EMPLOYMENT TRIBUNALS

Claimant: Mr S Johnsen

Respondents: (1) Miss K Binji (2) Mr D Moore (3) AJB Woodworking Ltd

Heard at: London North (CVP) **On: 18 January 2023**

Before: Employment Judge A.M.S. Green

Representation

Claimant: In person
Respondents: Mr R Oulton - Counsel

RESERVED JUDGMENT ON PRELIMINARY ISSUES

The claimant was not disabled at the relevant time and his claim for disability discrimination is struck out under Rule 37 as having no reasonable prospect of success.

REASONS

Introduction

1. By a claim form dated 9 June 2022, the claimant brought a claim of disability discrimination.

2. The claimant was employed from 15 February 2016 as an Assembly Co-Ordinator at the third respondent's premises until 13 April 2022 when he walked out of an appraisal meeting and never returned. The third respondent specializes in the design and manufacture of joinery products. The first respondent is the third respondent's Company Secretary and is in charge of

human resources. The second respondent is the Factory Manager and was the claimant's line manager.

3. In section 8 of the claim form, the claimant states:

> *I have had worked for AJB for 5 years, in the past few months of my employment I have been really struggling with my mental health and in the early part of the year went to my GP for help.I was put on medication, both Kulvinder and Darren were made aware of my situation and when Darren was made aware he thought it was a funny joke and asked if 'is that why your a hot head' ..*
>
> *Just over 2 weeks after notifing them I was taken in for an 'apprasial' meeting and straight from the off I was bombarded with what I call abuse, told I wasn't do my job properly how my mood was and in general made me feel worthless ..*
>
> *Due to my ongoing issues I could not sit and take this so I got up and walked out the meeting, I told them I didn't need this in my life right now and walked out, as I was leaving the room Kulvinder simple said 'bye then' ..*
>
> *I had always been a valuble member of staff at AJB but as soon as I made them aware of my mental health problems this all changed and I fully believe they have discriminated again me for my disability and they have now made my health worse resulting in my having to again see my GP and they had to double my dousage to the MAXIMUM does an adult is allowed a day.*

4. The respondents deny liability. They raised a preliminary issue in that they do not accept that the claimant meets the definition of disability within the Equality Act 2010, section 6 ("EQA").

5. This public preliminary hearing was listed to deal with the following:

    a. Whether the complaint (s) of unlawful disability discrimination contrary to EQA should be dismissed if the claimant is not entitled to bring it if they do not have a disability within the meaning of section 6 and schedule 1 of EQA.

    b. To determine whether any of the claimant's claims should be struck out as having no reasonable prospect of success.

    c. To list the case for hearing, if appropriate.

    d. To make any further case management orders to progress the claim and response.

6. The hearing started one hour late because of administrative issues. Notwithstanding this, we concluded the hearing within the three hours allocated. We worked from a digital bundle. Mr Oulton also provided written submissions. The claimant adopted his disability impact statement [84] and gave oral evidence. The first and second respondents adopted their witness

statements and gave oral evidence. The claimant and Mr Oulton made closing submissions.

7. The claimant must establish that he is disabled within the meaning of EQA, section 6 on a balance of probabilities. If he fails, then his claim must be dismissed as it is axiomatic that for the claimant to succeed with his claim for disability discrimination he must be or have been disabled at the relevant time.

8. In reaching my decision I have carefully considered the oral and documentary evidence. The fact that I have not referred to every document referred to should not be taken to mean that I have not considered it.

Findings of fact

9. In his disability impact statement, which is dated 21 September 2021, the claimant states that he had been struggling with his mental health for a few years but was embarrassed to go and get the help that he needed. It was only after his wife intervened that he plucked up the courage to get help. He describes the effects of his illness from being in a "bit of a mood to then having suicidal thoughts". He goes on to say that at the beginning of the Covid pandemic, his wife, who has serious medical issues, was told that she had to isolate and that everyone in the household should isolate as well. He explains that the first respondent refused his request to isolate. Unlike his colleagues, he was not placed on furlough. The claimant claims that this added a huge strain to his mental health because he was fearful that he would cause serious harm to his family but he had no choice but to go into work. He says that he would become agitated and angry, and this worsened progressively which affected his home life which made him hate himself more. The claimant says that he struggles to concentrate. He struggles to look people in the eye when they are talking to him, and he feels worthless. He says that he falls into a deep depression and has anxiety and panic attacks. He says that his illness is ongoing and he is unable to put a date on when it will end because it is a mental illness. The claimant says that he is currently under the care of his GP and has been prescribed Sertraline. His dosage has increased from 100 mg to 200 mg which is the maximum dosage permitted. He has not accepted therapy. If he feels up to it, he will engage with the process. I am prepared to accept what he says. He has mental health problems. However, this is not the end of the matter because I have to assess the severity of his condition, how long it has lasted and is likely to last. I also have to make findings of facts regarding some or all of the respondents' knowledge of the claimant's mental health.

10. There was contested evidence as to how long the claimant had been suffering from mental health problems. He suggested under cross examination that he had been in denial, and he believed that he might have been suffering for up to 2 years. The respondents' position is that the earliest date upon which it could be said that he had mental health problems as disclosed by the evidence in the bundle was 15 February 2022. I agree with the respondents for the following reasons:

    a. The claimant's GP records have an entry for 15 February 2022 indicating that he was suffering from disrupted sleep and anxiety and was prescribed Sertraline [75]. His wife sent him for review because

she was worried by his ongoing low mood and aggressive outbursts. The claimant agreed with this when cross-examined. He also accepted that he has not received a firm diagnosis of any mental health condition or psychiatric disorder.

b. He was also taken to his annual health questionnaires [33-48]. Prior to the annual health questionnaire dated 28 March 2022 he had indicated that he had not suffered from severe anxiety, depression or other psychiatric order. The earlier questionnaires cover the period 2018-2021.

11. Under cross examination he was taken to his claim form which he completed himself where he ticked the box stating that he did not have a disability [14]. He acknowledged that he had ticked the box which on the face of it meant that as of 9 June 2022 he did not consider himself to be disabled although he said that he did not think that he had been thinking clearly suggesting that he had made a mistake. I find this difficult to believe given that his only claim is for disability discrimination. It is not plausible that he would erroneously tick the box indicating that he was not disabled if he was making a claim of disability discrimination. This damages his credibility.

12. When the claimant completed his annual health questionnaire on 28 March 2022, he indicated that he suffered from severe anxiety, depression and other psychiatric disorders. Consequently, the second respondent was prompted by the third respondent's computer system to take action on the matter. The second respondent went to speak to the claimant on the same day about this. In his witness statement the second respondent states that the claimant told him that he was stressed out and that the doctors were looking at his brain. He told the second respondent that he was having a buildup of anger and he would be given drugs to calm him down. In the second respondent's opinion nothing had been confirmed by the claimant's doctor because he was having tests. The second respondent made notes on the computer system of what he had been told [53]. In the section headed "action taken" the second respondent wrote "not really work-related PTSD having some tests" [53]. The second respondent also noted that the claimant was taking Sertraline and the action taken section in relation to this states "to fix the chemical reaction in scotts head, currently just started taking it". In the section where it was noted that the claimant was under the care of his GP the action taken was "just started having test for something the doctors are not confirmed yet". There was conflicting evidence about whether the claimant told the second respondent that he was suffering from PTSD. However, on the evidence, it is clear that as at 28 March 2022, the second respondent knew that the claimant was taking antidepressant medication, had been to see his GP and was undergoing tests. From this it is reasonable to infer that the second respondent knew that the claimant had mental health issues but had not received any firm diagnosis. Indeed, under cross examination, the claimant accepted that he was being treated for an undiagnosed mental health condition before disclosing this to the second respondent on 28 March 2022.

13. The claimant alleges that when the second respondent became aware of his mental health issues he thought it was a funny joke and asked him if that "is why you're a hothead". In his witness statement, the second respondent denies this. He continued to deny this whilst being cross examined. There is no evidence to support what the claimant says. However in his appraisal, in

the comment session I find that the second respondent did have issues regarding the claimant's behaviour where he says [66]:

> *You get sulky when it not going your way, arrogant with others, shutdown when it not going right. Goes home. Stubborn side to ask for help [illegible word] wash hand with people. Disrespect to system/working practice at times example-emails, to do list, change your ethos negative to team/respect, [illegible words] no encouragement. As mental you don't want to entertain apprentices*

14. The third respondent operates an annual appraisal scheme. Prior to the appraisal, the member of staff is given a form to complete which they then send to their line manager. The line manager completes their own comments for discussion at the appraisal meeting.

15. On 12 April 2022, the claimant completed his appraisal form and returned it to the second respondent [69]. The second respondent then made his own notes [63-66]. One of the issues that the second respondent noted related to the claimant was not fulfilling the role of coordinator effectively by training members of his team.

16. On 13 April 2022 the first and second respondents conducted an appraisal meeting with the claimant. The claimant had completed his appraisal form before the meeting. The purpose of the meeting was to discuss what he had written against the numbered sections in the form. Question one on the form was "has your past years performance had an impact on your department and how?" The claimant wrote the following [71]:

> *Yes, I have ensured targets have been met whilst trying to train others and help other departments when they are struggling.*

17. The first and second respondents started to discuss what the claimant had written in response to question one. In his witness statement, the second respondent says that the claimant stated that he was a good trainer but it was not his job to babysit the apprentices. The second respondent goes on to say that, in his opinion, because the claimant was the coordinator of the Department, it was his job to train and support staff. He then goes on to say in paragraph 15 of his witness statement that the first respondent asked him to explain how he could say that he was a good trainer. In paragraph 16 of his witness statement, the second respondent says that the claimant got agitated, that he got up and said that he did not want to be spoken to in that way. The first and second respondents try to reassure him that they were not criticising his performance at work. The issue was that the claimant did not want to babysit other staff, which was part of his role. Under cross examination, the claimant accepted that the concern that had been raised was that he was not properly training people under him. At that point, the claimant walked out of the meeting. The claimant's mental health was not discussed at any time during that meeting. There was contested evidence about what the first respondent said at the point when the claimant left the meeting. The claimant suggested that the first respondent was goading him into having an episode and said "bye then" in a dismissive manner and was short and abrupt with him. The first respondent denies that. She claims that she said "thank you". Either way, I do not think there was justification for the claimant to take

offence. Both purported responses are innocuous and have nothing to do with the claimant's alleged disability.

18. The claimant did not return to work. He told the Tribunal that he had secured another job. He could not give a precise date, but he thought that it was in April or May 2022. He continues to work in a self-employed capacity. He continues to take Sertraline.

Applicable law

19. The Equality Act 2010 ("EQA"), section 6 defines a 'disabled person' as a person who has a 'disability'. A person has a disability if he or she has 'a physical or mental impairment' which has a 'substantial and long-term adverse effect on [his or her] ability to carry out normal day-to-day activities.' The burden of proof is on the claimant to show that he this definition.

20. The Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ('the Guidance') under EQA, section 6(5). This Guidance, which came into force on 1 May 2011, replaces the previous Guidance on the same matters issued under the Disability Discrimination Act 1995 ("DDA") in 2006. The Guidance does not impose any legal obligations in itself, but courts and tribunals must take account of it where they consider it to be relevant, (EQA para 12, Sch 1). Indeed, in **Goodwin v Patent Office 1999 ICR 302, EAT**, the EAT's then President, Mr Justice Morison, stated that tribunals should refer to any relevant parts of the Guidance they have taken into account and that it was an error of law for them not to do so. However, more recently, in **Ahmed v Metroline Travel Ltd EAT 0400/10** the EAT qualified the **Goodwin** approach, noting that the observations made in that case were now long-standing, well established and well understood by tribunals. Mrs Justice Cox said that it was especially important for the correct approach to using the Guidance to be understood in the early years of the DDA. However, it was more than 15 years since disability discrimination legislation had been introduced. In this particular case the employment judge had understood the potential relevance of the Guidance and the importance of using it correctly, and no error of law was disclosed by his failure to refer to the Guidance in more detail, particularly when his attention had been drawn to it so extensively in written submissions. Furthermore, where, as in the instant case, the lack of credibility as to the claimant's evidence of his disability was the main reason for concluding he was not disabled within the meaning of the DDA, there could be no error of law if the tribunal failed to refer to the official Guidance.

21. Appendix 1 to the EHRC Employment Code states that 'There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause' (para 7). This endorses the decision in **Ministry of Defence v Hay 2008 ICR 1247, EAT**, where the EAT held that an 'impairment' under section1(1) DDA could be an illness or the result of an illness, and that it was not necessary to determine its precise medical cause. The statutory approach, said the EAT, 'is self-evidently a functional one directed towards what a claimant cannot, or can no longer, do at a practical level.'

22. The time at which to assess the disability (i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act (**Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT**). This is also the material time when determining whether the impairment has a long-term effect. An employment tribunal is entitled to infer, on the basis of the evidence presented to it, that an impairment found to have existed by a medical expert at the date of a medical examination was also in existence at the time of the alleged act of discrimination (**John Grooms Housing Association v Burdett EAT 0937/03 and McKechnie Plastic Components v Grant EAT 0284/08**).

23. For current impairments that have not lasted 12 months, the tribunal will have to decide whether the substantial adverse effects of the condition are likely to last for at least 12 months. The word 'likely' is also used in other related contexts — namely, for determining whether an impairment has a recurring effect, whether adverse effects of a progressive condition will become substantial, and how an impairment should be treated for the purposes of the EQA when the effects of that impairment are controlled or corrected by medical treatment. In all four contexts the Guidance stipulates that an event is likely to happen if it 'could well happen' (see para C3). This definition of the word 'likely' reflects the House of Lords' decision in **Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL.** In that case B suffered from nodules on her vocal cords, which resulted in her experiencing chronic hoarseness when speaking. At a pre-hearing review to determine whether B was in fact disabled, the tribunal found that she suffered from a physical impairment and that, but for coping strategies which she used in her daily life, it was 'more likely than not' that the substantial adverse effect of the impairment would have continued. Therefore B was disabled for the purposes of the DDA. On appeal, the Northern Ireland Court of Appeal upheld the tribunal's finding on disability but held that, in addressing the degree of likelihood required under the DDA, the tribunal should have asked whether the substantial adverse effect 'could well happen'.

24. Dismissing the employer's appeal, the House of Lords unanimously decided that the Court of Appeal had been correct in endorsing the 'could well happen' over the 'more probable than not' approach. According to Baroness Hale, the word 'likely' in each of the relevant provisions of the DDA (now EQA) simply meant something that is a real possibility, in the sense that it 'could well happen', rather than something that is probable or 'more likely than not'. This decision clearly makes it much easier for individuals with certain conditions to satisfy the statutory test for disability, in that their Lordships' construction of the word 'likely' represents a significantly lower hurdle than the probability test that was formerly thought to apply.

25. The question of whether the effects of the impairment are likely to last for more than 12 months is an objective test based on all the contemporaneous evidence, not just that before the employer. The tribunal is not concerned with the employer's actual or constructive knowledge of the disability – **Lawson v Virgin Atlantic Airways Ltd EAT 0192/19.**

26. Rule 53 (1) (c) of the Rules of Procedure confirms that a Tribunal has the power to consider the issue of strike out at a preliminary hearing. Rule 37 sets out the grounds on which a Tribunal can strike out a claim or response (or

part). A claim or response (or part) can be struck out on a variety of grounds including that it is scandalous or vexatious or has no reasonable prospect of success (rule 37 (1) (a)).

27. The Tribunal must take a view on the merits of the case and only where it is satisfied that the claim or response has no reasonable prospect of succeeding can it exercise its power to strike out. In **Balls v Downham Market High School and College 2011 IRLR 217, EAT** Lady Smith stated that where strike out is sought or contemplated on the ground that the claim has no reasonable prospect of success the Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success. The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written words or assertions regarding disputed matters are likely to be established as facts. It is a high test. The Tribunal should have regard not only to material specifically relied on by parties but also to the employment tribunal file. There may be correspondence or other documentation which contains material that is relevant to the issue of whether it can be concluded that the claim has no reasonable prospect of success, or which assists in determining whether it is fair to strike out the claim. If there is relevant material on file and it is not reflected by the parties an employment judge should draw their attention to it so that they have the opportunity to make submissions regarding it. It is unfair to strike out a claim where crucial facts are in dispute and there has been no opportunity for the evidence in relation to those facts to be considered.

Discussion and conclusions

28. The claimant submitted that he had been suffering from mental health problems for a long time. Given the nature of mental health, it was not possible to give a prognosis as to how long he would continue to suffer.

29. The relevant dates for determining whether the claimant was disabled are 28 March 2022 and 13 April 2022. I cannot consider anything beyond those dates.

30. Having considered the evidence, I do not accept that the claimant was disabled at the relevant time for the following reasons:

    a. As at the relevant dates the claimant's mental health was inchoate. It is still inchoate. He had gone to see his GP on 15 February 2022 after being referred by his wife for low mood and aggressive outbursts. No formal diagnosis was given although he was prescribed Sertraline. I agree with Mr Oulton's submission that it is impossible to say how long any adverse effects would typically last.

    b. I agree with Mr Oulton's submission that there was no evidence before the Tribunal to show that the claimant's mental health condition had lasted 12 months at the relevant time. There is no evidence to suggest that whatever was wrong with him was likely to last 12 months at the relevant time.

c. I agree with Mr Oulton's submission that it is difficult to say what effect the claimant's impairment would have had in the absence of the Sertraline that he has been taking. He has been able to continue to work having secured alternative employment within a month or two of leaving the third respondent and he continues to work.

d. It is telling that the claimant did not consider himself to be disabled when he submitted his claim form.

31. Given that the claimant was not disabled at the relevant time, his claim for disability discrimination has no reasonable prospect of success and is struck out.

32. If I am wrong and the claimant was disabled at the relevant time, his claim would have no reasonable prospect of success given that the points raised with the claimant at his appraisal meeting had nothing to do with his mental health but were concerns about his ability to co-ordinate and train his team. Even if the first respondent said "bye then" at the appraisal meeting, this was innocuous and not connected with his disability. Regarding the first incident on 28 March 2022, the claimant has not established that the second respondent joked about his mental health or said that he was a hothead. He has not established unfavourable treatment.

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Employment Judge Green

_____

Date 20 January 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

17/2/2023

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FOR EMPLOYMENT TRIBUNALS