EMPLOYMENT TRIBUNALS

Claimant: Mr S Maltby

Respondent: Chestnut Inns Limited

Heard at: Watford (by CVP) **On:** 29 April 2022

Before: Employment Judge Maxwell

Appearances
For the claimant: in person
For the respondent: Mr Roberts, Counsel

JUDGMENT

1. The Claimant was not a disabled person at material times and his disability discrimination claim is dismissed.

2. The Claimant's unfair dismissal claim is struck out, as he lacked two years continuous employment.

3. The Claimant's breach of contract claim with respect to early payment of wages in December 2020 is struck out, as it has no reasonable prospect of success.

4. The Claimant's claims of breach of contract claim with respect to 1 week's notice pay and for holiday pay are **not struck out** and will continue to a hearing.

REASONS

Preliminary Issues

1. A preliminary hearing was ordered to decide the following issues:

   1.1. whether the claimant was a disabled person at material times, namely between December 2020 and January 2021;

   1.2. whether the claimant's claim (or any part of it) should be struck out as having no reasonable prospect of success;

1.3. (whether the claimant's complaint of unfair dismissal (if it has not yet been withdrawn or struck out) should be struck out on the ground that the claimant lacked sufficient continuous employment with the respondent at the time of his dismissal;

1.4. whether the claimant should be ordered to pay a deposit as a condition of pursuing any contention(s) in the claim;

1.5. whether any application to amend the claim should be allowed.

Claims

2. The Claimant commenced and concluded ACAS conciliation on 3 March 2021. He presented his claim on 12 April 2021 bringing complaints of:

2.1. Unfair dismissal;

2.2. Disability discrimination;

2.3. Notice pay;

2.4. Holiday pay.

3. The Claimant was employed by the Respondent as Head Chef from 29 January 2020 to 11 February 2021.

4. The discrimination claim was clarified by EJ Brown on 20 January 2022 as one of discrimination arising from disability (EqA section 15) with respect to dismissal. For being a disabled person the Claimant relied upon the physical impairments of IBD and a burn to the hand, along with the mental impairment of PTSD. The something arising from disability was his inability to attend for work because he was shielding from Covid.

Further Information

5. Both prior to and after the case management hearing on 20 January 2022, the Claimant has written to the Respondent and / or the Tribunal endeavouring to set out his claim. Unfortunately, each time the Claimant writes, he describes his complaints in a somewhat different way. This has made it difficult to understand the legal claims he wishes to pursue and what impairments he is relying upon for being a disabled person. I sought to clarify these matters with him during this hearing.

Evidence

6. I received:

6.1. a bundle of documents from the Respondent, which the Claimant had been invited to agree but disputed;

6.2. more recent email correspondence from the Claimant, attached to which were screenshots of email correspondence relating to the commencement of his employment;

6.3. witness statements from:

6.3.1.the Claimant;

6.3.2.Ms Barclay, Group Human Resources Manager;

6.3.3. Keith Thornhill (an email);

6.3.4.Daniel Jones;

6.3.5.Daniel Goldsack (an email).

7. The Claimant, Mr Thornhill and Ms Barclay all gave evidence under oath or affirmation and were cross-examined or made available.

Amendment

8. Given that one of the amendments sought is with respect to the impairments relied upon by the Claimant for his discrimination claim, it is appropriate that I deal with that first, before going on to decide whether he was a disabled person at material times and if so on what basis.

Law

9. In **Selkent Bus Co Ltd t/a Stagecoach v Moore [1996] UKEAT/151/96** the EAT provided helpful guidance on the consideration of applications to amend, per Mummery J:

> **(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:**
>
> **(a) The nature of the amendment**
>
> **Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.**
>
> **(b) The applicability of time limits**
>
> **If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions eg, in the case of unfair dismissal, S.67 of the 1978 Act.**
>
> **(c) The timing and manner of the application**
>
> **An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the**

> **making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.**

10. Whilst the **Selkent** factors will often be highly relevant to whether an amendment application is granted or not, this will not always be so. The determination of permission to amend is not a tick-box exercise; see **Abercrombie v Aga Rangemaster Ltd [2014] ICR 209 CA** . Notably, even when an amendment would involve adding an out of time claim, this will not necessarily be decisive agent allowing the same; see **Transport and General Workers Union v Safeway Stores Ltd (2007) UKEAT/0092/07**. Ultimately, the interests of justice require a balancing exercise.

11. The body of case law which has developed in connection with amendment applications was recently considered by the EAT in **Vaughan v Modality Partnership [2021] IRLR 97**, per HHJ Tayler:

> **20. In Abercrombie Underhill LJ went on to state this important consideration, at para [48]:**
>
> **'Consistently with that way of putting it, the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted.'**
>
> **21. Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim.**

22. Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence. This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later.

[…]

24. It is also important to consider the Selkent factors in the context of the balance of justice. For example:

24.1. A minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing.

24.2. An amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim.

24.3. A late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.

25. No one factor is likely to be decisive. The balance of justice is always key.

26. Rather like Charles Darwin who, when pondering matrimony, wrote out the pros and cons, there is something to be said for a list. It may be helpful, metaphorically at least, to note any injustice that will be caused by allowing the amendment in one column and by refusing it in the other. A balancing exercise always requires express consideration of both sides of the ledger, both quantitively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice.

27. Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it.

28. An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice.

Discrimination Arising

12. The central factual complaint made by the Claimant can be stated simply. He was Head Chef in the kitchen at the Respondent's Rupert Brooke pub. On 17 December 2020 he suffered a burn to his hand as a result of a workplace accident. This burn became infected and required antibiotic treatment. His GP advised he was unfit for work. Notwithstanding he made his employer aware of this state of affairs, he was pressurised into carrying on at work over a number of busy days. Shortly thereafter, the Claimant was advised to shield and isolate because of covid. Following that point, the Respondent discovered what it believed were a number of serious breaches of procedure, including with respect to hygiene or health and safety in the kitchen at which the Claimant was Head Chef. Disciplinary proceedings were commenced and the Claimant dismissed. The Claimant says that his absence from work whilst shielding contributed to the kitchen issues for which he was dismissed. For the purpose of a claim under EqA section 15, the something arising was the Claimant's absence from work.

13. The proposed amendment to the discrimination claim is for the Claimant to be able rely upon the additional impairments, namely:

    13.1. obesity;

    13.2. taking opioid mediation for pain relief;

    13.3. asthma;

    13.4. seizure.

    The Claimant also indicated that he no longer relied upon IBD.

14. Whilst the Respondent submitted there was a "disconnect" between the additional alleged impairments and the something arising, Mr Roberts did not oppose permission to amend. This seems to me to be a very small amendment to an existing claim. Essentially the same complaint is being made, the Claimant simply wishes to rely upon different impairments for the purpose of showing that him shielding and not attending work was something arising from a disability. The application is made at a relatively early stage in proceedings and if granted the Respondent will have time to prepare to respond to it. It is in the interests of justice to grant the amendment, which I do.

Health and Safety

15. In connection with the question of whether or not the Claimant had sufficient qualifying employment for his unfair dismissal claim, in written statements the Claimant referred to ERA section 100, although he had not said how this applied. He expanded upon the point in oral submissions at the hearing. The Claimant said:

> **"For section 100. No health and safety was put in place for me. If it had been they would have shown some interest.**

The Claimant's assertion is that the Respondent failed in its duty of care to him, either in failing to prevent the accident in the first place, or not doing more to support him after it happened. Whilst his expectations in this regard may or may not have been reasonable, this is not a circumstance falling within the relevant statutory provision. The Claimant did not say that he had brought a health and safety concern to his employer and for this sole or principle reason he was dismissed.

16. Permission to amend to add a claim of automatic unfair dismissal pursuant to ERA section 100 is refused, as the proposed claim would have no reasonable prospect of success. It is not in the interests of justice to give the Claimant permission to amend to add a claim which, very clearly, has no merit.

Protected Disclosure

17. Although the Claimant did not pursue any amendment with respect to whistleblowing in oral submissions at this hearing, I note he had referred to it in his prior correspondence and for the sake of completeness I will deal with it now. Since his dismissal, the Claimant has alleged various wrongdoing by the Respondent. In this way, he sees himself as 'blowing the whistle'. He does not, however, set out any history of doing so before his employment terminated. This matter is addressed in the Claimant's "MY CLAIM AGAINST THE CHESTNUT GROUP" document of 11 January 2021:

> **4. Whistle blowing**
>
> **I feel the chest group went well out of there way to discredit and destroy my career I can prove clearly that they went to great lengths to dismiss me even to the level of planting discriminating evidence withholding information during an investigation failing to comply with fair practises on their own disciplinary process blatant out right lying and bullying. I believe all of this was done to me so I wasn't in the business no more threw fear I may talk about my mono poisoning from condemned and faulty equipment that hadn't been gas safety checked for over 2 years I also have proof of an illegal party witch I was unaware of till 9/2/21 being held at the Rupert Brooke on the 26/12/20 with all in attendance and evidence of this incident being hushed as well as proof of them isolation staff members from abroad in accommodation that wasn't where they were residing putting myself and kitchen team at risk as they were living with the isolators**
>
> **I would also like to reference to dan goldsack general manager of the Rupert Brooke at the time with some of his recollections and confirmation of lack of care and consideration to team members**

> **I will attach all relevant evidence**
>
> **It feels like I was dismissed instead of all in attendance as it would be better for the company hence y no one recived a disciplinary or investigation to this incident.**

18. ERA Section 103A applies to dismissals where the reason for dismissal is the employee made a protected disclosure. There is no equivalent of EqA section 27(1)(b) which can apply where a detriment is done because the Claimant "may do, a protected act".

19. Permission to amend to add a claim of automatic unfair dismissal pursuant to ERA section 103A is refused, as the proposed claim would have no reasonable prospect of success.

Disabled Person

Facts

Generally

20. Almost all of the medical evidence produced by the Claimant post-dated his employment. The Claimant did not obtain his GP records. In the course of being questioned about this, he said he "did not feel the need to do something so silly". He was then referred to correspondence in which the Respondent had drawn to his attention the potential relevance of this material and the Claimant responded that it had not been "physically possible" for him this by the time ordered. Mr Roberts pointed out that more than three months between the last case management hearing and today was ample time in which to approach his GP. The Claimant did not disagree.

21. I am satisfied the Claimant had sufficient time before today in which to approach his doctor and obtain copies of his records. During the same period the Claimant has produced lengthy and detailed documents arguing his case. A letter or email to his GP practice making such a request would have been a far easier step to take. I note the Claimant did in fact contact his GP and request a "to whom it may concern" letter, dated 7 February 2022. He could, therefore, have requested his records and has chosen not to.

History

22. On 27 April 2019 the Claimant was admitted to hospital following an overdose of tramadol and seizure. The record in this regard includes:

> **Maltby was seen in West Suffolk Hospital on 27th April, following an overdose of tramdol and a first seizure event thought to be related. Mr Malby self-discharged against medical discharge before assessment and treamtnet was complete.**

When referred to it, the Claimant at first appeared to dispute this record but it seemed to me it was only the word "overdose" he took exception to. He explained that what happened was merely a dosage miscalculation (i.e. he did not deliberately take an excessive dose of Tramadol). The is no evidence, either from the Claimant or contained in a medical record, of the Claimant having suffered a

seizure on any other occasion or having undergone any further medical investigation or treatment in this regard. This was a one-off event, most likely triggered as set out above.

23. When the Claimant commenced his employment with the Respondent he was required to complete a medical health questionnaire. During the hearing, when cross-examining Ms Barclay, the Claimant suggested the signature on questionnaire in the bundle was not his and this was a forgery. He also said the name written on it was "Shave" as opposed to "Shane" Maltby. In effect, he was inviting an inference that the forger had mistakenly used the wrong first name. I do not accept these points and find on the balance of probabilities this is a genuine document. The supposed "v" in the handwritten first name, could easily be an "n". I compared the Claimant's signature on this document with others in the bundle (which he had not said were forged) and these appeared similar. Furthermore, certain information on the form can only have come from the Claimant, in particular the reference to having undergone surgery on his shoulder and the number of days absence from work this necessitated. The details for the Claimant's GP are also correct. In this form, along with shoulder surgery, the Claimant recorded that he suffered with hay fever. He did not say anything about obesity, asthma, PTSD, having a seizure or taking opioids. The Claimant ticked "no" for taking medication, having any relevant health problems or being a disabled person within EqA. I am satisfied the way in which this form was completed accurately reflected how the Claimant felt about his health at the time.

24. On 17 December 2021, the Claimant suffered a nasty burn to his hand as a result of an accident at work. He continued to work, although he believes this was only because he was pressurised to do so. Mr Roberts put to the Claimant that when he attended to the disciplinary hearing on 11 February 2021, he was wearing no bandage or dressing and the burn appeared to have healed. In answer he said "That was two months after, of course it appeared nearly to be healed". Retrospectively, on 21 May 2021, the Claimant's GP gave him a fit note saying that he was not fit for work between 17 December 2020 and 17 February 2021, being a period of 9 weeks. I find that by 17 February 2021, the burn had substantially healed.

25. The Claimant was dismissed on 12 February 2021.

26. On 21 May 2021, the Claimant's GP wrote a letter saying he had been brought in for vaccination because he was in the high risk category for covid 19.

27. A letter of 21 October 2021 from a pain management specialist noted the Claimant had suffered with right-sided shoulder pain following an encounter with the police in 2019 when he was arrested for a crime he did not commit. The Claimant is said to have undergone acromioclavicular joint repair and been managing well until something "slipped and popped" whilst "he was doing some bench presses in the gym". The letter included:

> **Mr Maltby tells me that he is otherwise fit and well and he denies any significant medical history. He tells me that he has previously experienced a significant ulnar nerve injury to his left arm which has left him with some residual problems. In terms of other management, he did have a local steroid injection into his shoulder which gave him some good relief, but the benefit of this has now waned,**

The letter referred to the Claimant's pain relief mediation for his shoulder and then:

> **This led on to a slightly more detailed discussion about Mr Maltby's wellbeing and his mood. He currently feels quite despondent about his pain and in concerned about how things will be in the future. He reports his pain is feeling life changing and is currently frustrated as this is preventing him from working to his role as a chef. […] Mr Maltby clearly understands that pain and mood can be linked.**

28. A letter of 5 November 2021 from a Clinical Psychologist included:

> **Shane told me that more recent events of losing his job have caused more distress and been more traumatic and unsettling for him. Work provided him with so much, a sense of purpose helped his mood, and helped him to stay active. He was unfairly treated and dismissed under circumstances which did not warrant this. I wonder whether being unfairly treated and wrongfully dismissed may well have re-triggered feelings of vulnerability. He reported an increase in nightmares based around fears of this area of his life. Shane has experienced a great deal of difficulty in his life […]. However, he felt that he had dealt with and processed these events. The impact of them on him were different and related to where he was in his life at that time, e g being younger and not being a parent himself yet.**

29. A letter dated 8 December 2021 from a mental health practitioner included the Claimant reporting that he had undergone a traumatic event in 2019, namely being wrongfully accused of a crime, remanded in custody and then acquitted. This was then followed by further trauma because of the events surrounding his dismissal by the Respondent. The Claimant is noted as saying "I used to be able to do these things" and "I have lost everything". I note the Claimant provided only pages 1 and 3 of this letter, page 2 has been omitted. The practitioner was of the opinion the Claimant's flashbacks of these events were indicative of PTSD. Psychological therapies were recommended. There is also a more recent letter (14 January 2022) which records the Claimant being assessed for CBT.

30. The Claimant has produced a letter from his GP dated 7 February 2022 which says:

> **Mr Maltby is a patient at the Reynard Surgery. He currently takes Venlafaxine to help with depression and he is only codeine to help with chronic shoulder pain. In his medical history he has a diagnosis of depression and asthma which was diagnosed in 2003 although he is not currently on treatment for that. In the past he has been on stronger pain relief including morphine and tramadol for his shoulder pains.**

31. The Claimant's impact statement, for the most part, consists of complaints about his treatment by the Respondent. Only one paragraph appears to address his impairments and this provides:

> **So as a whole because of my seizure ,ibd,asma,and long term medication I am unable to walk no more then 50 metre if I skip one tablet medication I could go into withdrawal and die I have had all of these issues since before my time at the chestnut inns these are all protected characteristic and especially my ptsd it a clear disability and is protected under the equality act. I can not operate my hands properly I am aided in eating**

> **bathing dressing and going to the bathroom because of my mental state I cant handle being around people I do not trust I have lost all my social skills I am always suffering with hopelessness and the ability to not move on from how I was treated at and buy the chestnut inns because of my mental state that chestnut has caused I am not aloud to be left unattended with my children I will never be able to move forward from what they did to me I was a module employee y would they want me gone for unless it was to benefit there profit I was heartbroken when I see the Rupert Brooke on look east and some other guy in my position hadn't gone threw a single close down or one issue he had been employed as a head chef for a fortnight it was me who worked with equipment failing every week I was the head chef who was closing down and opening the Rupert Brooke during all the u.k lock downs they national treated me like I didn't exist.**

32. Whilst the impact statement may accurately describe the Claimant's current position now, I do not accept it reflects the position when he was employed by the Respondent. According to the impact statement the Claimant is extremely limited in being able to walk, cannot use his hands properly, needs help with bathing and dressing and has difficulty being around people. This description is not only very different from the medical questionnaire he completed but also inconsistent with the substantive role he carried out for the Respondent, being head chef at the Rupert Brooke pub. More likely, the impact statement reflects a subsequent deterioration in the Claimant's health. The Claimant told me that his "career" as a head chef was "over" because of the way in which he had been treated by the Respondent, which strongly suggests a worsening of his health thereafter. I am also reinforced in this conclusion by the observations of the Claimant's psychologist in her November letter about the "re-triggering".

Obesity

33. As far as obesity is concerned, the only evidence I was referred to in this regard is the Claimant's own letter of 24 February 2022:

> **Living with excess weight puts people at greater risk of serious illness or death from COVID-19, with risk growing substantially as body mass index (BMI) increases. Nearly 8% of critically ill patients with COVID- 19 in intensive care units have been morbidly obese, compared with 2.9% of the general population.**
>
> **I have already given the respondent the medical proof of my clear obesity since 2019 when I was 21st and during my employment in 2020 when I was between 18st an 19st this has been confirmed buy a medical professional in writing that the respondent does have I will attach a copy of said letter confirming my weight and from the year to date.**
>
> **As my BMI was an average of 37.5 over for someone of 5ft lOinch this put me at a morbidly obese status during my time at the chestnut and one of a multitude of reason as to y I would have been high risk during my employment.**

34. The Claimant says nothing about obesity in his impact statement. There is no evidence that he ever consulted his GP or received medical treatment in this regard. Whilst I acknowledge there must be an increased risk of adverse health consequences as a result of the Claimant being overweight, I cannot find that he was suffering with any adverse effect at the material time.

Opioid Pain Relief

35. In his email of 3 February 2020, the Claimant says:

> **it has been confirmed that my I.B.D is not the cause for my shielding or my high risk my seizure back in 2019 and medication that can provoke seizures was as I have been on an on and off basis with these types of medicine since my shoulder injury 2018 (codeine morphine tramadol etc.)**

36. The taking of medication, in and of itself, is not a physical or mental impairment for the purposes of EqA section 6 and the definition of a disabled person. Where medication is taken because of an impairment, then any side effects might be considered as part of the adverse effect resulting from the same. It is, however, clear that the medication to which the Claimant refers was taken because of shoulder pain. The Claimant was asked expressly whether he relied upon his shoulder as an impairment for the purpose of his disability claim and said he did not. This appeared to be on the basis that the position has worsened more recently; the Claimant showed his arm was in a sling, which was not the case when he was working for the Respondent.

Asthma

37. The Claimant was diagnosed by his GP as suffering from asthma. The Claimant has not, however, described any symptoms resulting from this and I note that his GP said he was not in receipt of medication. This suggests the asthma is mild.

Seizure

38. The Claimant had one seizure in 2019, most likely caused by an overdose of tramadol. He has not had another seizure, nor any treatment.

Burn to the Hand

39. As above, I find the Claimant received a nasty burn to the hand on 17 December 2020, which had substantially healed by the point of 9 weeks later.

PTSD

40. I do not find the Claimant was suffering with PTSD and the time of his employment.

41. The Claimant has suffered with depression in the past, although I cannot make any finding about the nature and extent of that on the evidence before me. It does not, however, appear the Claimant was receiving any treatment for depression (either talking therapies or medication) during his employment by the Respondent. Unfortunately, following the Claimant's dismissal his mental health deteriorated and as at February 2022, he was being prescribed Venlafaxine for this.

Law

42. Section 6 of the **Equality Act 2010** ("EqA") provides so far as material:

> **(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.**
>
> **[...]**

43. The definition at section 6 is supplemented by Schedule 1 to EqA, which so far as material provides:

> **Long-term effects**
>
> **2(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.**
>
> **[...]**
>
> **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.**
>
> **(3) Sub-paragraph (1) does not apply—**
>
> > **(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed**

44. Guidance on the correct approach to determining whether a person is disabled within the meaning of EqA was provided by the EAT in **Goodwin v Patent Office [1999] ICR 302**, per Morrison P:

> **[…] 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?**

45. In relation to "impairment" the question for the Employment Tribunal is a functional one, what the Claimant cannot do practically. It is unnecessary to consider the cause of such limitation; see **MOD v Hay [2008] IRLR 928 EAT**.

46. In determining whether a person satisfies the definition of disability the Employment Tribunal must focus on what the person cannot do or can only do with difficulty, as opposed to what they can; see **Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19 EAT**.

47. Guidance on the correct approach to identifying a mental impairment was provided by the EAT in **J v DLA Piper [2010] IRLR 936**, per Underhill P:

> **40. Accordingly in our view the correct approach is as follows:**
>
> **(1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin v Patent Office [1999] ICR 302 .**
>
> **(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.[…]**
>
> **41. The facts of the present case make it necessary to make two general points about depression as an impairment. […]**
>
> **42. The first point concerns the legitimacy in principle of the kind of distinction […] between two states of affairs which can produce broadly**

> **similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness—or, if you prefer, a mental condition—which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or—if the jargon may be forgiven—"adverse life events". We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians […] and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived.**

48. "Substantial" is defined at EqA section 212(1) as "more than minor or trivial". In this context a substantial adverse effect means a limitation going beyond the normal differences in ability which may exist amongst people.

49. Normal day to day activities can include work activities where they are found across a range of employment situations; see **Chief Constable of Dumfries & Galloway v Adams [2009] IRLR 613 EAT**.

50. The question of disability must be determined as at the date of the alleged discriminatory act, as opposed to the date of hearing; see **Cruickshank v VAW Motorcast [2002] IRLR 24 EAT** and **Richmond Adult Community College v McDougall [2008] IRLR 227 CA**.

51. In this context the word "likely" means could well happen; see **SCA Packaging v Boyle [2009] IRLR 746 HL**.

52. The task for an employment tribunal is, therefore, to ask on each date when the Claimant alleges an act of discrimination:

    52.1. whether a sufficient impairment had lasted for at least 12 months;

    52.2. whether a currently sufficient impairment could have been said at that point to be likely to last for at least 12 months or to recur.

53. Pursuant to EqA section 6(4), a person who was a disabled person in the past, prior to the matters complained of, is treated a disabled person for these purposes.

Conclusion

54. The various impairments now relied upon emerged at different times in the Claimant's various attempts to set out his complaints in writing. The Claimant explained this pattern in two ways: firstly, his PTSD made him forgetful (i.e. he forgot to mention some of these matters when preparing his documents) and secondly, he did not know which conditions had been taken into account when he was told to shield or isolate. This latter point is of some importance. The Claimant has sought to work backward from the fact that he received advice to shield or go into isolation, as indicating that it must follow that he had one or more serious health concerns amounting to a disability. I cannot, however, proceed in this way. There is no evidence of why the Claimant was advised to shield or isolate. The Claimant says he was contacted by Track and Trace. Whilst this might suggest he was a close contact of someone who had tested positive for covid, the Claimant says it was to tell him he needed to shield. There is a letter from the Claimant's GP about receiving the vaccination saying he was in a high risk category but not why. I note that the Claimant's witness, Mr Goldsack, says the Claimant's partner was pregnant at the time and at higher risk.

55. My task is to make findings of fact based upon the evidence before me and then apply the relevant to the statutory test, in essence:

    55.1. whether the Claimant had one or more physical or mental impairments at the material time;

    55.2. whether this had a substantial adverse effect on his ability to carry out normal day to day activities;

    55.3. whether such effect was long term.

56. With respect to the impairments relied upon by the Claimant:

    56.1. whilst he may have suffered a physical impairment by reason of being **overweight,** this had no adverse effect on his ability to carry out normal day to day activities at the material time;

    56.2. taking **opioid pain relief** is not, of itself, a physical or mental impairment;

    56.3. although the Claimant suffers with **asthma**, this was mild, required no treatment and did not have any adverse effect on his ability to carry out normal day to day activities at the material time;

    56.4. the Claimant suffered one **seizure** in 2019, most likely caused by an accidental overdose and there was no physical impairment (or adverse effect) in this regard at the material time;

    56.5. whilst the **burn** to the Claimant's hand was a physical impairment and must have had an adverse effect in terms of pain and reduced function when healing, this had not lasted for 12 months at the material time and nor could it be said to have been likely to do so; rather substantial healing would have been anticipated with a few weeks at most;

56.6. the Claimant was not suffering with **PTSD** at the material time (whilst he had a prior history of depression, I could not find this was active at the time or that it had a substantial adverse effect when it had been previously).

57. Accordingly, the Claimant was not a disabled person within the meaning of EqA section 6 at material times by reason of any of the impairments he relied upon, whether considered separately or cumulatively.

58. The Claimant cannot, therefore, pursue any disability discrimination claim and this will be dismissed.

Strike Out and Deposit Orders

Unfair Dismissal

59. The period of employment required for an unfair dismissal claim is 2 years. The Claimant did not have this and his claim will be struck out.

Breach of Contract

60. The Claimant contends for a breach of contract in two ways:

60.1. He was paid early in December 2020;

60.2. He did not receive any notice pay.

61. Even if the payment made early to the Claimant in December 2020 was a breach of contract (about which I have some doubt) there was no financial loss and this element of the breach of contract claim will be struck out as having no reasonable prospect of success.

62. Whether the Claimant was, objectively, guilty of gross misconduct such as entitled the Respondent to summarily dismiss him is not a matter I can form a view about at this hearing. I cannot be satisfied such a claim enjoys either no or little reasonable prospect of success and do not, therefore, either strike it out or make a deposit order. For the avoidance of doubt, the measure of damages in this regard is limited to the pay the Claimant would have received during his notice period, namely 1 week's pay.

Holiday Pay

63. I can reach no conclusion about the merits of the holiday pay claim, which was not addressed in argument before me and this may also continue to hearing.

EJ Maxwell

Date: 1 May 2022

Sent to the parties on:12/5/2022

For the Tribunal Office: NG