



EMPLOYMENT TRIBUNALS

Claimant

Mr. S. Morter

v

Respondents

- (1) Ecocleen Services Limited
- (2) Perenco UK Limited
- (3) KGM Services Limited

Heard at: Bury St. Edmunds (via CVP)

On: 23rd March 2022

Before: Employment Judge: Mr. A Spencer (sitting alone)

Appearances:

For the Claimant: Mr. G. Baker (Counsel)

For the First and Third Respondent: Mr. Williams (Solicitor)

For the second Respondent: Mr S. Margo (Counsel)

JUDGMENT

1. **The Claimant was a disabled person for the purposes of section 6 of the Equality Act 2010 in the period from December 2020 to January 2021.**

REASONS

Introduction

2. This case came before me for a hearing to determine a preliminary issue. That issue is whether the claimant was a disabled person at the times relevant to his complaints of disability discrimination. The claimant requested these written reasons after judgment and reasons were given orally at hearing.
3. The claimant was employed as a cleaner by either the First Respondent (R1) or the Third Respondent (R3) from December 2013 until he was dismissed on 18 Jan 2021. The claimant worked at the premises of R2 at their gas terminal at Bacton, Norfolk. R2 was a customer of R1 or R3. R3 was added to the proceedings at an earlier preliminary hearing as the potential employer of the claimant. There appears to be some confusion as to whether it was R1 or R3 who employed the claimant. I hope that

confusion on what should be a simple issue can be resolved by the parties before the final hearing.

4. The claimant was dismissed by R1 or R3 on 18 January 2021 for alleged failure to comply with health and safety protocols and in particular for refusing to wear a face mask and refusing to have a particular type of Covid-19 test on site. Both these measures were put in place to protect the workforce from Covid-19 infection.
5. The claimant brings complaints including disability discrimination. The claimant says he was a disabled person by reason of anxiety (including Obsessive Compulsive Disorder) and chronic depression. The case advanced in his claim form is that his conditions cause social anxiety and panic attacks. The panic attacks being particularly debilitating.
6. The claimant asserts that because of his disability he was unable to wear a face mask and have the particular Covid test as these requirements triggered his anxiety and/or panic attacks. He asserts that his dismissal amounted to discrimination arising from disability (s15 Equality Act 2010 (EQA)) and/or that the respondents failed make reasonable adjustments (s20 and 21 EQA).
7. None of the respondents accepted that the claimant was a disabled person for purposes of EQA.
8. Case management orders were made at a preliminary hearing on 3 November 2021. The orders included listing the case for today's preliminary hearing to determine question of whether the claimant was a disabled person at the material time.

The Disability and the "Material Time"

9. The relevant health condition that the claimant says made him a disabled person, is anxiety (including OCD) and chronic depression.
10. The disability discrimination claims relate to a specific period of time. That period was agreed at the outset of today's hearing to be December 2020 to Jan 2021

Evidence/Submissions

11. I took into account the documents in an agreed hearing bundle, an opening note from the claimant's counsel and a skeleton argument from R2's counsel. I also watched a You Tube video recorded by the claimant.
12. I heard evidence from the Claimant, Mr. Morter, who verified the contents of his two impact statements under affirmation.
13. I had the opportunity to see Mr. Morter's evidence tested under cross examination and the opportunity to put questions to him myself.
14. I also took into oral account submissions on behalf of the parties.

Findings of Fact

15. Having heard the evidence, my findings of fact are as follows:
16. I begin with the medical evidence. This is not a case where I have been provided with any particularly helpful medical evidence. However, there is a good reason for that (which I will come to).
17. The claimant has suffered from anxiety symptoms for a long time. A letter from the claimant's GP Dr Singh dated 18 December 2020 is of limited assistance. It confirms that the claimant "*has suffered from anxiety symptoms for a very long time*" but gives no other helpful details.
18. The claimant disclosed copies of his GP medical records. They cover the period to August 2021. However, they too are of limited assistance.
19. The respondents assert that for several years prior to 2020 the claimant's medical records show that he did not report to his GP any of the problems with his mental health that he now relies on. The respondents invite me to draw the inference that the claimant was not suffering the problems that he now asserts made him disabled. The respondents are correct that there are no recent medical entries relating to the claimant's mental health. However, I accept the claimant's evidence as to why that is the case. There are a number of entries from about 2010 to 2012 where the claimant reported symptoms of anxiety. There is an entry in 2010 referring to the claimant having severe depression. He was also signed off work for depression and anxiety around the same time and was also referred to the mental health team. The medical records are consistent with the claimant's evidence which is that attempts were made from 2010 to treat his condition with medication. The claimant was also recommended to have counselling and referred for Cognitive Behavioural Therapy (CBT). Attempts were made to find appropriate medication and treatment. However, the claimant had unpleasant side effects from the medication and did not wish to take medication. He ceased to do so in about 2012.
20. Thereafter, the claimant sought to control his anxiety and depression with self-help and lifestyle changes. Including diet, yoga, exercise, and a number of other changes. He decided against the conventional medical approach. It was clear from the claimant's You Tube video that he made the video with the aim of advocating the effectiveness of such changes.
21. The claimant has developed a morning routine which helps him control his anxiety and depression. This includes meditation and yoga, a cold shower and breathing exercises. The routine takes between 1-2 hours depending on how low or anxious the claimant is feeling on a particular day. The claimant also eats a ketogenic diet, practices mindfulness, takes regular exercise and walks in the country.
22. The claimant did not seek medical help for his mental health issues after about 2012. He turned away from conventional medical treatment having become disillusioned with it.
23. In the circumstances, the claimant's self-help measures and his resistance

to taking medication entirely explain the lack of recent evidence in the medical notes regarding mental health issues. The claimant had tried the conventional medical approach, including medication, found it did not suit him and sought other approaches to controlling his condition.

24. Notwithstanding these measures the claimant continued to suffer problems with anxiety and depression. I was invited by the respondents to discount the claimant's evidence as lacking credibility due to:

24.1 The lack of recent entries in the medical records; and

24.2 A You Tube video recorded by the claimant shortly after the Covid-19 pandemic began in which he advocates his self-help methods and describes himself as feeling "healthier than I have ever been".

25. Despite these points I accept the claimant's evidence as to the effect his anxiety and depression had upon him. The absence of evidence of mental health issues in the claimant's medical records is entirely explained by the fact that he tried conventional medical treatment and moved away to more "non-medical" solutions. Further, his pronouncement in the You Tube video should be placed in context. The claimant was plainly recording the video as a means of advocating or "selling" his approach to health. His comment about his health was made in that context. I accept the claimant's evidence that he was learning to make such videos at the time and accept that his comment was very much made in the manner of a sales pitch for his 8-step plan to better health. The claimant gave evidence in his impact statements as to the effect his anxiety and depression had upon his day to day life. That evidence was detailed, consistent and credible. The claimant came across a genuine and truthful witness. I do not accept that the claimant was lying or exaggerating his evidence.

26. In particular, I accept the claimant's evidence that:

26.1 Anxiety and depression have been a constant feature throughout most of his life.

26.2 He has a tendency to overthink and catastrophise events resulting in intrusive thoughts.

26.3 He has difficulty sleeping.

26.4 He frequently wakes up feeling low and depressed and struggles to elevate his mood and to get out of bed in the morning.

26.5 If the claimant is required to do activities outside his comfort zone, he becomes anxious and finds it hard to concentrate and focus (finding it difficult to concentrate on more than one task at a time).

26.6 On a regular basis the claimant becomes so depressed or anxious that, as he puts it, he "shuts down", feeling tired and exhausted and goes to bed. This occurs on about a weekly basis.

26.7 The claimant also suffers from regular panic attacks with a

frequency of about once per month. During such episodes he feels nauseous, his breathing becomes shallow, he becomes lightheaded and dizzy and begins to sweat.

- 26.8 The claimant suffers from social anxiety, feeling uncomfortable in social situations and crowds. He does not like meeting new people and as a result spends much time alone.
- 26.9 The claimant is also intolerant to noisy situations often having to leave to find somewhere quiet.
- 26.10 The claimant's anxiety affects his driving. Particularly when driving in busy city areas. This induces feelings of anxiety and panic and on occasion will bring on a panic attack causing him to have to pull over and his wife to take over driving if she is with him.
- 26.11 The claimant also has intrusive worries and thoughts about health issues.
27. These effects of the claimant's anxiety and depression continued notwithstanding the implementation of his self-help measures.
28. The claimant's mental health began to deteriorate further just before that first Covid national lockdown in March 2020. During the pandemic the claimant's anxiety increased significantly and his depression deepened. This caused the claimant's symptoms to worsen. They included worsened sleep, regular feelings of nausea and vomiting. The claimant also became more withdrawn.
29. During the pandemic the claimant had a nasal swab test at R2's request. He found the experience very uncomfortable and became extremely anxious about the prospect of having to submit to such tests on a regular basis to the extent that this triggered panic attacks.
30. The claimant was also unable to wear face masks for anything other than a short period of time. Wearing a face mask induced feelings of claustrophobia, and feelings of being unable to breathe and suffocation. Again, this caused a spike in the claimant's anxiety levels manifesting in his heart racing, feeling hot and triggering a panic attack.
31. It was for these reasons that the claimant declined to submit to the particular type of Covid test that he had found so uncomfortable and also declined to wear a face mask.

Applicable Law

32. The protection against disability discrimination given by the Equality Act 2010 ("the Act"), applies only to those who fall within the Act's definition of a disabled person.
33. Section 6(2) of the Act defines a disabled person as a person who has a disability.

34. Section 6(1) of the Act states that a person has a disability if he or she has a physical or mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day to day activities. The burden rests upon the claimant to show on the balance of probabilities that he falls within that definition. In applying that definition, I must take into account, where relevant, the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability which I will refer to as “The Guidance” and the Equality and Human Rights Commission: Code of Practice on the Equality Act, which I will refer to as the “EHRC Employment Code”.
35. The time at which I must assess the disability is the date of the alleged discriminatory acts. This is also the material time when determining whether an impairment has a long-term effect. It is agreed that the various alleged discriminatory acts occurred in December 2020 to January 2021 (ending with the claimant’s dismissal on 18 January 2021) and therefore this is the material time period.
36. Section 6(1) Act requires the Tribunal to consider the evidence by reference to four different questions, or conditions. They are:
- (i) did the Claimant have a mental and / or physical impairment?
 - (ii) if so, did that impairment affect the Claimant’s ability to carry out normal day to day activities?
 - (iii) if so, was that adverse effect substantial? and
 - (iv) if so, was the substantial adverse effect of the impairment long term?

Conclusions

37. Applying my findings of fact to the relevant law, my conclusions are as follows:
38. I considered the four essential questions sequentially. My conclusions in relation to each of the four questions are as follows:
39. Question one – I considered whether Mr. Morter had a physical or mental impairment for the purposes of the Act. He had anxiety (including OCD) and depression at all material times. These were long standing conditions that he has had for many years (including at the material time). These conditions amount to “mental impairments” within the meaning of s6 EQA.
40. Question two – I considered whether that impairment affected Mr Morter’s ability to carry out normal day to day activities. Paragraphs 14 and 15 of Appendix 1 to the EHRC Employment Code provide guidance as to what is meant by the term “normal day to day activities”. The focus should be on what the claimant cannot do or can only do with difficulty. I refer to my findings of fact as to the numerous ways in which the conditions adversely affected the claimant.

41. The claimant's counsel advanced two particular day to day activities as part of the claimant's case. They are:
 - 41.1 Covid testing using a nasal swab; and
 - 41.2 Wearing of face masks.
42. The claimant submitted that his ability to undertake these activities was substantially adversely affected by his impairment. I accept that this is the case on the evidence before me. The claimant had significant difficulties in both activities due to his anxiety.
43. The respondents invite me to find that neither activity is a "normal day to day activity" for the purposes of the Act. I accept that submission in relation to testing but not mask wearing.
44. The phrase "day to day activities" is explained in the EHCR Employment Code as "activities which are carried out by most men and women on a fairly regular and frequent basis".
45. I do not accept the claimant's submission that invasive nasal testing of the type the claimant found so anxiety inducing meets this definition. Even at the height of the pandemic this was not an activity carried out by most men and women on a fairly regular basis.
46. In contrast, mask wearing plainly did become such a common activity. At the material time in this case it was an activity carried out almost universally by most men and women on a regular basis. It became a requirement of day to day life.
47. However, whilst these may be interesting legal arguments to the lawyers involved in this case, even if I had excluded these two activities from my assessment, I would still have found that there was an adverse effect on the claimant's other day to day activities at the material time. I refer to the findings set out at paragraphs 26 to 30 above in this regard.
48. Question three – I considered whether those adverse effects were substantial. The word "substantial" is defined in Section 212(1) of the Act as meaning more than minor or trivial. Again, I refer to my findings of fact. Taken together the effects were plainly more than merely minor or trivial. They were substantial. It is also of note that the substantial adverse effects occurred notwithstanding the fact that the claimant had made and implemented extensive and wide-ranging lifestyle changes to manage his condition without resorting to medication. Paragraph 5 of Schedule 1 of the Act requires me to consider the question of whether adverse effects were substantial by ignoring the effect of "measures" taken to treat or correct the impairment. Paragraph 5 states:

Effect of medical treatment

- 5(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 treat or 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 aid.
49. The respondents invite me to find that the claimant’s self-help regime falls outside the definition of “measures”. I reject that submission. The definition of “measures” in paragraph 5(2) uses the word “includes” to denote that it is not limited to medical treatment. The use of the word measures should not be interpreted as being limited to medical interventions. Self help measures such as those applied by the claimant (and diet in particular) are of significant utility in treating or controlling a whole host of illnesses or diseases. It would be perverse to exclude such steps from the definition of “measures”.
50. In any event, even with the measures adopted by the claimant in place I have found on the evidence that the adverse effects on the claimant’s day to day activities are still substantial. If I were to ignore the effects of those measures, the adverse effects would plainly be more substantial still. The claimant’s clear evidence was that his self-help regime helped control his symptoms.
51. Question four – I considered whether the substantial adverse effects of the impairment were long term. Under paragraph 2(1) of Schedule 1 of the Act, the effect of an impairment is long term if either it has lasted for at least 12 months, or it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected. This is not a case where it is submitted that the effects were likely to last for the rest of the claimant’s life. However, on the evidence before I accept that the substantial adverse effects had affected the claimant in the ways described for more than 12 months by the material time. Even if I had decided differently on this point those substantial adverse effects were likely to have continued for a further 12 months in any event. With regard to the word ‘likely’, an event is likely to happen if it “could well happen”. This is a relatively low hurdle for a claimant to overcome. Given the severity of his condition at the material time and the long history of symptoms it appears likely than substantial adverse effects would have continued for a further 12 months. Certainly, it was something that “could well happen”.
52. It follows from these conclusions, that I find that all the essential elements of the Section 6(1) definition are made out in this case and Mr. Morter was therefore a disabled person as defined by the Act at the material time. It follows that he has the protection of the Act with regard to his right to

pursue complaints of disability discrimination for events which occurred within that period.

Employment Judge Mr A Spencer

Date: 25th March 2022

Judgment sent to the parties on

31/3/2022

N Gotecha

For the Tribunal office