to four 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?

12. The Respondent's knowledge is not directly relevant to any of these questions or the issue of whether a person meets the definition in section 6 EQA. However, of course, evidence from the Respondent (whether witnesses or documents) can be taken into account whether there is any corroboration for (or undermining of) the Claimant's account to have been suffering from particular adverse effects at particular times.
13. In SCA Packaging Ltd v Boyle [2009] ICR 1056, the court suggested that when considering whether an impairment is likely to recur the word "likely" means that it could well happen. That suggestion has been adopted in the Equality Act 2010 Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability. It does not follow from the fact that there was actually a subsequent recurrence of an impairment that there was likely to be a recurrence at the date of the alleged discrimination. The issue of whether a recurrence was "likely" cannot be judged retrospectively, but has to be analysed based on what was "likely" as of the date of the alleged discrimination.
14. In Rayner v Turning Point [2010] 11 WLUK 156, the court held that although the question of whether there is a "substantial" adverse effect is a matter of fact for the Tribunal to determine, in circumstances where a claimant was diagnosed with anxiety by his GP and his GP advises him to refrain from work, that is evidence of a substantial effect on day-to-day activities, because were it not for the anxiety the claimant would have been at work, and his day-to-day activities include going to work.

Facts in this case and my analysis

15. I accept the claimant's account in his statement, that:

I have suffered from the effects of anxiety for several years, always struggled going to social events invited through family and friends. I cannot relax, sweat, and sometimes stutter in conversation, fidget, feel sick, after I feel I have made an appearance I make my excuses to leave. I suffer the same effects when I go to visit my family

16. There is support for the fact that the Claimant has had several incidents of anxiety in the list of sick notes (several of which are in the bundle) at the bottom of page 1 of his statement. As I explored with him in his oral evidence, on some of those occasions he had been advised to refrain from work, for one week or two weeks at a time. The earliest note listed there was 2004, and the latest 2009, though there were more recent episodes too.

17. The Claimant described in detail:

My suffering from the effects of anxiety came to a head on 14th December 2016 when I woke up and I couldn't cope any longer with day to day activities. I didn't get out of bed, wash, eat, no interest in anything – television, couldn't go out or speak to friends on the telephone, and just wanted to sleep. I contacted my GP with the support from my girlfriend. The first medication prescribed I tried for a week or two but it heightened my anxiety even more and I struggled even more to cope, so the GP changed my medication to Sertraline and propranolol. During this time I had a designated mental health nurse who telephoned and visited me on a regular basis to give advice and support, also to monitoring what affect the medication was having on me to help reduce and manage my anxiety. She would give regular updates to the GP looking after me about my mood, how I was coping day to day and advise him if the medication dose needed changing.

18. I accept that is an accurate account and it is consistent with the GP records (albeit those records also refer to certain matters which are omitted from the Claimant's impact statement).

19. In due course, the Claimant returned to work, but he remained on the medication. The dosage of Sertraline was increased, and was regularly reviewed and extended. I am satisfied that the reason the medication continued (and the dosage increased) is that the GP's were satisfied that without the medication the Claimant would have continued to suffer from the effects mentioned above. I am also satisfied, based on the Claimant's account, that he was not symptom free even with the medication.

20. The Claimant's return to work interview in January 2017 was at page 59 of the bundle. It notes that he was feeling "ok" and better than he had been previously. It does not suggest that he is suffering no adverse effects at all, and it notes that he is taking "17 tablets a day" and that he needed to try to keep his stress levels low as possible. It also noted that being in a vehicle / driving was stressful. I accept the Claimant's account that until the end of his employment (almost 3 years later), he did not return to driving duties due to a combination of the anxiety itself, and the side effects of the medication. Driving is a normal day to day activity, and this was significantly adversely affected.

21. A return to work in June 2018 (following surgery which is not related to his anxiety) referred (Box 5) to “anxiety”, “medication” and “on a few meds for anxiety/depression”. This is consistent with the GP records, including the 20 September 2018 entry which records that he was still taking Sertraline (2 x 100mg per day). A 20 March 2019 entry refers to a discussion the Claimant had about work, anxiety, and the possibility of an OH referral. (As long ago as 2006, the Respondent seems to have produced a referral for OH, but I have seen no reports).
22. I am also satisfied that the Claimant attended work as often as he could because he believed that it was beneficial to his condition. He did not say (and I do not find) that he was medically unfit for work, but attended anyway. However, he did say, and I do find, that the mere fact that he was fit to carry out his duties (or most of them at least, the Claimant suggests that he sought an adjustment about not having to return to the depot too often) does not imply that his anxiety had no (or only negligible) effects on his day-to-day activities during the periods that he was not absent from work (or absent for a reason other than anxiety).
23. Based on the evidence, I am satisfied that the Claimant’s anxiety did cause an impairment which had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities, including socialising, relaxing, driving. Some days / weeks / months were worse than others. At peak times, he did not feel like doing anything at all, even watching TV. At other times, and with the benefit of medication, the effects were not quite that bad. There were frequent recurrences, and had been since 2006 onwards (and possibly earlier, the records do not go back further). However, in terms of the severe episode which commenced in December 2016, based on the history of medication and renewal of prescriptions, I am satisfied that by no later than 6 March 2017 it was “likely” that those severe effects would recur, and/or that they would recur but for the medication.

Employment Judge Quill

Date: 17 August 2021

JUDGMENT SENT TO THE PARTIES ON

13/9/2021

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