



EMPLOYMENT TRIBUNALS

Claimant

Ms. Connolly

v

Respondents

**Scrivens Opticians and
Hearing Care Limited**

Heard by CVP

On: 25 November 2022

Before:

Employment Judge Wedderspoon

Representation:

Claimant:

In person

Respondents:

Ms. Whelan, Consultant

JUDGMENT

1. The claimant was disabled at the relevant time within the meaning of section 6 of the Equality Act 2010.

REASONS

1. The respondent requested written reasons at the end of the open preliminary hearing. These are the reasons.

Background

2. The claimant was employed by the respondent from 14 March 2016 until her resignation on 16 September 2021. The purpose of the Preliminary hearing was to determine whether the claimant met the definition of disability pursuant to section 6 of the Equality Act 2010 for the period of 21 March 2021 until 16 September 2021.

The issues

3. The issues to be resolved at this open preliminary hearing are as follows :-
 - 2.1D Did the claimant have a mental impairment namely a generalised anxiety and depressive disorder ?
 - 2.2 If so did that impairment have a substantial adverse effect on the claimant's ability to carry out normal day to day activities ?
 - 2.3 If so, was that effect long term? In particular when did it start; and
 - 2.3.1 Had it lasted at least 12 months?

2.3.2 Was the effect likely to last at least 12 months?

4. The Respondent disputed the disability of generalised anxiety and depressive disorder relying upon the fact that the claimant did not receive this formal diagnosis until 27 September 2021.

The Hearing

5. The claimant relied upon a section 6 disability impact witness statement along with a medical report from her G.P., Dr. M Ahmad dated 23 May 2022. Mr. Bosock the claimant's partner also gave evidence. The Tribunal was provided with an agreed bundle of 71 pages.
6. The Tribunal found the claimant to be a credible witness who did not exaggerate. Mr. Bostock who is not a medical expert, could only provide incidental evidence.

Facts

7. From 21 March 2021 until her resignation on 16 September 2021 the claimant worked as a frame dept manager. The respondent operates a chain of branches offering optical and hearing aid services to customers.
8. The claimant started suffering issues with her mental health from 2017 when she was diagnosed with anxiety. She was prescribed 50mg sertraline and in August 2018 this was increased to 100mg. From 15 November 2018 she was prescribed 200mg the dosage. She has reviews of her medication every 3 to 6 months. She has remained on this medication since.
9. Mr. Ahmad in his medical report identified two diagnoses Anxiety from 14 November 2017 and mixed anxiety and depressive disorder since 27 September 2021. He states

"She was continuing to take her sertraline and she had a medication review on 10 September 2021 and it was decided to continue her anxiety medication. On 27 September 2021 Miss Connolly presented to us again with worsening symptoms which were mostly related with her work. She mentioned that her symptoms were not getting better she was having poor sleep she was over arising and she was having suicidal thoughts when in her previous job but she mentioned that she will never act on them. Miss. Connolly said that she was having suicidal thoughts because of her stress, depression and anxiety which was moistly related with her work. She mentioned that at the time she was overeating and she lives with her partner. We discussed Mirtzapine a low dose which will help her sleep and depression and she was explained that it was a sedative anti-depressant Her dose of sertraline was reduced to 100mg once a day with mirtzapine 15 mg a night. Her anxiety GAD score was reported 16/21 and her PHQ9 score for depression was 20/27 which puts her in the bracket of moderate to severe depression. She was reviewed on 22 March 2022 and the mediation was maintained. He last prescription of Mirtzapine 15 mg was on 26 October 2021 whic stopped at the end do November 2021. The claimant continues to take Sertraline 200 mg a day for her anxiety and depression"

10. In 2020 the claimant underwent some private counselling. She was not in a financial position to finance the sessions in 2021.
11. The claimant complains she was unsupported in the role from March 2021 and determined to resign on 16 September 2021. Her case is that in the absence of her medication her function would be impaired by reason of panic attacks, risk of suicidal ideation, inability to get out of bed and go to work.
12. In respect of her contact with the GP in 2021, the claimant said she had a medication review on 10 September 2021. Her evidence about this review is that the GP did not consider it appropriate to change her medication because she would need to be weaned off the medication to change for another. Instead, she was kept on sertraline medication. She sought a GP consultation but could not get an appointment until 27 September 2021.
13. On 27 September 2021 the claimant had a telephone consultation with her GP; the Tribunal accepted the claimant's evidence that this was the first GP consultation. The GP at this stage made a formal diagnosis of mixed anxiety and depression. The Tribunal accepts the claimant when she says that her health began to deteriorate from March 2021. Her symptoms were as described on 27 September as set out in the G.P. medical report.

SUBMISSIONS

14. The Tribunal invited the respondent to make submissions first as an experienced employment consultant to set out her case for the claimant to respond to but provided the respondent with a right to reply to the claimant's submissions.
15. Ms. Whelan on behalf of the respondent submitted that the claimant had the burden of establishing that she fell within s. 6 of the Equality Act 2010 and that she had failed to discharge that burden. The claimant relied at the preliminary hearing upon the condition of mixed anxiety and depressive disorder (a recognised psychiatric illness); this was only diagnosed on 27 September 2021. The claimant could not establish she suffered from this disability during the material dates of 21 March to 16 September 2021.
16. The respondent directed the Tribunal to consider what happened on 10 September when the claimant attended her GP; the notes state and the medication was maintained. It was not until 27 September that a diagnosis (11 days after the claimant's resignation from her employment). There is no evidence before the tribunal save for the claimant's assertion that had she got a G.P. appointment sooner than 27 September 2021 she would have been diagnosed sooner. On 10 September 2021 the GP report is really saying that the claimant's condition was stable and unchanged and her medication was not changed.
17. The respondent did not dispute that the claimant suffered with anxiety since 2017. The respondent also noted that the claimant did not have any counselling in 2021. There was a gap in the medical report. It's unclear what

occurred to the claimant between 16 September 2021, the date of her resignation and 27 September 2021, the date of the diagnosis.

18. E.J. Wedderspoon asked the respondent to comment on the case of **Nissa**. The respondent submitted that this is not a case here with no start date of diagnosis; there is a diagnosis of mixed anxiety and depressive state on 27 September and not before so that the claimant cannot establish she suffered from that condition during the material period.
19. The claimant submitted she has suffered from anxiety since 2017 and has been medicated for this condition since. On 10 September 2021 she was experiencing symptoms of additional depression but this appointment was a medication review only. She was unable to get a consultation with her GP until 27 September 2021. Her mental condition had been worsening before her resignation on 16 September 2021.
20. The claimant submitted that she had always suffered from anxiety. Depression was added to the diagnosis on 27 September 2021. Her anxiety condition is long term and she is on the maximum dosage of sertraline.
21. In response the respondent submitted the claimant is mentioning two conditions her but she only relies upon one from the preliminary hearing namely generalised anxiety and depressive disorder which she can not establish is the disability at the material time for the purposes of section 6 of the Equality Act 2010

The Law

22. For the purposes of section 6 of the Equality Act 2010 (EqA) a person is said to have a disability if they meet the following definition :
*“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.”*
23. The burden of proof lies with the claimant to prove that he is a disabled person in accordance with that definition.
24. The term “substantial” is defined at section 212 as “*more than minor or trivial*”. Normal day to day activities are things people do on regular basis including shopping, reading and writing, having a conversation, getting washed and dressed preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, socialising (see D2 to D9 of the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011)).
25. Further clarity is provided at Schedule 1 which explains at paragraph 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."*
26. Likely should be interpreted as meaning "it could well happen" rather than it is more probable than not it will happen; see **SCA Packaging Limited v Boyle (2009) ICR 1056**. In the case of **Patel v Metropolitan Borough Council (2010) IRLR 280** the EAT stated that the issue of whether the effect of an impairment is long term may be determined retrospectively or prospectively. A claimant must meet the definition of disability as at the date of the alleged discrimination.
27. In the case of **Nissa v Waverly Education Foundation Limited UKEAT/0135/18** a warning was given not to concentrate solely on a diagnosis which will be relevant but not determinative. HHJ Eady stated "*the correct question was to consider what the effects of the impairments were at the material time and to consider whether there was information before the ET which showed that viewed at that time it could well happen that the effects of the impairments would last for more than 12 months.*"
28. Formerly there was a requirement that a mental illness had to be clinically well recognised illness before it could be a mental impairment but that requirement was repealed as from 5 December 2005.
29. As to the effect of medical treatment, paragraph 5 provides :-
(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 include in particular medical treatment.."*
30. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government's office for disability issues entitled "Guidance on matters to be taken into Account in Determining Questions Relating to the Definition of Disability" The guidance should not be taken too literally and used as a check list (see **Leonard v Southern Derbyshire Chamber of Commerce (2001) IRLR 19**).
31. Some guidance is given in paragraph B1 as to the meaning of "Substantial adverse effects" namely
"The requirement that an adverse effect on normal day to day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences and ability which may exist amongst people. A substantial effect is one that is more than a minor or trivial effect."

Conclusions

32. The Tribunal takes into account the evidence from the claimant, her partner which was incidental, the medical material, the Equality Act Guidance on the definition of disability and submissions. The Equal Treatment Bench Book reminds the Tribunal as to the disadvantages a litigant in person may face in litigation (in particular pursuant to section 26 page 19 that litigants in person may make basis errors in the preparation of their cases and may fail to identify salient points in their statement of case).
33. The starting point is that the claimant has the burden of establishing that she met the definition of disability at the relevant time (21 March 2021 to 16 September 2021) in accordance with section 6 of the Equality Act 2010. Before Employment Judge Jones the claimant identified her disability as “mixed anxiety and depressive disorder” but the claimant submitted today she has suffered from anxiety since 2017; that fact is not disputed by this respondent.
34. In my Judgement, the claimant has suffered from a long-term mental impairment namely a condition of anxiety. This has been evidenced by the claimant’s oral testimony and the medical material showing a diagnosis of anxiety state in 2017 on going which has been continuously medicated by sertraline. The claimant has taken the maximum dosage of 200 mg for a significant period of time for this condition. The respondent does not dispute that the claimant has suffered long term anxiety.
35. In the absence of this medication the claimant’s functioning would be significantly impaired. The claimant’s evidence, which was accepted by the Tribunal, that in the absence of sertraline the claimant would suffer panic attacks, would be unable to get out of bed or attend work and/or suffer from suicidal ideation. The impairment of anxiety has a substantial and long term and adverse effect of the claimant’s ability to carry out normal day to day activities.
36. In respect of the diagnosis of mixed anxiety and depressive illness; this diagnosis was made on 27 September 2021. The claimant described an increase of symptoms from March 2021 and she was aware that her mental health was declining; the Tribunal accepts this evidence.
37. However, there is insufficient material to establish that the claimant suffered from the particular mental impairment of generalised anxiety and depressive disorder for the period of 21 March to 16 September 2021. The claimant gave evidence that she felt her condition was deteriorating. There was a review of her medication on 10 September her dosage and medication were maintained. She had a GP consultation on 27 September when the diagnosis was made. Due to the lack of medical evidence on this point namely whether indeed the claimant was suffering from this particular diagnosis from 21 March to 16 September 2021 the Tribunal is not

persuaded that this particular mental impairment of both generalised anxiety and depressive disorder was present for that period.

38. The respondent's case is that the claimant has not relied upon the diagnosis of anxiety but asserted a different condition namely mixed anxiety and depressive disorder at the preliminary hearing. The respondent submits that if the claimant cannot establish she had this particular condition during the relevant period she cannot pursue a disability claim. On the basis that the diagnosis was only made on 27 September 2021 the respondent submits the claimant cannot succeed.
39. The Tribunal rejects the submission of the respondent.
40. Section 6 of the Equality Act 2010 states a person has a disability if they have a physical or mental impairment. The Tribunal determines that it is unnecessary for a claimant to assert a specific diagnosis or classification of a condition pursuant to section 6 of the Equality Act 2010; it is sufficient for a claimant to establish they have a "mental impairment".
41. The Tribunal takes into account the comments of HHJ Eady QC in the **Nissa** case when it was stated :*"the correct question was to consider what the effects of the impairments were at the material time."*
42. There is no longer a requirement that a mental impairment has to be a "recognised mental illness" following a change in the law; the Tribunal is guided to consider the effects of the impairment. Furthermore, the Equality Act guidance Definition of disability refers to the fact at paragraph A3 that *the impairment does not have to be the result of an illness*. The focus of the Tribunal in determining whether a claimant falls into section 6 of the Equality Act 2010 is to consider the effects of the impairment however categorised.
43. The claimant described to the Tribunal the effects of anxiety as set out above which she has suffered from 2017 and continue; and took into account the claimant's state in the absence of taking her medication. The Tribunal finds that in the absence of her medication the claimant's function would be impaired by reason of panic attacks, risk of suicidal ideation, inability to get out of bed and go to work. These are accepted by the Tribunal. The effects had a more than minor adverse effect on her normal day to day activities.
44. In the circumstances the fact that the claimant identified the classification of her mental impairment at a preliminary hearing as generalised anxiety and depressive disorder does not prevent her from relying upon her long term and accepted (by the respondent) condition of anxiety at today's hearing in order to satisfy the definition pursuant to section 6.
45. The claimant is a litigant in person. As recognised by the ETBB litigants in person do face disadvantages in a litigious process. The claimant may well not have recognised the significance placed by the respondent upon the fact

that the condition identified was not diagnosed until 27 September 2021 after her employment ended. The respondent is not disadvantaged since it was aware from the medical material and evidence that the claimant had a long standing anxiety condition and in fact accepts that the claimant had such a condition.

46. "Mental impairment" pursuant to the Act is a general category where the focus of the Tribunal must be on the effects. Mental impairment does not even have to be caused by an illness (see the Guidance on the definition). It would make a nonsense of the statutory provisions that if the claimant who has a long standing anxiety condition which meets the definition pursuant to section 6 is not deemed by the Tribunal to be disabled at the material time (despite suffering from a long standing condition related to a new diagnosis) because she identified at a preliminary hearing the newest related diagnosis. The purpose of the provisions must be to protect individuals with mental impairments however categorised.
47. The Tribunal concludes that the claimant was a disabled person at the relevant time by reason of a mental impairment namely anxiety. This is sufficient to satisfy section 6 of the Equality Act 2010 for the claimant to proceed with her disability discrimination claim.

**Employment Judge Wedderspoon
25 November 2022**

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