



EMPLOYMENT TRIBUNALS

Claimant: Mr Steven Sullivan
Respondent: Prime Atlantic Group Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: Cambridge **In Chambers:** on 3 November 2021
Before: Employment Judge Cassel (sitting alone)

Appearances

For the Claimant: In Person.
For the Respondent: Ms J Learmond-Criqui, Solicitor.

JUDGMENT ON THE ISSUE OF DISABILITY

The claimant was not a disabled person at the relevant time in these proceedings and the tribunal has no jurisdiction to consider his claims under the Equality Act 2010.

REASONS

The Hearing

- (1) An open preliminary hearing took place on 11 June 2021 when the issue before me was whether the claimant was a person with a disability under the provisions of the Equality Act 2010, at the time of alleged breaches. A substantial bundle of documents was produced including a number of medical notes and specialist reports. The claimant gave evidence on oath, and was cross-examined by Ms J Learmond-Criqui.
- (2) The claimant was unrepresented and at the end of the hearing, which lasted several hours, the claimant indicated that he felt unable to proceed and wished to speak to his solicitor before making any submissions. Having considered the representations and bearing in mind the basis of the claimant's case, which is

that he has been, and is experiencing a substantial mental impairment, I ordered that the case be adjourned to enable both parties to make written submissions on which the other party would be able to comment.

- (3) Written submissions were provided by both parties, for which I am grateful and on which each representative was able to comment on the submissions of the other. I have also received submissions from the respondent regarding the claimant's claim of "whistleblowing". The claimant, apparently has yet to comply with Order 4 of 11 June.
- (4) At the end of the hearing on 11 June I made an order in respect of the disability issue at Order 3. The wording was quite specific. I ordered that the parties were to provide submissions "On the evidence given today on whether the claimant was a person with a disability at the time of the alleged breaches." At no stage during the hearing did the claimant refer to additional evidence nor did he apply at any stage for the inclusion of further evidence. I note that in a schedule attached to the submission the claimant's solicitor refers to other incidents and evidence. The respondent objects to the inclusion of that evidence. The respondent's solicitor points out that at no stage has that evidence been tested, if it were admitted the respondent would be put to severe disadvantage and in all the circumstances the claimant should not be allowed to rely on this evidence. I agree with that submission. To include that evidence would put the respondent to a substantial disadvantage. In any event in the notice of hearing for the preliminary hearing it was made clear that at the preliminary hearing evidence was to be considered. It was up to the claimant to present evidence on 11 June 2021. There was a substantial bundle of documents presented on behalf of the claimant and no reason recorded or has been advanced as to why additional evidence should be considered.

Background and Findings of Fact

- (5) Findings of fact are made on the balance of probabilities and by reference to documentation before the tribunal, brought to my attention and the oral evidence of the claimant. The onus is on the claimant to show that the tribunal has jurisdiction.
- (6) The claimant was an employee and director of the respondent company until his employment was terminated by the respondent on 2 July 2020.
- (7) The complaints that he makes cover a number of alleged discriminatory acts and cover the period of 3 December 2019 until 20 February 2020. The act of dismissal on 2 July 2020 is also claimed as disability discrimination. The task for the tribunal therefore is to determine whether on these dates the claimant fulfils the definition of a disabled person under the provisions of section 6 of the Equality Act 2010. The claimant argues that he has suffered with mental health problems and has had symptoms relating to a severe depressive order since around August 2018. At page 5 of the bundle the claimant has listed 31 effects of the impairment.

- (8) The claimant accepted in cross examination that there was no recorded medical information that he experienced a depressive illness in August 2018 and it was not until December 2019 that there was any reference to his mental health and that was in a note made by his G P. He also accepted that when he saw his GP on 6 December 2019 he did not mention having any suicidal thoughts and for that reason there is no reference to that.
- (9) The directors of the respondent company agreed to pay for treatment for the claimant at the Priory Health Centre. There were 10 sessions with Dr J Moulder-Brown, Counselling Psychologist, which spanned from 6 September 2019 to 17 January 2020. Notes from the Priory were produced at page 214/215 of the bundle. Within that note there is repeated reference to no suicidal thoughts or risk concerns. In the last session there is reference to, "Stephen doing well and sleeping better" Although there is reference to depression and anxiety, there is no reference to any serious mental illness. At page 69 is a letter from Dr J Moulder-Brown dated 24 January 2020 in which the substance of the various sessions is described and again although there is reference to him reporting suicidal thoughts to his GP, which do later appear in the GP notes as "fleeting thoughts", there is nothing to suggest a substantial mental illness.
- (10) At page 71 and onwards of the bundle are notes from the NHS Well-being Centre of 25 February 2020 and for later dates. The notes continue for several pages and record various measurements until 24 June 2020. Of particular relevance is the graph at page 79 which is a summary of readings for mental health based on the claimant's self assessment, PHQ-9 and GAD-7 and risk Q-9. The first reading, for 25 February records a borderline moderate to moderately severe mental health which shows a steady decline from 4 May 2020 to 24 June 2020 between which dates a healthy outcome is recorded. The claimant was cross-examined about the outcome graph and accepted that it was an accurate assessment of his condition and he accepted that by May 2020 he was "healthy". He gave evidence that during the period of lockdown he was with his family and more particularly his wife who was very supportive of him.
- (11) GP notes from 2010 until January 2021 were produced at pages 140 onwards. The claimant was questioned extensively in cross examination about those notes. He was a regular attender at his GP surgery and the notes are voluminous. He accepted that it was not until 22 January 2020 in the note at page 154 there was ever any reference to depression. There was reference at a previous entry on 17 January that he denied any thoughts of suicide and that on 20 January he stated that he wanted to start antidepressant tablets but in evidence said that he never took them. However by 7 February 2020 it was recorded that he was "feeling better and mood is better "and by 21 February 2020 he "feels much better". He was referred to the NHS Well Being Service on 25 February 2020. He accepted in evidence that there was no further reference to mental ill health in the GP notes until 11 December 2020.
- (12) As noted above at page 5 of the bundle of documents the claimant lists the effects of the impairment on his ability to perform normal day-to-day tasks. That list was prepared for the benefit of these proceedings. He lists 31 separate items but it was apparent that the vast majority of the issues that are now raised were

not discussed or, recorded as being discussed in the notes produced at pages 214/215 when he attended the Priory. Neither was there reference at page 69 of Dr Moulder-Brown's summary nor any substantial reference to these effects in the GP notes. Although in his letter at page 69 Dr Moulder-Brown refers to the claimant having "high physiological anxiety symptoms which affect his capacity clearly" these are not reflected in the notes prepared contemporaneously at pages 214/215.

- (13) Within the GP notes is an assessment by the mental health crisis team. This referral was made when the claimant was unemployed. In the report from Dr Iles, to which I refer later, the examination was characterised as follows in paragraph 40 of his report "Mental state examination revealed a well-kept man who maintained good eye contact, but he was tearful during assessment. He reported broken sleep. He was overeating and had gained weight. His speech was coherent and normal in rate, tone and volume. He was low in mood. There were no abnormal thoughts or normal perceptual experiences served or exhibited. Although he expressed fleeting suicidal thoughts there were no plans or intent to act on these. He denied thoughts to harm others".
- (14) At page 209 is a letter from Dr Moulder-Brown in which there is reference to a further meeting which took place on 12 February 2021. The claimant met with Dr Moulder-Brown for psychological assessment. The letter is dated 25 February 2021 in which Dr Moulder-Brown gives an assessment based on the meeting of 12 February. On that date he noted that the claimant "presented with moderate to severe symptoms of both depression and anxiety. Therefore I have recommended to Stephen that he contact his local NHS psychological therapies team to have further CBT sessions.

Stephen's depression and anxiety has disrupted his sleep and had a negative effect on his energy levels and engagement and pleasurable activities. Significantly Stephen also has suicidal thoughts which mostly occur when he receives communications from his lawyers about the legal processes involved in with his former business partners. Thankfully, Stephen has no intention to act on these thoughts and his wife is a strong supportive factor in assuring him that he is needed and loved by his family. Stephen experiences concentration difficulties, e.g. forgetting what he wanted to say, restlessness and feeling fidgety, rumination and excessive worrying.

Stephen reports that the historical actions and legal case with his former business partner is a significant source of distress for him and exacerbates his depressive and anxiety symptoms..."

- (15) In the bundle of documents at page 38 onwards is a report prepared by Dr Andrew Iles dated 27 April 2021. The report was commissioned by the claimant following orders made by the tribunal. Dr Iles is a consultant forensic psychiatrist who is well qualified to give an opinion as to the mental health of the claimant at the time of his examination, which was a two-hour video interview on 8 April 2021. On that date Dr Iles concluded that the claimant was a disabled person for the purposes of the Equality Act. In his opinion the claimant meets the diagnostic criteria for severe depressive disorder (without psychotic symptoms) paragraph 90 of his report and should be considered to have a disability and the meaning of

Section 6 of schedule 1 of the Equality act 2010 at paragraph 91 of his report.

- (16) At paragraph 10 of his report, Dr Iles lists those documents to which he had access in the preparation of his report. Many of those documents were in the hearing bundle and certainly those relating to the claimant's medical history which are relevant in these proceedings were the subject of extensive cross examination today. Dr Iles was not in tribunal when the claimant was cross-examined and did not have the benefit of hearing the claimant's evidence. That is not intended as a criticism but as an observation which in my judgement is fundamental in these proceedings. It is particularly relevant because at for example paragraphs 97 and 12 of his report his findings or diagnosis presuppose that the claimant gave him an accurate account of the progress of his mental health. At paragraph 97 he uses the following language "the defendant's medical contain evidence that he presented to his GP in December 2019; however it is the claimant's evidence that he had been suffering from symptoms of the same mental disorder from approximately August 2018." At paragraph 102 is the following comment "If the start date of August 2018 was accepted the illness (and the impairment of course) had been ongoing for more than 12 months at the point that he was dismissed. If his self-report is not accepted by the tribunal, and the starting date of the symptoms (and the impairment they cause) is to be August 2019 when he disclosed difficulty to his former co-directors the symptoms had been ongoing for two – three months by the time that he was dismissed."
- (17) The respondent in their submissions point to the wording of the communication in August 2019 in which the claimant describes himself as having "lost his mojo" at page 244 and makes no reference to his mental health. In further cross-examination the claimant was again taken through that email and accepted that there was no mention of ill-health although he maintained the respondent was aware of his state of mind. However it was accepted there was no clear correspondence expressing a belief to his employers that he was suffering from mental ill health. As noted above the start date of August 2018 was the subject of cross examination and I find on the balance of probabilities that although there was an assertion of depressive illness made by the claimant, there was in reality no evidence to substantiate that and the evidence that was produced does not demonstrate an illness of any severity during his employment or indeed at its conclusion.

Relevant Law and Conclusions

- (18) Section 6 of the Equality Act 2010 defines disability in the following terms: –
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.
- (19) Paragraph 12 of schedule 1 of the Equality Act 2010 provides that when determining whether a person is disabled the tribunal "must take account of

such guidance as it thinks is relevant” the Equality 2010 Guide: Guidance on matters to be taken into account in determining questions relating to the definition of disability was issued by the Secretary of State pursuant to Sec 6(5) of the Act (“the guidance”).

- (20) In **Goodwin v Patent Office [1999] ICR 302** that then-President of the EAT Morison J provided guidance on the proper approach for a tribunal to adopt when applying of what were then the provisions of the Disability Discrimination Act 1995. He held that the following four questions should be answered, in order
- A) did the claimant have a mental or physical impairment?
 - B) did the impairment affects the claimant’s ability to carry out normal day-to-day activities?
 - C) was the adverse condition substantial?
 - D) and was the adverse condition long-term?
- (21) The relevant point in time to be looked at by the tribunal when evaluating whether the claimant is disabled under section 6 is not the date of the hearing, *but the time of the alleged discriminatory act/s* **Cruickshank v Vaw Motorcast Ltd [2002] ICR 729**.
- (22) The first question I have to ask is whether at the time of the alleged discriminatory acts the claimant had a mental or physical impairment? The claimant alleges that he had a mental impairment. The contemporaneous medical notes points to a mental illness, depression. I bear in mind the Guidance at A and guidance from Mummery J in **McNicol the Balfour Beatty Rail Maintenance Ltd [2002] EWCA Civ 1074**, where the Court of Appeal established that the term “mental impairment” should be given its “natural and ordinary meaning “and the tribunal should use its “good sense” to make a decision whether the claimant is suffering from a mental impairment on the facts of each case. I find that the claimant did have an impairment.
- (23) The second question that requires an answer is whether the impairment affected his ability to carry out normal day to day activities. Looking at the contemporaneous evidence sensibly and reasonably there is little to suggest that the impairment affected his ability to carry out normal day-to-day activities. I accept that at page 5 there is a list provided by the claimant of what he says in hindsight were the effects of the impairment but simply put I do not believe him when he says that these were experienced at the relevant time.
- (24) If I am wrong, the next question I have to consider is whether the adverse condition was substantial. I have to take into account the cumulative effects of the impairment and I recognise it is important to consider whether its effect on more than one activity, taken together, could result in an overall substantial effect, B4 and Appendix 1 to the E H R C Employment Code and the guidance on the meaning of “substantial”. I bear in mind that account should be taken where a person avoids doing things which, for example, causes pain, fatigue or substantial social embarrassment; because of the

loss of energy and motivation". Looking through the contemporaneous evidence, and in particular the reports by Dr Moulder Brown and his GP and the findings of fact that I have made I do not accept that the adverse condition were substantial.

- (25) Finally I have to answer the question as to whether the adverse condition was long-term. All the evidence in contemporaneous form points to the impairment being fairly short in so far as the relevant time is concerned. It may well be that after the termination of his employment and the stress of extended and expensive litigation he developed a substantial mental illness but that is not the issue before me and what I am required to focus on is the set of circumstances that existed at the time of the alleged breaches. I bear in mind the Guidance at C 5 and 6. I do not consider that the short period of impairment does qualify as a long-term impairment for the purposes of the Act. Simply put I do not find the effects on normal day-to-day activities during the period in question were substantial.
- (26) The tribunal has no jurisdiction to consider the complaints of disability discrimination under the Equality Act 2010.

Employment Judge Cassel

Date: 4 November 2021

Sent to the parties on:

19 November 2021

For the Tribunal: