



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr G Kozakiewicz

v

Perenco UK Ltd

Heard at: Cambridge Employment Tribunal

On: 30th June 2021

Before: Employment Judge King

Appearances

For the Claimant: Mr Bussau (paralegal)

For the Respondent: Mr Margo (counsel)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was (V) video having been conducted by CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The claimant was not disabled within the meaning of s6 Equality Act 2010 at the relevant time.
2. The claimant's claims for indirect discrimination and failure to make reasonable adjustments are dismissed.
3. The claimant's claims for direct discrimination are dismissed save for those that relate to his wife's disability.

REASONS

1. This is the reserved judgment of the Tribunal in the above matter. The case was listed for a preliminary hearing on 30th June 2021 to deal with preliminary matters but the Tribunal reserved its judgment due to time constraints on the day of the hearing. At the outset of the hearing, it was agreed that the matter of whether the claimant was disabled would be dealt with first and then the matter would be listed for a further preliminary hearing to determine the other issue as appropriate.

2. The claimant was represented by Mr Bussau (paralegal). The respondent was represented by Mr Margo (Counsel). I heard evidence from the claimant. I heard no evidence from the respondent. The claimant and respondent exchanged documents in advance and prepared an agreed bundle of documents which ran from pages to 1 to 117 to which I have had regard.
3. In addition both sides had prepared helpful skeleton arguments and there was a supplemental preliminary hearing bundle provided by the claimant that contained these, directions of the Tribunal, the claimant's impact statement, some inter-party correspondence and authorities and ran to 245 pages. In so far as this was relevant to the issues today, I have also had regard to this bundle.
4. The matter was heard via CVP. The case had been listed for a preliminary hearing following the respondent's application within its ET3 and further by letter dated 14th September 2020 to consider whether the discrimination complaints were submitted in time and whether the claimant was disabled at the relevant time. This was ordered to be listed by Employment Judge Ord and a notice of hearing was sent on 15th November 2020.
5. The claimant brought claims for constructive unfair dismissal (constructive), direct discrimination on the grounds of his disability and his wife's, indirect discrimination and failure to make reasonable adjustments. If the claimant can establish he is disabled all claims will proceed subject to the determination of the time point. If he cannot, then only the claims of unfair dismissal and direct discrimination on account of his wife's disability will proceed.
6. Employment Judge Ord also directed on 7th November 2020 that the claimant obtain a medical practitioner's report to deal with the issue of disability and a standard document was provided to the claimant's representative to ensure that relevant questions were asked of the GP. The direction was also made that this should be served by 31st January 2021 and then that the claimant provide an impact statement by the same day and that the respondent would confirm within 21 days of the same whether it concedes disability or not.
7. The claimant did not comply with these directions and on 22nd February 2021 the respondent wrote for an unless order directing the claimant to so comply. The Tribunal did not grant the unless order as it highlighted the burden was on the claimant at the forthcoming preliminary hearing to establish disability.
8. On 27th April 2021 the claimant served a report from Professor Fox who was not a GP but a psychiatrist. The respondent raised issue with the appointment of an "expert" to provide medical opinion by letter dated 5th May 2021 as there was no direction for an agreed expert and also raised the non-compliance with the order for an impact statement. On 13th May 2021 the claimant disclosed his medical records from his GP but no impact

statement. The respondent raised this with the Tribunal again. On 27th June 2021 a further direction was made by Employment Judge Postle that this should be provided forthwith.

9. The claimant did provide his impact statement on 29th June 2021 the day before the hearing and this was in the supplementary bundle. Notwithstanding that the claimant did not comply with the directions in this matter, I did have regard to its contents. No explanation has been forthcoming for the failure to comply with directions in connection with the impact statement but the claimant did outline it had not yet got Professor Fox's report.

The issues

10. The issues to be determined at the preliminary hearing had been set out in the notice of hearing of 15th November 2020 as follows:
 - 10.1 Whether the complaint of unlawful disability discrimination contrary to the Equality Act 2010 should be dismissed if the claimant is not entitled to bring it if they do not have a disability within the meaning of section 6 and schedule 1 of the Act.
 - 10.2 Whether the claim for discrimination and victimisation should be dismissed because the claimant is not entitled to bring it if the statutory time limit has expired.
11. At the outset of the hearing these issues were confirmed before evidence was heard but that the Tribunal would determine issue 10.1 first before determining 10.2. As the hearing progressed it was evident that it was not possible for the Tribunal to determine issue 10.2 on this occasion as the claimant had not sufficiently particularised the discrimination complaints for the Tribunal to determine whether they were in time. There was in any event insufficient time to determine both matters in just three hours and the matter was listed for a further preliminary hearing.

The law

Discrimination

12. The provisions concerning disability in respect of discrimination claims are set out in s6 Equality Act 2010 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.

- (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.
13. There are further provisions set out in Schedule 1 of the Equality Act 2010 concerning long term effects, effect of medical treatment, certain disabilities being classed as disabilities (which does not apply here) and other matters. I have had regard to Schedule 1. Further, the EHRC Code of Practice on Employment and Appendix 1 in particular and the Equality Act 2010 Guidance.
12. The respondent's counsel referred to a number of cases to which I have had regard namely and which are clearly relevant to the issues today:

Royal Bank of Scotland v Morris UKEAT/0346/10/MAA
J v DLA Piper UK LLP [2010] ICR 1052

17. The claimant's representative also referred to a number of cases which I have considered but which do not have sufficient relevance to the issues to be determined today to be of assistance to the Tribunal but are nevertheless set out below for completeness and relate more to substantive issues not being determined today:

Parnaby v Leicester City Council [2019] UKEAT 0025/19/1907
Archibald v Fife Council [2004] UKHL 32
Griffiths v The Secretary of State for Work and Pensions [2015] EWCA Civ 1265
R (Coll) v Secretary of State for Justice [2017] UKSC 40

Findings of fact

18. The claimant's evidence in his claim form was that he started to feel stressed in approximately 2017. His wife was diagnosed with two conditions one in 2017 and one in 2019 which are not relevant for the purposes of this hearing. His claim form outlined that it was in consequence of his wife's disability in approximately 2017 that the claimant started to develop his own mental health conditions.
19. The claimant was employed by the respondent from 2011. The claimant had visited his GP during 2018 for other unrelated health conditions but there was no reference to the conditions he relies on today. There is no relevant entries in 2017 either in the GP records.
20. The first time the claimant went to the GP about his mental health issues was on 18th July 2019. He was signed off as not fit for work from 18th July 2019 to 19th August 2019 as "feeling stressed". The claimant was further signed off from 19th August 2019 to 2nd September with the same reason being given. No prescription medication was given to the claimant and no forms of therapy prescribed at that stage.
21. Following this first absence, the respondent sent the claimant to occupation health. The practitioner was asked whether the Disability Act may apply. (The reference should of course had been to the Equality Act which had been in force for 9 years) The advice was related to his obligations as a carer and not related to his own condition. Again, the focus was very much on the difficulties with his home life and his wife's condition and the only references to the claimant's condition are that he was looking very tired and that he expressed concern about his family and his work.
22. The claimant returned to work on 16th September 2019 on a phased return to work but this had not been successful. The claimant was invited by letter dated 22nd October 2019 to a formal absence meeting. The outcome of the meeting was confirmed to the claimant by letter dated 15th November 2019 which confirmed that the reason for his absence was "due to caring for your wife who is suffering from a heart condition and mental health condition". It also referenced his daughter's health but nothing about his own health or conditions.
23. The claimant made a flexible working request on 20th January 2020. This submitted that the reason for the request was "to be able to be at home with his wife due to her disability and illness which is in relation to the Equality Act 2010, which affects her daily living." He confirmed that "this is not to provide personal care but reassurance that someone is there and can keep an eye out for her whilst she tries to get better." Additional detail was provided which concerned the personal information about his wife so is not repeated here but made no reference to his own mental health,

disability or illness in any way. It expressed that it unwise for his wife to be left alone at home.

24. The flexible working request was declined by letter dated 25th February 2020. On 28th February 2020 the claimant was signed off again for 4 weeks with a stress related problem.
25. The claimant resigned with immediate effect on 3rd March 2020.
26. The substance of the claimant's claim was that the claimant was disabled as a consequence of his mental health issues and that the refusal to grant his flexible working request or allow a trial amounted to a detriment for his direct discrimination claim and again the indirect discrimination claim and the reasonable adjustments claim centred around that flexible working request. As such the relevant time for the question of disability is when the flexible working request was made and critically rejected. The relevant period is thus January/February 2020.
27. The claimant provided an impact statement which contained a number of relevant matters for today's hearing. The claimant confirmed that although it was not immediately obvious to him at the time he said he became stressed and anxious about his wife's condition in early 2018. This is later than his claim form.
28. His evidence was that throughout 2018 he had no conscious appreciation of his own conditions and did not contemplate that he could be disabled himself. His statement described that he suffered mental fatigue and lethargy in early 2019. He would feel this way 1 or 2 days a week. This is the only impact highlighted.
29. In 2019 he stopped attending his monthly shooting meetings. The claimant attended work one day a week in September 2019 onwards but was working a further four days a week by January 2020 with those four days being at home. He further confirmed that at the time he made the request in January 2020 to formalise the arrangement permanently that he did not appreciate that he was directly suffering from any ailment personally.
30. Other than shooting and that he stopped attending work functions, the impact statement provides no other detail of his normal day to day activities and any substantial impact on the same. He was reluctant to leave his wife home alone which formed part of the basis for his application for flexible working.
31. The claimant's GP records contain the information outlined and that he was not prescribed any medication relevant to these matters during 2017, 2018 or 2019-2020 prior to his resignation.
32. The claimant provided a report of Professor George Fox dated 9th April 2021. The claimant had been referred to him for an assessment for

diagnosis and for the Tribunal matter. This describes the claimant's history and stressful life events but does not outline any of the information the Tribunal directed the claimant should provide in its standard document provided to assist the claimant so details around the impairment, the symptoms, the effect on the normal day to day activities, whether it is likely to last 12 months or more and other questions. It is not clear why the claimant did not ask him to do so, and if he did why he chose not to answer those questions as they were designed to assist the Tribunal and the claimant's case of course.

33. The report describes the claimant has having been on no medication. It outlines that now (April 2021) he has lost his self esteem. The focus on the report is very much a diagnosis as at April 2021. The only reference to the relevant time is that the claimant now believed that he was suffering from depression and anxiety at the time. This is the claimant's opinion.
34. Professor Fox diagnoses mixed anxiety and depressive disorder, autism spectrum disorder and adult ADHD. He recommends CBT. He gives no date of the diagnoses save to say they are as at April 2021. He outlines that he has been asked three specific questions by the claimant's representative none of which particularly assist this Tribunal for the hearing.
35. Professor Fox confirms the claimant has anxiety disorder as indicated and he believes this commenced in Spring 2018 but provides no information to assist the Tribunal as to the effect on day to day activities and whether these are substantial.
36. Dr Fox was asked whether the claimant was disabled and he confirms he would be "seen as disabled" but this does not say whether this is as at April 2021 or earlier. There is no reference to the Equality Act 2010. There are no other detail as to how he reaches this conclusion. The question had two limbs including a date range but he has not directly answered this element. He confirms "in my view he would be seen as disabled" not that he is or from when. He further confirms that this is as a result of the Autistic Spectrum Disorder and mixed anxiety and depressive disorder and then does onto describe the difficulties of someone suffering from autistic spectrum disorder. This is not the disability upon which the claimant relies. The claimant relies on stress and anxiety. It is also not clear whether it is the combination of these conditions that cause the Professor to conclude he would be "seen as disabled" or actually the conditions the claimant relies on.
37. The final question relates to whether he has suffered a mental injury for losing his job and is not relevant for the purposes of today.
38. During his evidence the claimant confirmed that he held a shotgun licence and that this has been renewed successfully as outlined in his GP records. The claimant also confirmed that he did not make the flexible working request for his own condition.

Conclusions

Whether the complaint of unlawful disability discrimination contrary to the Equality Act 2010 should be dismissed if the claimant is not entitled to bring it if they do not have a disability within the meaning of section 6 and schedule 1 of the Act.

Does the claimant have a physical or mental impairment?

39. I have considered *Goodwin v Patent Office* and that the Tribunal should assess each element of the definition separately and where appropriate sequentially. However, this is the sort of case envisaged under *J v DLA Piper [2010]* and whether the claimant was at the relevant period suffering from a mental impairment or whether this was a reaction to adverse circumstances. The claimant's personal circumstances were clearly difficult. As per the guidance of *J v DLA Piper* in such circumstances it is entirely proper that the Tribunal should look at the claimant's ability to carry out normal day to day activities first.
40. It is also important that the claimant's conditions upon which he relies are mental impairments rather than physical impairments and specifically stress and anxiety. Given Professor Fox's recent diagnosis of multiple conditions, this is important.

Does that impairment have an adverse effect on the claimant's ability to carry out normal day to day activities?

41. Professor Fox does not refer to stress at all but does deal with the diagnosis of mixed anxiety disorder and this is one of the conditions the claimant relies upon. The other conditions are not relied on by the claimant and are not relevant to the issues in this case.
42. The Tribunal is not assisted by Professor Fox's report as this does not outline the symptoms the claimant suffers with that condition upon which he relies, there is absolutely no information on the effect of any impairment on his ability to carry out relevant day to day activities at the relevant time or at all and whether at the time the impairment had or was likely to last 12 months. The claimant's impact statement also does not deal with these matters to the level one would expect. Professor Fox's report then focuses on autistic spectrum disorder and that this caused him to develop more significant psychological problems. The report merely says anxiety commenced in Spring 2018 and deteriorated but not to what extent or when. It is clear by the time he sees Professor Fox he has a number of conditions and is diagnosed accordingly.
43. It is for the claimant to establish he is disabled within the meaning of the Equality Act 2010. The focus should be on what the claimant cannot do or can only do with difficulty not what he can do. The effect should be more than minor or trivial. Here the claimant has only given evidence that he no

longer went shooting and stopped attending work events. There was also evidence that he was reluctant to leave his wife on the flexible working application and supporting documents. This is of course, understandable but it does not assist the Tribunal with determining whether the cessation of these two activities were because of the alleged disability or because of his personal circumstances.

44. Even assuming it related to his disability and not his personal circumstances the claimant has not established that any other day to day activities were adversely effected. The reference to fatigue and lethargy was in passing and no additional detail was given. Feeling this way for 1/2 days a week is not substantial and he does not describe any impact on loss of sleep for example to assist the Tribunal. The claimant did not outline any impact on other normal day to day activities. As such, the Tribunal cannot conclude that any alleged mental impairment had any impact on normal day to day activities let alone a substantial adverse effect. The claimant has simply remained silent on such critical matters and failed to establish his case.
45. There is no medical evidence to support any other effect on day to day activities at the relevant time or at all. The claimant was briefly signed off work but not with anxiety but stress. Professor Fox's report makes no reference to stress at all and it would seem entirely logical given the limited medical evidence that the claimant suffered a reaction to his adverse circumstances particularly when his own evidence was that he did not consider himself so impacted at the relevant time such that the stress was an acute reaction and not one which could be capable of meeting the requirements of s6 Equality Act 2010.
46. There is no reference to anxiety within the GP notes and the diagnosis comes much later in April 2021. Whilst of course Dr Fox is the medical expert on such matters I am conscious that his report clearly diagnoses the claimant in April 2021 but does not give enough information to deal with the relevant factual issues at the relevant time or indeed even in April 2021. There is no evidence to justify any finding or conclusion as to how long before April 2021 the claimant may have suffered with anxiety to the extent that it constituted a disability.
47. The Tribunal needs detail to assess the adverse impact on the claimant's normal day to day activities and this has not been forthcoming. Even at the relevant time the claimant was himself not referencing any such difficulties in his flexible working request just his wife's condition. The medical report does not even provide sufficient detail for the Tribunal (if indeed it had to) that there was a substantial adverse effect on the claimant's day to day activities in April 2021 let alone at the relevant time.
48. As such the Tribunal can only conclude that the claimant has not presented any evidence, medical or otherwise, that he was suffering from an impairment as a result of stress and anxiety at the relevant time, that any such condition had a substantial adverse effect on his ability to carry

out normal day to day activities or that such condition had lasted or was at the time likely to last at least 12 months.

49. There is no evidence before the Tribunal to establish that the claimant was disabled during the relevant period. The claimant has not given the Tribunal sufficient evidence to draw such conclusions either on the medical evidence or even on the claimant's own evidence via the impact statement that was served inexplicably late but was nevertheless permitted to be relied upon by the claimant but was lacking in detail and insufficient to deal with the issues notwithstanding he was represented.
50. As the claimant is not disabled within the meaning of s6 Equality Act 2010 it follows that he cannot bring any discrimination claim related to his own alleged disability. The claimant's claims of indirect discrimination and failure to make reasonable adjustments are therefore dismissed.
51. The claimant can still proceed with his direct discrimination claim but only limited to the extent that he relies on his wife's disability as the respondent accepts she is so disabled. The claimant's claim for direct discrimination in connection with his alleged disability is dismissed.
52. As a result of these conclusions the Tribunal will not need to consider time limits in connection with the claimant's claims for discrimination save for in connection with the direct discrimination claim that arising from his wife's disability. In this regard the flexible working request was declined on 25th February 2020. The ACAS EC certificate confirms that ACAS EC started on 12th April 2020 and ended on 12th May 2020 and the claim was presented on the 19th July 2020.
53. The matter will be listed for another PH to determine whether the claim was presented in time or within such further period as should be considered just and equitable. Additional directions will be given to the parties under a separate order in advance of that hearing.

Employment Judge King

Date:29.09.2021.....

Sent to the parties on: ..11.10.2021.
THY

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For the Tribunal Office