



EMPLOYMENT TRIBUNALS

Claimant: Ms S Muhammad

Respondent: Fortune UK Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Watford ET
On CVP

On: 31 October 2022

Employment Judge: Employment Judge Henderson (sitting alone)

Appearances

For the claimant: In Person

For the respondent: Dr J Kerr (Counsel)

PRELIMINARY HEARING JUDGMENT

1. The claimant was not a disabled person within the definition of section 6 of the Equality Act 2010 at the material times in this claim.
2. The respondent did not have actual or constructive knowledge of the relevant impairment at the material times.

REASONS

Background

1. This was an open preliminary hearing (OPH) listed (at a Case Management Hearing (CPH) held on 11 April 2022) for one day to determine the following issues:

-at the material time (ie the time of dismissal on 5 February 2020) did the claimant have a mental impairment which had a substantial and long-term effect on her ability to carry out normal day-to-day activities for the purposes of section 6 Equality Act 2010 (EQA) (“a relevant impairment”)? If so, -was the respondent aware or ought the respondent to have been aware that the claimant had such relevant impairment at the time of the dismissal?

2. The claimant had also applied to amend her claim. The respondent opposed the application. It was agreed that if time allowed, the amendment application would be dealt with at the OPH, failing which it was agreed that this could be dealt with “on the papers”.
3. The claimant was employed by the respondent, a manufacturing company, as a manufacturing technician from 1 December 2016 until 5 February 2020. Following early conciliation from 6 February-6 March 2020, the claim form was presented on 6 April 2020. The claims brought were for unfair dismissal and/or discrimination on grounds of disability. The claimant had resigned on 7 January 2020 and the respondent disputed that there had been a dismissal. The respondent defended the claims.
4. At the CPH on 11 April 2022 the Final Hearing for this claim was listed for 3 days commencing on 6 November 2023 and the issues for determination by the tribunal were agreed and directions were given for the timetable leading up to that hearing.
5. The claimant described her disability as anxiety, depression and PTSD. She accepted at today’s hearing that she had produced no medical evidence to support the reference to PTSD.

Conduct of the Hearing

6. The hearing was conducted remotely using the Cloud Video Platform (CVP). The claimant was not legally represented at the hearing; however, she had been receiving advice from a law centre, who assisted in preparing her impact and witness statements. The claimant originally intended to attend on her own, but I suggested that she might want to have someone with her for support (even if they were not a legal adviser). The claimant’s mother arranged to be with her.
7. The parties had agreed an electronic bundle for use at the OPH (110 pages); the respondent wished to add 3 documents to that bundle namely the ET 3; the claimant’s resignation dated 7 January 2020 and the respondent’s response to the resignation dated 17 January 2020. The claimant also produced an electronic folder containing several texts, which showed that she had been consistently late for work and which she said supported her case that the respondent was aware of her disability (15 pages).
8. The tribunal also heard evidence from the claimant (her witness statement and her impact statement); from Mr Casey Fortune (Director of the respondent) and Mr Michael (Mick) Fortune (Managing Director of the respondent). The

witnesses adopted their written witness statements as their evidence in chief and were cross-examined by the other side. Both parties made oral submissions and Dr Kerr also presented her written submissions, which she had previously sent to the claimant.

9. As the claimant was a litigant in person, the employment Judge explained the process to be followed at the OPH. Further, given the claimant's medical condition of anxiety and depression disorder, the tribunal agreed to take regular breaks and also encouraged the claimant to ask for any breaks should she need them.
10. The evidence and submissions concluded at 4:05 pm and the tribunal's decision was reserved. If relevant, it was agreed that the Tribunal would consider the claimant's application to amend on the papers.

Findings of Fact

The claimant's evidence

11. The claimant said that she first noticed she was seriously unwell in 2016 after experiencing frequent panic attacks. This was at her previous job. She had not made the respondent aware of these panic attacks when she commenced her role in December 2016. However, the claimant also said in her oral evidence that she had been depressed since she was 10 years old. There was no reference to this in either of her statements.
12. The claimant's GP notes (partly redacted) were at pages 82-86 of the electronic bundle. The medical notes covered the period 25 September 2017 to 5 February 2020 and did not refer to the panic attacks mentioned by the claimant in 2016 or make any reference to her childhood depression.
13. The claimant said the panic attacks became more frequent in 2017 and the doctor prescribed anti-depressants, but the claimant did not believe she was depressed so she did not take the medication. The GP notes refer to panic attacks becoming more frequent in July 2017. The notes say the claimant did not believe that there was anything particularly stressful in her life at that time; however, there is an entry on 5 June 2017 that the claimant was pregnant and was considering an abortion. This could reasonably be regarded as placing stress on the claimant.
14. In 2018 following a conversation that sparked a memory, the claimant recalled being abused by a family member in her childhood. The claimant said that "this worsened the depression, which she was not acknowledging". The panic attacks became more frequent. Again, there is a lack of consistency in the claimant's evidence. If she had suffered with depression since she was 10, it is not clear why she was not acknowledging that condition.
15. The claimant returned to the doctor in July 2018: the entry reads "Anxiety with depression (first)". The claimant accepted in her oral evidence that this

suggested this was the first time this had been diagnosed by her GP. This evidence was unclear and inconsistent with other evidence from the claimant about when she first experienced depression. The claimant was given further anti-depressants and was also referred to Talking Therapy for counselling support. The claimant acknowledged in her evidence that she would frequently omit to take her medication though she recognised that she did feel better when she was taking her medication. This statement is inconsistent with other evidence from the claimant that she felt better when she was not taking the medication.

16. On 3 August 2018 the GP entry states that the claimant is no longer having panic attacks and is commencing her therapy. She attended counselling until around 2020 but found it unhelpful to talk about her trauma. She also tried cognitive behavioural therapy (CBT) which she found more helpful.
17. The claimant said that on 7 August 2019 she had been asked by her therapist to carry out a writing activity. This was on her mind and she was struggling to get her work done. She said she wrote a letter to both Michael and Casey Fortune to explain that she was attempting to process her childhood trauma and asking if she could leave work early to carry out the writing activity. The claimant said she had handed this letter to Casey Fortune but had not kept a copy for herself. The respondent's witnesses both denied having seen or received such a letter.
18. The claimant said she was allowed to leave work so she went to a local park to do her writing, whereupon she had an allergic reaction to a nearby tree and had to take the following day off work to recover from the resulting rash. She pointed to her GP notes to support her version of events. However, the doctor's entry which the claimant said supported her account by noting her allergic reaction, is dated 8 August 2018 and not 2019. This must raise doubts about the reliability of the claimant's evidence and recollection regarding this event. Given this inconsistency, I prefer the respondent's evidence and find on a balance of probabilities, that no letter was written by the claimant in August 2019 which set out the details of her childhood trauma.
19. Therefore, there is no evidence to show that the respondent knew about the childhood abuse suffered by the claimant. In any event, although such abuse would, of course, have been distressing for the claimant, it was not of itself, evidence of an impairment or disability.
20. On 25 September 2019 the family member who had abused the claimant went into a diabetic coma and died on 26 September. The claimant went to work the following day but had to leave early as she could not stop crying. The claimant said that Mick Fortune asked for details about her relative and how close they had been before he allowed her to leave. The claimant said she found this questioning intrusive and overwhelming. However, she accepted in her oral evidence that Mr Fortune had already given her permission to leave before he asked the questions, and that her answers were not conditional on his giving permission for her to leave.

21. Again, this was not evidence that the respondent knew of the claimant's impairment or its effect upon her. She had asked for time off due to a family bereavement.
22. The claimant said she was struggling to process her feelings at this time but was focusing on her son's birthday (4 October) and managed to arrange a party for him. The day after her son's birthday the claimant was "almost like a zombie" crying a lot and incoherent. The claimant went to her GP on 10 October 2019. The entry records a review of the claimant's anxiety with depression, and notes that the claimant has come off her anti-depressant medication since the beginning of the year and is feeling better and is reluctant to return to them. The claimant said that her anxiety had been triggered by the situation with her relative who had abused her.
23. The family member's funeral was on 14 October 2019 and the claimant drank in excess to get through the day. On 18 October 2019 the claimant was so overwhelmed she had a panic attack and had to call 111. She was advised to see her GP and was signed off work for a month. The claimant was subsequently signed off work from 20 November 2019 - 5 February 2020. The Fit Notes cited "mixed anxiety and depressive disorder"
24. The claimant said in her impact statement that "over the next 7 months" i.e. from mid-October 2019, her mental health deteriorated drastically. She could not understand what people were saying to her and found that others could not fully comprehend what she was saying to them. She gave as an example, being confused by insurance with a new company rather than renewing her old policy – no date was given for this incident.
25. However, the claimant's employment ended on 5 February 2020 so the relevant period for the tribunal to consider, must be from mid October 2019 to early February 2020, which was 3.5 months and not the 7 months referred to by the claimant.
26. The claimant said she struggled to complete tasks. She would start things and then take many months to complete them, such as decorating her home. However, people often take several months to complete home decoration. The claimant did not specify the period over which the home decoration occurred.
27. The claimant said "at times" she would have to ask her mother or friends to do the shopping for her. Sometimes, she was too overwhelmed to take care of things like cleaning the house or cooking for herself and her son. Her mother would help with this. The claimant did not give any specific examples or any indication of how often or when this happened. There was no evidence produced from the claimant's mother or her friends as to when/how often their help was required and to what extent.
28. The claimant also said that "at times" she needed to be accompanied to the shops because if she went on her own, she would simply sit in her car and find herself returning home without having done the shopping. Again there was no indication of when or how often this happened.

29. The claimant said that she had lost the ability to plan. If she wants to cook a meal it may take her several days to get the ingredients because she would experience high anxiety at the shop and would have to leave. Again the claimant did not give any time frame for such events.
30. The claimant also said she experienced flashbacks (though she did not specify of what exactly), also vivid dreams. This appeared to be linked to her childhood abuse, but this was not made clear.
31. The claimant said she was managing her symptoms better now, but she still had “weeks” where she would lose control; sleep excessively and feel fragile and emotional. She could be very sensitive and any negativity would upset her. She no longer goes out to bars with her friends. She used to watch television soaps but finds that this now triggers her, so she no longer watches them. On a bad day she struggles with self-care and sometimes has gone several days without brushing her teeth or washing. Again, no time frame or context was given for the “weeks” referred to by the claimant.
32. There was no evidence from the claimant’s family or friends which may have clarified the time frame of such events/impacts.
33. In considering the claimant’s impact statement, I note that in the Case Management Order in April 2022, the Employment Judge provided helpful guidance on the content of the impact statement. He specifically stated that the claimant should give clear examples of the effects of the impairment on her ability to carry out day-to-day activities between September 2019 and February 2020; should give the dates when the effects of the impairment started and stopped; say how long they were expected to last if they continued. The claimant (and her legal advisors) did not follow this guidance.

The claimant’s texts

34. These were the texts produced by the claimant on the morning of the hearing. I noted that the majority referred to her needing sleep; oversleeping; having an impending migraine; stomach pains; having tests (unspecified) at the doctor and her son being ill. The claimant accepted in her oral evidence that generally the texts made no explicit reference to her medical condition or to her disability.
35. I asked the claimant to point out where, in the texts she had told the respondent that she had anxiety and depression, such that they would know she had a disability.
36. She referred to a text dated 13 June 2019 to Casey Fortune saying “I have had two panic attacks in the last hour. Don’t know what’s going on”. This was followed by a text 2.5 hours later asking if she could come in at the weekend instead of working that day. The claimant also referred to a text dated 13 August 2018 saying, “I’m not reliable at the minute, haven’t even managed to get shopping for me and Mars (her son) this weekend”. This was followed by a message asking if she could come a few hours late so she could do the shopping. The tone of this text suggested that the claimant had not had time to

do the shopping rather than that she was unable to do so because of mental impairment.

37. The claimant seemed to assume that because she knew the nature of her condition, the respondent must also be aware of it, even without any specific reference to that condition.

The respondent's evidence

38. Both the respondent's witnesses said they had no knowledge of the claimant's medical condition. Mr Michael Fortune said he had not known until the first Fit Note in October 2019 referred to Anxiety and Depression. Mr Casey Fortune said that he had not seen the sick notes as he did not deal with the administrative side of things at work.
39. The claimant put to Casey Fortune that because he let her leave early and come in late, he must have known of her depression. He said that he knew that things were difficult for her as a single mother and so he had been prepared to make some allowances. The claimant also put to Casey Fortune that she had shared with him her problem with lack of sleep and that she was stressed. He acknowledged this but said that often the stress was linked to her relationship with her boyfriend and other lifestyle matters and that he (Casey) tried to listen and help as a friend as well as her employer. He had let her leave early to attend doctor's appointments but did not know the reason for the appointments and had not known that she was having counselling.
40. The claimant also put to Casey Fortune that he had told her not to take her antidepressants so he must have known about her condition. Mr Fortune said that this was not correct. The claimant had told him that she felt bad when she took the medication and he had suggested that she try and make other changes to her lifestyle to improve her health. He acknowledged some references in the claimant's texts to panic attacks but said that many people had panic attacks and experienced stress in their lives and he did not suspect that the claimant had any underlying medical condition.
41. Both the witnesses said that despite her lateness and leaving early, they had no complaints about the claimant's work and that she was regarded as a valuable member of staff. She had no unusual levels of sickness absence until October 2019. I accepted both witnesses' evidence as honest and credible.

Conclusions

42. Has the claimant discharged the burden of proof (on the balance of probabilities) to show that she is a disabled person within the meaning of section 6 EQA?

Mental Impairment

43. The claimant has demonstrated (as supported by her GP notes) that she has a mental impairment namely anxiety and depressive disorder. There was no evidence produced of PTSD and no finding is made as regards that condition.

Substantial Adverse Effect on Normal Day to Day Activities

44. Section 212 EQA 2010 and The Guidance of the definition of disability (2011) notes that “a substantial effect is one that is more than minor or trivial”.
45. Based on the evidence presented to the tribunal, the claimant has not demonstrated on a balance of probabilities, that the impairment had a substantial adverse effect on her normal day to day activities. She has referred to being unable to complete tasks such as shopping/cooking but has given no time frame or indication of the frequency of such events to enable the tribunal to assess whether or not the effect is substantial.
46. The claimant said that “at times” she would ask family or friends to do her shopping for her and referred to a text in August 2018 to Casey Fortune which referred to her not managing to get the shopping done for her and her son. However, the tone of the email suggested that the claimant had simply run out of time (“I’m chasing my tail” – “I need rest but have no time for it”) not that she was too unwell to carry out the task.
47. The claimant also referred to “weeks” where she would lose control; sleep excessively and feel fragile and emotional. However, once again no time frame was given for this and this was part of the claimant’s reference to the 7 months following October 2019, whereas her employment ended on 5 February 2020. It was therefore unclear exactly when the events referred to by the claimant had taken place, and whether these were at the material times.
48. There was no evidence from friends or family to support the claimant’s statements and it was noted that the claimant had not taken any significant periods of sick leave until October 2019.
49. The claimant also referred to no longer socialising with friends but gave no indication as to how often she had previously done so; she also said she could no longer watch television soaps as these “triggered” her. I do not find that either of these examples as described by the claimant, demonstrates a substantial adverse effect on normal day to day activities.
50. Further, the only description of the adverse impact of the impairment on the claimant’s normal day to day activities in the GP notes were to:
- Having problems getting on trains; being around people (July 2017 and then again in November 2019).
 - General references to panic attacks.
 - Struggling to do her work (November 2019)
 - Can be tearful; difficulty getting to sleep (but once asleep did not wake up during the night); reduced appetite (January 2020)

51. The medical notes do not support many of the adverse impacts described by the claimant in her witness statements.

Long Term

52. There is also inconsistency in the claimant's evidence as to how long she has had anxiety and depression (see Findings of Fact above) – but in any event the medical records produced show that this dated back to July 2017 for anxiety (page 86) and back to July 2018 for anxiety with depression (page 85). The claimant must show that that the impairment had a substantial adverse effect on her normal day to day activities which was long term namely, which was for 12 months or more. The evidence presented by the claimant was not sufficient to show that the adverse effect on normal day to day activities was long term, even if the impairment was.

53. Therefore, I find that that claimant has not discharged the burden of proof to satisfy the definition of disability in section 6 EQA.

54. However, even if I were to be wrong on this point, I would find that that respondent did not have actual or constructive knowledge of the alleged disability. (**Seccombe v Reed In Partnership Limited EA-2019-00478-00**)

Respondent's knowledge

55. The respondent knew from October 2019 (as set out in the claimant's fit notes) that she had anxiety and depression. However, I have accepted the evidence of the respondent's witnesses that they did not know of any such impairment at an earlier stage. The claimant accepted she had not told them about having panic attacks when she commenced employment. She had mentioned panic attacks and stress in her daily life (as a single mother) to Casey Fortune but he was unaware of her impairment. She had also mentioned this to Venetia (a colleague) but Venetia was not the claimant's line manager or supervisor.

56. In any event, I do not accept that the claimant's texts were indicative of her having a mental impairment or disability. They displayed problems dealing with the claimant's lifestyle as a working single parent, but other than one or two references to panic attacks the texts were unlikely to indicate to Casey Fortune that the claimant had a mental impairment, and it would not be reasonable to expect him to have drawn that conclusion from their content/tone.

57. Casey Fortune accepted that he had discussions with the claimant about taking her medication but even if he had known that the medication was for depression, that would not of itself constitute knowledge of the extent of the claimant's impairment.

58. I have not accepted the claimant's evidence that she had written a letter to both respondent witnesses about her childhood abuse – but in any event, that abuse, of itself would not be a medical impairment.

59. I find that the respondent did not have actual or constructive knowledge of the claimant's disability.

60. Given my finding on disability, I do not need to consider the claimant's amendments to her claim to include harassment on the ground of her disability.

Employment Judge Henderson

JUDGMENT SIGNED ON: 21 November 2022

JUDGMENT SENT TO THE PARTIES ON

6 December 2022

FOR THE SECRETARY OF THE TRIBUNALS