EMPLOYMENT TRIBUNALS

Claimant: Mr D Ford

Respondents: (1) Ingenica Solutions Ltd; (2) Mr S O'Callaghan

2201155/23

Representation:

Claimant: Mr L Murdin (Counsel)
Respondent: Ms J Duane (Counsel)

Heard on: 4 July 2023, London Central Employment Tribunal by CVP video platform.

Employment Judge: Mr D A Pearl

JUDGMENT

The tribunal makes the following Judgment:

1 The Claimant was disabled within the meaning of the Equality Act 2010 by reason of two conditions: (a) Functional Neurological Disorder from a date no later than 3 March 2022, when it was first diagnosed, to 11 November 2022; and (b) stress and/or anxiety from April 2021 to 11 November 2022.

REASONS

1 This was the open preliminary hearing to determine "whether at the material time the Claimant had a disability within the meaning of the Equality Act 2010." He was dismissed by the First Respondent (and I shall use the term 'Respondent' for the company) on about 11 November 2022. He had been a founder of the company. He relies on two conditions: (1) anxiety/stress from April 2021; (2) Functional Neurological Disorder ('FND'), which was diagnosed in early March 2022. I should add that of the various discriminatory acts complained of

(there are principally seven) only one pre-dates that diagnosis, namely an alleged failure to pay a bonus in February 2022.

2 The Claimant's case is that he remained disabled up to the point of dismissal in November 2022 and, indeed, beyond that date. The Respondent suggests that he fails to meet the statutory definition at any time; and, alternatively, that by a date after March 2022, any qualifying impairment had ceased. Other arguments raised by the Respondent will be dealt with in my conclusions.

Facts

3 I need to make factual findings and I am drawing these from a combination of the medical evidence, the documents and the Claimant's evidence. This latter is to be found in his impact statement and the substantial evidence he gave when being cross-examined. There is a submission that in one particular respect, and, perhaps, generally, I should be cautious about accepting his evidence and should reject, in particular, evidence about his ability to drive. That is not a submission I can accept. I found the Claimant to be credible and measured in the evidence he gave. He was, in my judgment, careful not to mislead the tribunal. Thus, although he had a sound grasp of much of the chronology, there were a few points at which he readily accepted that he could not remember a date, especially if events were blurred in his mind at the time. I will come later to the driving issue, but, as will be seen, I consider his evidence in that regard to have been patently honest. I have found no reason to doubt any of the evidence he gave; and a great deal of it is consistent with the medical evidence, to which I now turn.

FND

4 Dr Murray, a Consultant Neurologist, first saw the Claimant on 19 January 2022, on referral from the GP. He took a detailed history. Relevant medical problems had begun in February 2021, with extreme tiredness, brain fog and other symptoms. These were severe and they worsened, to include a balance problem and other matters set out in the report. He presented with excessive fatigue and veered when walking. Dr Murray carried out a detailed neurological examination and found "a complex set of neurological symptoms" but was unable to record any conclusion, pending scans being performed.

5 In his next report, of 10 February 2022, Dr Murray reported that the scan showed an unusual soft tissue anomaly in the neck. On 3 March, after further scans, he concluded that the Claimant "most likely has a Functional Neurological Disorder causing left hemiplegia." He was not psychologically unwell "and he is clearly not making his symptoms up." He discharged him from further neurology follow-up. I should note that Dr Murray was consulted privately and that the Claimant then reverted to the NHS. Any suggestion that he may have been symptom-free in March 2022 is incorrect. During the period February 2021 to June 2022, the Claimant arranged to receive physiotherapy, speech therapy and psychotherapy, and he attended those sessions.

6 The Claimant was certified unfit for work from 8 February 2021 to 16 May 2022. I need not cite the detail in paragraphs 20 and 21 of his impact statement, where he sets out the effects on daily life; these are consistent with the medical

evidence I have referred to. From March to July 2022 he attended physiotherapy sessions to help with mobility and balance.

Anxiety/stress

7 It is important to note that the symptoms overlap with those described above. He first attended the GP with symptoms in mid-2018 and in February 2021 he suffered a major collapse. He was signed off work until 16 May 2022. Medication was prescribed, initially fluoxetine, then sertraline. Paragraph 8 of the impact statement sets out various effects on day to day activities, and I find this to be accurate evidence. By July 2022 the Claimant was fit to return to work. However, his condition worsened and he attributes this to the ongoing dispute at work with the Respondent. Again, I accept the evidence in the impact statement as to the effects on his mental health. It is clear that he was suffering from anxiety and stress. For avoidance of doubt, I am making no finding as to the cause of this.

Generally

8 In oral evidence, the Claimant was able to fill in many of the gaps in the chronology and also to give further detail about all aspects of his two conditions. As I have noted, I found his evidence to be moderate and accurate when dealing with the detailed cross-examination. He explained his adverse reaction to fluoxetine. Dosages of either fluoxetine or sertraline went up to 100 mg, but 50 mg of the latter was more normal. He pointed to the emails passing between him and the GP in March 2021 and the dosage then of 50 mg. These emails document the effect on his day to day activities and also the symptoms that he was experiencing at that time. He was imprecise about the dates when he was taken off medication between 2021 and 2022, but this does not affect his credibility. As he told me, and I accept, some of 2021 “is a blur.”

9 It was suggested that the Claimant’s credibility could be impugned because of his unaccompanied attendance at a medical appointment, when he said that he was unable to drive. The criticism is without substance. He told me in his evidence that he would be driven either by his partner, Alison, or the neighbour, Mr Winstanley. When challenged in cross-examination, about an hour later, he maintained that Mr Winstanley had taken him to this particular appointment. Unsurprisingly, the neighbour had not accompanied him into the consultation room. I find that the Claimant has given evidence about all of this in a straightforward way and I have no hesitation in accepting it and in rejecting the Respondent’s submission concerning credibility.

10 I am grateful for Ms Duane’s written and oral submissions and the short oral submissions from Mr Murdin and shall refer to them, where relevant, below.

Conclusions

11 The relevant law is set out by Ms Duane and, as she observes, the Claimant must establish that at relevant times he had a physical or mental impairment; and that the impairment had a substantial and long-term effect on his ability to carry out normal day-to-day activities. (Section 6.) This is further defined in schedule I, para 2, and the effect is long-term if “it has lasted for at least 12 months”; or “is likely to last for at least 12 months.” I further note Ms Duane’s reference to the

Guidance (see below) and the further guidance in case law from Adiremi [2013] ICR 591, Morgan v Staffs University, 2001, EAT and Herry v Dudley [2016] UKEAT/0100/16.

12 This last case cited the well known passage from J v DLA Piper dealing with stress, anxiety and a 'reaction to adverse circumstances.' HHJ Richardson in Herry noted that there are cases where a reaction to life events perceived as adverse can become entrenched; "where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities." Tribunals are not bound to find a mental impairment n such a case.

Stress/anxiety

13 I reject the submission that the Claimant exhibited a reaction to adverse life events that falls short of a mental impairment; and/or which did not have the substantial and long-term effect, as defined by statute. I cannot accept the implied submission that this is the sort of case to which HHJ Richardson was referring in the above paragraph. It seems to me that such a conclusion runs counter to the clear chronology the Claimant sets out in the impact statement, from 2018 and, in particular, the events of 2021 after his collapse in February. The GP diagnosed anxiety. The Claimant describes the effect of his condition on his ability to carry out normal activities. Medication was undoubtedly prescribed and taken. I have accepted that fluoxetine was replaced by sertraline and, in my judgment, his inability to point to exact dates when the prescriptions were changed or amended is beside the point. (In addition, he underwent CBT, but this merely confirms that there was a genuine condition and has no further consequence.) The medication, in turn, brings in para 1(5) of schedule 1, the 'deduced effects' provision, although refined and detailed analysis is unnecessary. Before that provision comes into play, as it must in this case, the Claimant's detailed evidence in paragraphs 7 and 8 of his impact statement is sufficient to establish the required substantial and long-term effect required by the Act. Any improvement, such that he was fit to return to work in July 2022 on a phased return, does not negative this conclusion. Indeed, the OH report of June 2022 (page 133) recommended a Workplace Stress Risk Assessment if, on his return, he felt any undue pressure. In the event, the improvement was not sustained and the mental condition worsened. I conclude that at all relevant times the Claimant's condition of anxiety and/or stress amounted to a disability.

FND

14 The Respondent's written submissions are relatively short and assert an evidential insufficiency. Ms Duane's oral elaboration incorporated two points, among others: (a) that the Claimant's credibility was in doubt; (b) that by the OH report of 17 June 2022, he was no longer experiencing any qualifying, physical or mental impairment. I am unable to accept these submissions concerning FND.

15 The OH report (page 130) starts with the "acute neurological event" of February 2021, the substantial symptoms that followed and the events leading to the diagnosis of March 2022. The overlap with stress is noted where the

treatments he had undergone were summarised: “Medication to treat underlying mood disorder. Psychotherapy to help manage symptoms and address stress. Physical and speech therapy.” The report concluded that by this date the Claimant had over 15 months “made a considerable improvement with regard to the speech difficulties and his mobility is improving. He has residual symptoms …" He could return to work as CEO, although some reasonable adjustments would be required. It is not surprising to see that the report also concluded that the condition may amount to a disability under the Act. “Mr Ford has a medical condition which has extended beyond one year and in the absence of medical treatment would have a substantial impact on his day-to-day activities.” The condition addressed in this report was FND. Although the wording used in the report departs from the statutory wording, the conclusion is clear and is, in my judgment, consistent with the statutory test. I consider that it was an almost inevitable conclusion that an OH practitioner would reach on the evidence before him or her at that time. In my position, having heard fuller evidence and considered documents, it is plainly a correct conclusion. The condition satisfied all the requirements of statute and had not ceased by June 2022, or thereafter. I disagree with the submission that there is any material inconsistency in the evidence. It follows that at all material times the Claimant was disabled within the meaning of the Act.

16 In reaching these conclusions, I should note that I have considered the Guidance on the Definition of Disability, which is helpful. I accept that it is not necessary to establish the cause of a physical or mental impairment (A3 of the Guidance.) In this case, it is irrelevant. Nor does the impairment have to result from an illness. I also note A6. It is not always possible, and it is not necessary, to categorise a condition as either a physical or mental impairment. The underlying cause may be hard to establish, “There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.” This is apt here, because of the overlap I have noted in symptoms, such as brain fog, fatigue and anxiety, and the chronological overlap of symptoms of the two conditions.

Employment Judge Pearl

Date17/07/2023

JUDGMENT & RESERVED REASONS
SENT TO THE PARTIES ON

17/07/2023

FOR THE TRIBUNAL OFFICE