



EMPLOYMENT TRIBUNALS

Claimant: Kenneth Derek Edgecombe
Respondent: AAH Pharmaceuticals Ltd
Heard at: Exeter On: 6 and 7 July 2022
Before: Employment Judge Smail

Representation

Claimant: Mr Gilman, Friend
Respondent: Miss Fadipe, Counsel

The Employment Judge, acting on his own motion, has had typed the ruling on disability. This is because correspondence between the parties suggests the desirability of having the record straight.

RULING ON DISABILITY REASONS

1. The claimant has presented two claim forms, the first dated 15 October 2020, the second dated 6 March 2021. Both include claims of disability discrimination. A preliminary hearing was ordered to determine whether the claimant was disabled and if so from when. The respondent has now accepted that the claimant was disabled from March 2022 by reason of mental impairment. The claimant contends that it was earlier than that: from at latest April 2020.
2. The claimant has been employed by the respondent as a backshift team leader. He has worked for them from June 2005. He remains on the books as an employee although he has been signed off from work continuously since 1 January 2020 with work related stress. The claimant claims he was subjected to bullying by a supervisor on 27 December 2019 and again on 30 December 2019. He claims this has caused distress and a mental breakdown.
3. In an Occupational Health report dated 16 March 2022, Dr Adrian Jarret records that the claimant was experiencing significant low mood, poor sleep,

marked daytime fatigue and anxiety. He was also experiencing significant concentration issues. He was avoiding leaving his home for more than basic shopping requirements and to attend mental health support group once a week. Based on Dr Jarret's findings, he thought it likely, although acknowledged it was a legal decision, that the claimant was a disabled person within the meaning of the Equality Act 2010. There was a significant underlying health concern namely anxiety. Recovery was not impossible. Resolution with the current dispute with time and medication could well lead to a good recovery. That report prompts the respondent to make the concession that it does. I remind myself of the definition of disability.

4. Section 6 of the Equality Act 2010 provides that a person has a disability if
 - (a) he has a physical or mental impairment,
 - (b) the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.
5. Long-term is defined in Schedule 1. The effect of an impairment is long-term if
 - (a) it has lasted for at least twelve months,
 - (b) it is likely to last for at least twelve months,
 - (c) it is likely to last for the rest of life.
6. We are concerned essentially with (b): is it likely to last for at least twelve months/
7. Paragraph 2 of Schedule 1 provides that 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. Fluctuating conditions are to be treated for the purposes of the definition as though the heightened state is the relevant state.
8. I have also been helpfully referred to the guidance on disability which carries the title 'Guidance on Matters to be taken into account in determining questions relating to the definition of disability'. Substantial means more than minor or trivial. 'Likely' for the purposes of the twelve month requirement - and this is important - means it could well happen.
9. C3 of the guidance is as follows:

"The meaning of likely is relevant when determining whether an impairment has a long-term effect, whether an impairment has a recurring effect, whether adverse effects of a progressive condition will become substantial, how an impairment should be treated for the purposes of the Act when the effects of that impairment are controlled or corrected by treatment or behaviour. In these contexts, likely should be interpreted as meaning that it could well happen."
10. Paragraph C4 provides:

“In assessing the likelihood of an effect lasting for twelve months account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken both of a typical length of such an effect on an individual and any relevant factors specific to this individual for example, general state of health or age.”

11. What this means is that the focal point in terms of time is the first allegation of discrimination and we agree that was August 2020. We will examine the issue of disability as at August 2020.
12. Returning to the medical evidence. The claimant had a consultation with his GP on 8 January 2020. In the course of that the GP recorded his condition as highly indicative of a moderate depressive episode. A sicknote was issued for stress at work. One such sicknote has been issued every month since then. The claimant makes an online application for a sicknote. He describes his understanding of his condition in that application. The doctor looks at it and decides whether or not to issue a sicknote. A sicknote has been issued every month based upon the claimant’s description of his condition which has been more or less constant throughout.
13. At that time, January 2020, the claimant was referred to the psychological service Talk Works. They record him feeling suicidal in February 2020. He was discharged from them in March 2020, although with the door open for re-referral.
14. The claimant describes the impact on day-to-day activities as involving difficulty sleeping, difficulty concentrating for any length of time, wanting to stay at home unless for shopping or therapy. That therapy has included working voluntarily in an orchard under the supervision of a mental health specialist. He describes not feeling able to return to work and feeling recurrently anxious. There is an Occupational Health report, the earlier report dated 17 April 2020, a report by Dr Dominic Hazeldine. At that point there was hope for a resolution. The claimant was also hopeful for a resolution but there is description by Dr Hazeldine as to how the claimant was presenting:

“As you are aware Mr Edgecombe is absent from work due to stress and anxiety. He says this absence relates to one specific occurrence in the workplace that you may be aware of. He describes that on Christmas Eve himself and colleagues were trying to finish on time but had a significant number of cytotoxic products to complete. Due to the size of the room only two colleagues could get involved so Mr Edgecombe kept himself busy with other duties.

“At the time he was not aware of an issue but a few days later the warehouse supervisor, who Mr Edgecombe tells me was not involved on the day in completing the cytotoxic orders, challenged him and became very irate about the issue. This was in front of other colleagues. Mr Edgecombe describes himself as very shaken up and upset by this and felt undermined. He is uncertain if a claim has formally been lodged from this incident. Unfortunately, this episode

took a significant toll on Mr Edgecombe's mental wellbeing. He has been thinking about the issues a lot of the time, at times he has been quite angry and his mood has deteriorated. His self confidence is on the edge a lot of the time. His sleep has been poor. Quite correctly, he has seen his GP who has signed him off work. He has commenced some counselling through talk works which started in late February with weekly sessions and he has found this quite helpful. He has also been referred to the confidence course but this has been delayed due to COVID. Quite correctly, Mr Edgecombe has not started on any medication".

15. Mr Hazeldine continues:

"Mr Edgecombe remains unfit for work. It is clear to me that until issues are fully dealt with in the workplace, Mr Edgecombe will struggle to return to work. It is clear that the solution to the issues is in the workplace and is not medical. There needs to be a clear and transparent investigation [for the] complaint...to be resolved. I would suggest that this happens as soon as reasonably practicable. Without resolution of these issues, I think it would be difficult for Mr Edgecombe to return to work at the moment."

I understand the reference to the solution being work-based and not medical, is not the expression of a view that the claimant was not suffering stress and anxiety; but rather that the solution was to sort it out at work rather than for example prescribe pills.

16. As to the standard questions on a referral: was there an underlying cause for his sickness absence? Dr Hazeldine answered "Mr Edgecombe is absent from work due to stress and anxiety. Mr Edgecombe reports his symptoms are due to the episode described in the workplace. At the moment Mr Edgecombe is unfit for work. Once issues in the workplace are resolved to the satisfaction of all parties involved, following a suitable investigation resolution and perhaps mediation, then Mr Edgecombe's mental wellbeing may improve sufficiently to allow him to return to work. When Mr Edgecombe is well enough to return to work, it is suggested that he returns in a flexible manner perhaps working a reduced number of hours to ease himself in the workplace, although a formal phased return as such is not required". No reason could be seen by Dr Hazeldine as to why Mr Edgecombe could not complete all duties expected of him.
17. At that point in time, it was Dr Hazeldine's opinion that Mr Edgecombe's current conditions would not be classified as disabilities owing to their relative short term nature and the expectation that he will recover shortly. "As you are aware however, it is a legal not a medical decision."
18. There was a close association identified by Dr Hazeldine between recovering from stress and anxiety and resolution at the workplace.
19. A grievance was brought by the claimant and the first claim in this matter relates to an alleged refusal on the part of respondent to allow the claimant to bring a non workplace companion which could well be Mr Gillman to the grievance hearing. The claimant asked for that as of 11 August 2020 and it

was refused, he alleges, by the respondent at latest on 17 September 2020. We are looking at the position in August 2020 and September 2020 as crystallising as it were the time when I have to determine whether the claimant was a disabled person.

20. Since the Occupational Health report in April 2020, every month the claimant had applied for and been issued with the sicknote. He had been in regular contact with Katrina Hill who was the lead social prescribing link worker at Pembroke House Surgery in Paignton. Whilst not medically qualified, she has training in matters of mental health and was relied upon by the surgery as providing links to those members of the Paignton community suffering from mental health who were registered at that surgery. She describes regular telephone consultations with the claimant over this period.
21. I take note of the caution advised in Herry v Dudley MBC 2017 ICR 610 where the Employment Appeal Tribunal cautions the Employment Tribunals not to find necessarily that an entrenched position by an employee to refuse to return to work until issues are resolved itself shows a mental impairment to satisfy the definition of disability. In particular there still has to be substantial adverse impact on normal day-to-day activities. I am satisfied however, from what the claimant tells me, and indeed it is corroborated by the witness statement from Mr Gillman, that throughout this period the claimant was suffering from more than minor or trivial adverse effects on normal day-to-day activities as described previously. They may have fluctuated but they remained as constant. Throughout the period leading up to August 2020, the claimant was suffering from a mental impairment that can be described as anxiety or depression or for that matter stress, the onset of which was the 1 January 2020.
22. I note Mr Gillman's submissions that there is some reason to believe there was a deterioration in mental health prior thereto because of challenges by management to the claimant's standard of work from October 2019. It is suggested it was out of character for the claimant to expose himself to such challenges. Be that as it may, the condition contended for is as the alleged result of the alleged bullying that took place on 27 and 30 December 2019, there is corroboration for a mental impairment arising in January 2020 in the GP notes.

CONCLUSION

23. The onset was 1 January 2020. As at August 2020 was it likely that it would last twelve months? That is the issue that I have to determine and at the end of the day it seems to me that the issue is settled by the definition of 'likely' that the guidance requires me to apply. The guidance I repeat is that in these contexts likely should be interpreted as meaning that it could well happen. As at August 2020, could it well happen that the claimant's stress, anxiety and depression would continue into the following year? It seems to me that if his concerns were not resolved then it could well happen that the claimant would still suffer a mental impairment the following January. As it happens, that has proved to be the case. The respondent accepts that the mental impairment was manifested in March 2022. It seems, then, it has lasted for over two years.

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24. The question for me is viewed from August 2020; could it well last into the following year? The answer is if his concerns were not resolved, then yes the mental impairment could well last twelve months.
25. On that basis it is my judgment that the claimant establishes he was a disabled person at latest from 1 August 2020 which is the relevant time for the purposes of this case.
26. The claimant is to be treated as a disabled person for the purposes of this case.

Employment Judge Smail
Ruling given on 7 July 2022 and
typed on 9 January 2023

Reasons sent to the Parties: 18 January 2023

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