



EMPLOYMENT TRIBUNALS

Claimant

Ms A Johnson

v

Respondent

Turney & Associates Limited

Heard at: Bury St Edmunds (by CVP)

On: 30 September 2021

Before: Employment Judge KJ Palmer

Appearances

For the Claimant: In person.

For the Respondent: Mr J Heard (Counsel).

RESERVED JUDGMENT PURSUANT TO A PRELIMINARY HEARING

1. It is the Tribunal's finding that the claimant is a disabled person for the purposes of s.6 of the Equality Act 2010. The disabilities in question are migraines, anxiety and depression.
2. The matter will be listed for a further preliminary hearing to consider case management issues. That hearing will be by telephone on 24 November at 10.00 am.

REASONS

1. The claimant was employed by the respondent from 16 June 2018 until 3 May 2020 as a mortgage and insurance case handler. The respondent is a mortgage broker.
2. The claimant's employment ended on 3 May 2020 purportedly by reason of redundancy.
3. The claimant presented a claim to this Tribunal on 10 August 2020 claiming discrimination by unfavourable treatment because of something arising from

her disability and a claim for reasonable adjustments. All of her claims are predicated on the protected characteristic of disability.

4. The claimant claims that she is disabled as a result of suffering from migraine, anxiety and depression. The respondent disputes that the claimant is disabled for the purposes of the Equality Act 2010. The matter came before Employment Judge Ord at a preliminary hearing by telephone on 11 January 2021.
5. Identifying the issues EJ Ord set those out in his case management summary.
6. As the question of disability remained in dispute he listed a preliminary hearing to determine disability which was originally due to take place on Friday 25 June 2021. Ultimately that hearing took place on 30 September 2021 before me. The hearing was conducted by CVP.
7. I had before me a helpful bundle and a skeleton argument produced by Mr Heard Counsel for the respondent. The claimant was not represented and appeared in person. I heard live evidence from the claimant and she was cross examined by Mr Heard.
8. In the bundle before me was an Impact Statement produced by the claimant and a variety of medical records.
9. Today's hearing was due to start at 10.00 am and was listed for 3 hours. Sadly CVP problems meant that it was impossible to get matters underway until 11.35 am. This left less time available than was required and that it the reason that it was necessary for me to reserve judgment.
10. I heard evidence from the claimant.
11. Mr Heard on behalf of the respondent cross examined the claimant and took her to medical records and her Impact Statement which she had provided in support of her claim that she is disabled for the purposes of this hearing. The gist of the cross examination was to take the claimant to her medical records which showed the level of medication which she had been receiving from her GP. He took her through the records produced showing that she had been prescribed Sertraline on 13 September 2018 by Doctor Matthew Stevens her GP, she was prescribed 50 mg tablets, 28 of them, one to be taken daily. Counsel calculated that when the claimant had used up those tablets there must have been a period of time when she was not taking medication as there were gaps in her medical records showing attendance before a GP and the further prescription of Sertraline. Mr Heard was questioning whether the claimant had consistently and for a long period of time through from 13 September 2018 remained on the Sertraline medication. She said that she had and that her partner's mother had extensive surplus supplies of Sertraline as she was being prescribed the same drug. She said that on occasions when she had run out of the drug she was able to use the surplus which her partner's mother had. Mr Heard

pointed out that she had not mentioned this in her Impact Statement and the claimant responded that she did not think that it would be relevant. Mr Heard points out that there appears to be no communications between the claimant and her GP for periods of time notably between 13 September 2018 and the rest of that year.

12. The claimant gave evidence that she took the medication every day and said that when she did run out she used the additional surplus stockpiled by her partner's mother. She did say that on occasion if she felt slightly better she would take half a 100 mg tablet even though during the course of 2019 and beyond she was being prescribed 100 mg tablets of Sertraline. In this way she was able to stretch out the medication she had without constantly having to further consult with her GP. She also said that the medicine was on a repeat prescription.
13. It is the claimant's case that she suffered depression and anxiety from September 2018 through to and beyond the point of her dismissal on 3 May 2020.
14. The migraine on the claimant's evidence is a side effect of the medication that she takes. In a well put together Impact Statement she sets out the impact on her day to day activities and talks extensively of her migraines, depression and anxiety. The GP records produced consist of a letter of 13 November 2019 and a letter of 8 January 2020. The first letter is from Ami Sivantharajh who is a psychological wellbeing practitioner. It is evidence of the claimant being invited to attend the CPFT psychological wellbeing service. The second letter is a synopsis of an assessment which took place by CPFT on 8 January 2020 this details the claimant's condition pursuant to symptom questionnaires which indicates mild depressive symptoms and severe anxiety symptoms. A further letter of 28 May from a psychological wellbeing practitioner Alison Cornhill evidences that the claimant had been receiving cognitive behavioural therapy from the psychological wellbeing service for difficulties with anxiety and depression. It confirms that the claimant was first referred to the service on 2 November 2019.

The claimant's evidence

15. Despite skilful probing by Mr Heard I found the claimant's evidence to be certain and credible. I believe her when she gives evidence that she continued to suffer anxiety and depression throughout the period of her employment from June 2018 to May 2020. I believe that she continued to take medication and that on occasions when medication prescribed to her had been used up she supplemented that medication with medication stockpiled by her partner's mother. Mr Heard tried to in cross examination persuade the claimant that there had been periods during her employment when she felt well, did not need to see the doctor and was not taking medication. She refuted that and I found her evidence entirely believable and credible. That she produced a well put together Impact Statement

which went into significant detail as to the effect on her of the disabilities she relies upon.

The Law

16. section 6 of the Equality Act 2010 so far as material provides that:

- “(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.”

17. Paragraph 2 of Schedule 1 of the Equality Act so far as material provides that:

- “(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,
 - (c) It is likely to last for the rest of the life of the person affected.”

18. Paragraph 5 so far as material provides that:

- “(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 aids.”

19. Substantial means more than minor or trivial, s.212(1) Equality Act.

20. But Mr Heard reminds me that when determining the issue of disability a tribunal is required by paragraph 12 of Schedule 1 of the Equality Act to take into account the guidance as it thinks is relevant.

21. In Goodwin v The Patent Office [1999] ICR 302 the EAT arranged the issues to be determined when applying s.6 to determine disability in the following way:

- “(1) Does the claimant have an impairment which is either mental or physical?
- (2) Does the impairment affect the claimant's ability to carry out normal day to day activities?

- (3) Is the adverse effect substantial?
- (4) Is the adverse effect long term?"
22. It is for the claimant on the balance of probabilities to prove disability and that the impairment had an effect but for the measures that are taken to treat or correct the condition i.e. the use of medication. I am also grateful to Mr Heard for bringing to my attention the case of Woodrup v London Borough of Southwark which essentially indicates that a degree of particularity needs to be descended to by a claimant seeking to prove the disability and that medical evidence would be necessary.
23. It is necessary for a tribunal to consider and examine on the evidence before it how the claimant's abilities had actually been affected at the material time whilst on medication and then to address their minds to the difficult question as the effects which they think there would have been but for the medication. The question is whether the actual and deduced effects on the claimant's abilities to carry out normal day to day activities is clearly more than trivial.
24. The material time is in this case the date from which the claimant's claims proceed namely her dismissal on 3 May 2020, that is the date of the alleged discrimination.

Submissions

25. I heard submissions from Mr Heard, I also helpfully had before me written submissions from him. In his submissions he argues on the basis of his cross examination that there were clearly periods when the claimant had not been prescribed the drug Sertraline and that therefore she was not unwell during these periods. He said that in her disability impact statement the plugging of the gaps in the prescription of medication to her by the use of the stockpile of her partner's mother was not mentioned. He said it was a matter for me whether I accepted the claimant's evidence or not on this point. He said that in his submission the evidence showed that there were gaps and periods when the claimant was not unwell. The gaps were significant and therefore the claimant had not shown and discharged the burden of proof upon her to show that the impairment was long term. He asked me to consider how matters would be without the medication. He reminded me that the burden was on the claimant. He said that the claimant cannot say what it would be like for her if she was not on medication. He said there is scant evidence to support that her condition would be worse. He therefore said there was no evidence on the but four questions. He said that the evidence does not support the argument that the adverse effect was regular or daily. She has not met the requisite threshold and has not discharged the burden upon her. He refers to the migraines and says there is no mention of migraines in the GP records, they are infrequent and therefore not regular.

Conclusions

- 26. I accept the claimant's evidence. She was skilfully cross examined by Mr Heard and was able to explain very clearly in my judgment any gaps in medicines prescribed to her. I believe her when she said she supplemented those gaps by using Sertraline stockpiled by her partner's mother. I therefore accept that the claimant took Sertraline throughout the period of her employment.
- 27. If therefore have no doubt that the claimant has a mental impairment and it has been long term. It is impossible for the claimant to be certain as to the nature of that impairment throughout the period of her employment if she had not been taking the medication but what is clear is that the impairment was significant and substantial. I accept her description of the difficulties she suffers in her impact statement. Despite Mr Heard's scepticism about the lack of mention of migraines in the medical evidence I accept the claimant's evidence on this as well.
- 28. It is clear on the evidence before me that if the claimant were not taking medication the effects on her would be severe. I am satisfied that the four tests in Goodwin v The Patent Office are discharged in the claimant's favour.
- 29. At the material time I find that the claimant was a disabled person and that the disability suffered was migraine, anxiety and depression.
- 30. The matter will be further considered from a case management point of view at a further preliminary hearing to take place by telephone. This will take place at Bury St Edmunds Employment Tribunal by telephone on 24 November 2021 at 2.00 pm.

Employment Judge KJ Palmer

Date: 28 October 2021

Sent to the parties on:.

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For the Tribunal Office