



EMPLOYMENT TRIBUNALS

Claimant

Ms Anna Agdan

Respondent

Kettle Foods Limited

v

Heard at: Norwich

On: 12 April 2023

Before: Employment Judge Postle

Appearances

For the Claimants: Did not attend and was not represented

For the Respondent: Mr R Hickford, Solicitor

JUDGMENT on PRELIMINARY HEARING

The Claimant does not satisfy the definition in s.6 of the Equality Act 2010 as a disabled person and therefore the Claimant's claims under the Equality Act 2010 are dismissed.

REASONS

1. This Preliminary Hearing was listed as an 'In Person' Hearing at the Norwich Employment Tribunal, sitting at Norwich Magistrate's Court by notice of 12 February 2023.
2. On 28 March 2023, the Claimant made an Application to have today's Hearing converted to a Telephone or Cloud Video Platform (CVP) Hearing. The basis of that Application was that her disability impacts...

"...me in a way that my case I am unable to leave my house due to my anxiety. Since my dismissal, I have been significantly impacted to the extent I am unable to leave my house or travel any great distance. Therefore, attending the Tribunal in person on 12 April 2023 will not be possible."

3. That Application was not supported by any medical evidence suggesting that the Claimant could not attend her Employment Tribunal Hearing in

person. The Application was refused by letter of 6 April 2023 by Employment Judge Postle and again I repeat, on 12 April 2023, that in the absence of any medical evidence supporting the Application the Claimant was unable to attend in person, the Hearing proceeds at Norwich.

4. The Claimant's further particulars set out her disabilities as unstable angina and anxiety. Originally the Claimant, in her claim form, had indicated no specific disability.
5. The Claimant had been employed by the Respondent from 3 September 2018 until her dismissal on 28 June 2022 due to ill health capability. During the Claimant's shift on 9 June 2021, the Claimant was taken to hospital by ambulance complaining of chest pains. The Claimant then remained absent for over a year from that date until her dismissal. It is clear, during the time the Claimant was absent she advanced various health reasons for those absences. In particular there appeared no ongoing medical concerns following her being taken to Accident and Emergency, having been discharged the same day. Thereafter, the Claimant asserted a prolonged period of absence due to Covid and then absence due to mental health conditions.
6. The Claimant being signed unfit from 26 June 2021 citing chest pain and the Claimant continually signed off absent with chest pains until 20 December 2021, despite there being no ongoing referrals to specialists.
7. On 27 September 2021, the Claimant attended a First Stage Capability Hearing to discuss her absence, in which the Claimant confirmed that the health issues at that stage, namely chest pains, had largely resolved and confirmed no particular issue had been found. At that stage she did not advance any mental health problems. The Claimant was offered a phased return to work. The Claimant, for reasons best known to herself, rejected that option not on medical grounds but on the grounds of travel difficulties.
8. A further Capability Meeting was arranged for 18 October 2021 and thereafter the Claimant was referred to Occupational Health. At that stage Occupational Health told they were waiting for the Claimant to have further tests with her GP and the results were expected shortly.
9. There was a further reconvened Capability Meeting on 22 November 2021, in which the Claimant confirmed her health was improving and she was just waiting for the outcome of final tests regarding her heart / chest pains. Again, the Claimant confirmed there were no mental health issues.
10. A further Occupational Health review was arranged for 5 December 2021. The outcome was that the Claimant was likely to be fit for her role as a Production Operative and able to return to work. The Report suggested adjustments to take regular short breaks to manage her symptoms, would be advisable. It was arranged the Claimant would return to her role as a Production Operative on 18 December 2021 with adjustments in place.

11. The Claimant did not return to work. Instead the Claimant submitted further MED3 Certificates, but now for the first time stress was stated as a reason.
12. A further referral to Occupational Health was made on 25 January 2022 which confirmed the Claimant was free from heart difficulties. However, the Claimant was now suffering from stress and dizziness. The Claimant was not taking any medication for stress and took no other steps to address the new issue.
13. A further Capability Hearing was arranged for 8 February 2022, at which the Claimant confirmed any problems with her heart / chest pains were now clear. However, she had now caught Covid. This was causing her stress. Her main concern was travelling to work and the time it took. As a result of the Claimant's continued absence in May the Claimant was again referred to Occupational Health. The Report stated the issues were related to heart, Covid or stress and it was alleged the main cause of the absence was anxiety about leaving the house. This was now the fourth different cause of absence.
14. The Occupational Health Report stated the Claimant was making progress but it was now likely to be at least another four to six weeks at the earliest, if her treatment for the new issue progressed.
15. In the meantime the Claimant had been referred by a GP to Norfolk and Waveney Wellbeing for Counselling and by 15 June 2022 the Claimant was discharged from Wellbeing Counselling. The Report went on to say,

“During these sessions you worked on managing anxiety. In order to further improve gains we discussed using positive coping self-taught to gradually expose yourself to anxiety provoked situations and tolerating the uncomfortable, physical sensations without making any adaptations such as avoiding or leaving...”

Your scores on the Wellbeing Tracker at your first and last appointments are detailed below.

*Low Mood – First appointment: 3 out of 27;
Last appointment: 5 out of 27.*

*Anxiety First appointment: 8 out of 21;
(DAD) Last appointment: 6 out of 21. ”*

16. Clearly, in a short space of time the Claimant's levels of anxiety and stress had reduced almost to the lowest base when considering anxiety.
17. During the whole of the year the Claimant was not medicated by her GP for stress or anxiety.
18. In this Hearing we have had the benefit of the Claimant's GP Notes and an Impact Statement. Having compared the reality of the situation and the

medical notes with the Impact Statement, the Tribunal concludes it is likely on the balance of probabilities the Claimant is gilding the lily to the effect her stress and anxiety has on her day to day activities.

19. Indeed, the Claimant confirmed in respect of the referral to the Waveney Wellbeing Service between March and June 2022 and stated,

“However, following the consultation in June 2022 the Level 2 Therapist was unsure as to why I was subsequently discharged from the Service”

20. Her Impact Statement is confusing and goes on to state,

“I also take medication to help with my anxiety. I do not take any medication for my anxiety. I sometimes take Kalms to manage my symptoms when I get mild anxiety.”

21. The Claimant accepts she has not been prescribed any medication by her GP.

22. The Employment Appeal Tribunal have said that when considering whether a person has a disability, one should look at the evidence by reference to four different questions:

22.1 Did the Claimant have a mental and / or physical impairment?

22.2 Did the impairment affect the Claimant’s ability to carry out normal day to day activities?

22.3 Was the adverse condition substantial? and

22.4 Was the adverse condition long term?

23. These four questions should be posed sequentially and not together.

24. In reaching the Tribunal’s decision, we have considered the 2010 Guidance on Disability and Codes of Practice and although they do not impose a legal obligation, we should take account of the things a person avoids doing, things that may cause pain, fatigue or otherwise. Focus should be on what a person cannot do, or can only do with difficulty, rather than the things that he or she can do.

25. The Tribunal concludes it may well be that the Claimant has since March or April had mild anxiety or stress. The evidence does not suggest that stress or anxiety is substantial and the Tribunal repeats the suggestion that the Claimant is unable to leave her house at all or for any period, is the Tribunal suspects gilding the lily and simply not borne out by the medical evidence. The Claimant’s impairment, if it is an impairment, is not affecting the Claimant’s ability to carry out normal day to day activities. The Tribunal do not conclude that the condition is substantial.

26. Furthermore, even if she met the other criteria, it is likely that the condition is not an adverse long term condition bearing in mind the Report from the Wellbeing Counselling Service which suggested within a short period of time, just a matter of months, her scores were at the lowest level and had come down during that period. It would seem that the Claimant would not satisfy the condition that the impairment was long term in any event.
27. In those circumstances, whilst the Claimant may have a mild impairment, it certainly is not an adverse condition which can be described as substantial or long term.

Employment Judge Postle

16.05.2023

Date:

2.06.2023

Sent to the parties on:

J Moossavi

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For the Tribunal Office.