



EMPLOYMENT TRIBUNALS

Claimant: Ms AB

Respondent: Department for Work and Pensions

Heard at: Manchester (by CVP)

On: 25 January 2023

Before: Employment Judge C Sharp
(sitting alone)

REPRESENTATION:

Claimant: Ms K Anderson (Counsel)

Respondent: Mr A Jones (Counsel)

JUDGMENT having been sent to the parties on 7 February 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The definition of disability is set out in s6 of the Equality Act 2010. All elements of that definition have been conceded by the Respondent with the exception of the question as to whether the effects of the impairment (which is recorded to be stress, anxiety and Post Traumatic Stress Disorder (“PTSD”)) was likely to have a long-term effect viewed from the perspective of the period of 13 July 2020 to 5 November 2020 – the Respondent says the adverse effect was not likely to last for at least 12 months when considered on the basis of the evidence available for this period. The Respondent does concede disability in full from 6 November 2020 onwards.

Legal principles

2. The test is agreed between the parties as to how I should approach this matter. They provided me with a copy of the statutory guidance on disability and referred me to paragraphs C3 and C4 (C4 is of more assistance). The test of “*likely*” is set out in the case of **Boyle v SCA Packaging Ltd** 2009 ICR 1056, HL and means “*could well happen*”. I have also considered the words of Baroness Hale to which Ms Anderson on behalf of the Claimant in particular referred me – that

assessing whether something is a risk against which sensible precaution should be taken is a useful way of deciding whether something was “*likely*” or “*could well happen*”. It may be a gloss on the words of the statute itself, but it is an useful observation.

3. What I must do is make an objective assessment using the circumstances at the time of the alleged discrimination, and not after. By “*circumstances*”, I mean facts or the evidence that points to what was happening at the time. This is echoed in the case of **McDougall v Richmond Adult Community College** 2008 ICR 431, CA **which** makes the same point as paragraph C4 of the statutory guidance:

“In assessing the likelihood of an effect lasting for 12 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 of both the 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).”

4. Looking at the List of Issues for the claims, it is evident that the date of 13 July 2020 is important; it is the date of the alleged discriminatory act not covered by the concession made by the Respondent that the Claimant was disabled from 6 November 2020.

5. Mr Jones on behalf of the Respondent referred me to the case of **All Answers Ltd v Mr W and another** [2021] EWCA Civ 606, and in particular paragraph 26 of the Judgment. I consider that **All Answers** does not raise any novel point that is not already covered by the principles set out above. It is settled that I must look at the facts and circumstances at the time of the discriminatory act, and make an assessment or prediction whether the effect was likely to last at least 12 months from that date; not what actually happened afterwards.

Findings of Fact

6. The starting point in this case are the events of 22 June 2020. I will not dwell on those events as I appreciate that the Claimant finds them deeply distressing and the Respondent has conceded the factual account of what happened. In essence, what happened was a violent, frightening attack upon the Claimant in the workplace by a colleague involving racist language and sexual assault; it was of a nature that simply by reading the account in the bundle, I could readily understand the distress, upset and effect that this attack is likely to have had on the Claimant at the time and in the immediate aftermath.

7. It is also appropriate for me to recognise that in the aftermath of this event the Claimant remained at work and attended work for the next two working days; this does not mean that she was unaffected by the attack. The Claimant then took special leave on 25 and 26 June 2020.

8. The Claimant's impact statement set out more detail about what had happened at this time, particularly paragraphs 12-14. Her account was that while she had returned to work on 23 and 24 June 2020, the behaviour of her colleagues made matters worse for her. The Claimant said that colleagues at work were making excuses for the behaviour of the attacker. She felt that she possibly required help and support, which was not provided in her view. The Claimant cited a particular

conversation that allegedly happened on 24 June 2020 where a colleague came up to her and asked if it was true she had been sexually molested. The Claimant talked in her statement about her anger that colleagues were speaking about her and what had happened on 22 June 2020. She also added that she felt that people who would have ordinarily spoken to her were starting to avoid her. The Claimant said that she had mentioned this to her managers, and started to feel paranoid and uncomfortable.

9. My conclusion is that from the Claimant's own account, the reason why she had special leave on 25 and 26 June 2020 was not necessarily or solely because of the attack, but because of the conduct of her colleagues arising from it.

10. The next relevant date is 29 June 2020 where the Claimant went to see her GP and certified herself for a week as unfit for work. The Claimant's account in her statement and the GP's account in the medical notes of what happened in that consultation appear to largely match. The Claimant in her impact statement talked about having difficulty sleeping, being tearful and crying, struggling to cope, being drenched with sweat and the GP offering her counselling support. The medical evidence showed that the Claimant was also suffering from symptoms of the menopause, and had been previously prescribed medication to deal with the symptoms (some of which the Claimant did not take in full – see below), and so the observation about sweat may have related to her menopause.

11. There is one difference though between the accounts of the Claimant and the GP about this consultation. The Claimant says that she had been on an antidepressant called Fluoxetine (commonly known as Prozac according to the Claimant). She was also on hormone replacement therapy. The Claimant says that she had a conversation with the GP at this consultation, and because she had already been prescribed fluoxetine but had not been taking it every day, the advice from the GP was that she should take it every day, that she had already enough for her current needs, and so there was no need for further medication or change. That account is not in the medical records before me.

12. I take account of the fact that there have been significant redactions within those records; while I do not doubt that those redactions are appropriate, it does mean I can only proceed on the basis of what I have seen. There is no record in the notes of the Claimant having that conversation with the GP about anti-depressants. I cannot find a record of the Claimant being prescribed Fluoxetine in the notes. Ms Anderson made the point that in the letter from the GP answering questions from those instructing her on 3 October 2022, there is a reference to antidepressants being changed in October 2020 which therefore must mean she was on antidepressants previously. Given the detailed note made by the GP of what happened in that consultation, and it is plain to me that the GP took great care in writing that note because they were concerned as it was a remote consultation, I consider that it is more likely than not that such a conversation would be referenced in that note, but it is not. I cannot find therefore that the GP advised the Claimant to take the Fluoxetine prescribed for the menopause as prescribed for that condition in order to deal with her distress following the attack.

13. What is recorded in the GP notes is the GP's diagnosis on 29 June 2020 that the Claimant is suffering from an acute crisis reaction, that the Claimant will be self-certifying herself as unfit for work for a week, and that if she started to get depressed or anxious, she may then need more time off work. The evidence shows that the GP

took the view that what happened on 22 June 2020 was a traumatic event leading to an acute reaction by the Claimant.

14. The next GP appointment is not until 2 October 2020, three months after 13 July 2020. I did not consider that there was a great deal of assistance in those later appointments that I could rely on to decide the issue before me today.

15. However, there are other relevant pieces of evidence before me. The next piece of evidence is the Occupational Health report of 13 July 2020, the date of the relevant discriminatory act. It echoes the Claimant's account that she was struggling with sleep, tearful, and that she had severe anxiety and moderate depression. It made the fair point that if the challenges the Claimant faced due to the attack and the emotions that she felt as a result were not addressed, it could affect her mental health at a later date. Occupational Health set out steps or adjustments that could assist the Claimant in the workplace in order to make her feel safe. This was relevant advice as the Claimant was attacked in the workplace.

16. The only other relevant finding on this point is the date of this report. It was very close in time to the incident itself; approximately three weeks after the attack.

17. I did note that the Claimant in her impact statement did talk about other symptoms that are not recorded in any of the other documents; for example she gave evidence about the change to her cooking patterns, though she must have been cooking at some point because there is a reference to her baking a cake in the GP's note of 29 June 2020. There is also evidence from the Claimant that she was going out less, her driving was affected and ultimately stopped and that in essence she was living a more isolated life, but there was no contemporaneous evidence that supported those observations by the Claimant. I did not find this evidence of assistance in resolving the issue before me today.

18. I did also consider the Occupational Health report of 6 November 2020, because it was useful to compare the two reports to note what had changed as the Respondent conceded that this report was the major factor as to why it conceded that the Claimant was disabled from 6 November 2020 but resisted such a concession for the period before this date.

19. This report sets out similar symptoms to the report of 13 July 2020. The difference is that the nurse directly dealt with the issue of PTSD in the later report. The earlier report did not refer to PTSD. The November report made the observation that in the immediate aftermath of a traumatic event, an individual would reasonably be upset, but it would be anticipated for there to be an improvement over the course of the next few weeks. As at 6 November 2020, the Claimant was found by Occupational Health to have not improved; from the wording of the November report, this is likely to be why it raised the point about PTSD. Very little time had passed from the attack to the July report, but months had passed by the time of the November report. As Occupational Health explained, the failure to rapidly improve was a sign that the Claimant may be suffering from PTSD.

20. The only other additional later evidence that I considered useful was the GP letter of 3 October 2020. It cannot be treated as a definitive answer to the question for several reasons. First, it is not an expert report as defined by the Civil Procedure Rules. Second, the answers given by the doctor to the key question before me today were described as "*guarded*" by Mr Jones on behalf of the Respondent. The letter is

not particularly supportive of the Claimant's position. In the letter, the GP says that it is difficult to assess whether the symptoms of "mental health" between June and November 2020 was likely to have lasted for at least 12 months. They add that "Certainly, if the cause of the stress is not resolved then it can perpetuate the problem and if the patient's resilience to workplace stresses is undermined then certainly the mental health can deteriorate and remain prolonged." The GP talks about symptoms, not effects, and it is a generic comment.

21. The only other additional point arose from the Claimant's oral evidence today. Her evidence was that there were later events after the incident on 22 June 2020, and in particular during July 2020, where she felt that the management effectively did not believe her. The Claimant explained that this caused her much stress and anxiety in addition to that caused by the attack, especially as she perceived that people who personally witnessed the attack were minimising or seeking to dispute what the Claimant believed to be true. She felt if witnesses did not believe her, those who did not witness the attack were unlikely to do so.

22. After considering the above, I have stepped back and asked myself the question whether as at 13 July 2020, was it likely that the adverse effects arising from the mental impairment of stress, anxiety and PTSD suffered by the Claimant would last 12 months or more? I have concluded that the answer is no. There was only about three weeks between the date of the attack (22 June 2020) and 13 July 2020. It was too soon for anyone to assess or predict that the effects as described by her, the GP and Occupational Health of struggling with sleep, tearfulness, anxiety and moderate depression could well last for 12 months or more from 13 July 2020 (or from 22 June 2020). As the GP recorded in late June 2020, the Claimant was suffering from an acute crisis reaction and going through the menopause.

23. The fact that Occupational Health made recommendations about steps that could be made to mitigate any potential risk in the future of any mental health injury is not enough in my judgement to equate to a risk that could well happen. All that Occupational Health was saying was that there were steps that could be taken to assist the Claimant to feel safe having suffered an attack in the workplace. The July report, unlike the November report, contained no observations that made it evident that the writer thought there was a risk of PTSD, stress or anxiety outside of the normal reaction after being attacked. It was the passage of time, combined with the Claimant's continued struggles, that meant there was a risk of PTSD by the time of the November report and that the effects arising could well last for a lengthy period.

Employment Judge C Sharp
Date: 20 February 2023

REASONS SENT TO THE PARTIES ON

20 March 2023

FOR THE TRIBUNAL OFFICE

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