



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss L O'Mara

v

Insight Financial Associates Limited

Heard at: Norwich

On: 30 August 2023

Before: Employment Judge M Warren

Appearances

For the Claimants: In person

For the Respondent: Ms J Bradbury, Counsel

JUDGMENT

The Claimant was a disabled person by reason of anxiety and depression as defined in the Equality Act 2010, for the period 13 May 2022 to 8 February 2023.

REASONS

Background

1. Miss O'Mara was employed by the Respondent as a Personal Assistant between 13 May 2022 and 8 February 2023. After Early Conciliation between 17 February and 17 March 2023, she issued these proceedings on 20 March 2023 claiming disability discrimination. The impairment upon which she relies as amounting to a disability is the mental impairment of depression.
2. Today's Public Preliminary Hearing was directed to take place in order that the Tribunal should decide whether or not Miss O'Mara, at the relevant time, met the definition of a disabled person as set out in the Equality Act 2010. The relevant time being the period of her employment with the Respondent.

Evidence

3. Unfortunately, no Bundle was ordered for today and that created something of a muddle. The Solicitors representing each party recognised there would be a need for a Bundle. The Respondents prepared a Bundle last week and then the Solicitors acting for Miss O'Mara filed a Bundle

yesterday containing significantly more documents. The problem which I had was that I had neither of those at the start of the hearing. Ms Bradbury came to my rescue and emailed me the Claimant's Solicitor's Bundle, so that I had access to both.

4. Miss O'Mara was ordered to provide an Impact Statement and Medical Evidence and I had those before me, such as they are, within her Bundle.
5. I also had at the start of the hearing, submissions from both sides.
6. Miss O'Mara was unrepresented today. I heard oral evidence from her.

Law

7. For the purposes of the Equality Act 2010 (EqA) a person is said, at section 6, to have a disability if they meet the following definition:

"A person (P) has a disability if –

- (a) P has a physical or mental impairment, and*
- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

8. The burden of proof lies with the Claimant to prove that she is a disabled person in accordance with that definition.
9. The expression 'substantial' is defined at Section 212 as, '*more than minor or trivial*'.
10. Further assistance is provided at Schedule 1, which explains at paragraph 2:

"(1) The effect of an impairment is long-term if –

- (a) it has lasted for at least 12 months,*
- (b) it is likely to last for least 12 months, or*
- (c) it is likely to last for the rest of the life of the person affected.*

(2) 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".

11. As to the effect of medical treatment, paragraph 5 provides:

"(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –

- (a) measures are being taken to treat or correct it, and*
- (b) but for that, it would be likely to have that effect.*

(2) *'Measures' includes, in particular medical treatment ..."*

12. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government's office for disability issues entitled, 'Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability'. The guidance is not to be taken too literally and used as a check list, (Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19) but much of what is there is reflected in the authorities, (or vice versa).
13. As to the meaning of 'substantial adverse effects', paragraph B1 assists as follows:

"The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences and ability which may exist amongst people. A substantial effect is one that is more than a minor or trivial effect".
14. Also relevant in assessing substantial effect is for example the time taken to carry out normal day to day activities and the way such an activity is carried out compared to a none disabled person, (the Guidance B2 and B3).
15. The Guidance at B4 and B5 points out that one should have regard to the cumulative effect of an impairment. There may not be a substantial adverse effect in respect of one particular activity in isolation, but when taken together with the effect on other activities, (which might also not be, "substantial") they may together amount to an overall substantial adverse effect.
16. As for what amounts to normal day-to-day activities, the guidance explains that these are the sort of things that people do on a regular or daily basis including, for example, things like shopping, reading, writing, holding conversations, using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, taking part in social activities, (paragraph D3). The expression should be given its ordinary and natural meaning, (paragraph D4).
17. In Goodwin v Patent Office [1999] ICR 302 the EAT identified that there were four questions to ask in determining whether a person was disabled:
 - 17.1. Did the Claimant have a mental and/or physical impairment?
 - 17.2. Did the impairment effect the Claimant's ability to carry out normal day-to-day activities?

17.3. Was the adverse condition substantial? And

17.4. Was the adverse condition long term?

Credibility

18. There are aspects to the evidence of Miss O'Mara which required some thought and gave rise to cause for concern.
19. At paragraph 10 of her Impact Statement, she made reference to attending counselling and using the Well-Being Service. It transpired in her oral evidence that whilst she had a telephone conversation with the Well-Being Service, they recommended and indeed set up for her, an appointment to attend a course of counselling occasioned by difficulties connected with the end of a relationship, she did not attend.
20. Miss O'Mara had one counselling session provided at her GP Surgery and two private counselling sessions.
21. In closing submissions after Ms Bradbury had made her submissions, Miss O'Mara made reference to having spoken to her GP on the telephone about repeat prescriptions of Citalopram. That was not something which had been mentioned before, it did not appear in her Impact Statement and she had not mentioned it in cross examination. She said it had not occurred to her until she was making her closing submissions. What is more, there do not seem to be any Medical Notes where her GP makes any kind of record of having spoken to her, which is surprising.
22. On the other hand, I acknowledge that certainly since Covid, GPs are doing much more on the telephone now and consultations about repeat prescriptions do take place by telephone. From the documents in the Bundle, one can see that Miss O'Mara did receive repeat prescriptions of Citalopram throughout the period between 2018 and 2023.
23. There was also the question of her work history illustrated by her CV, which showed her going through a series of new jobs without apparent difficulty during that period 2018 to 2023. I acknowledge that is not necessarily inconsistent with Ms O'Mara suffering from depression; people with depression are often able to hide it and put a brave face on things. It is something that ebbs and flows.
24. Notwithstanding those concerns about her evidence, I have to say that overall I found Miss O'Mara's evidence to be credible and what she had to say to me rang true of a person suffering from depression.

Facts

25. To review what she said in her Witness Statement and which generally I accept, she was diagnosed suffering from depression, mixed anxiety and depressive disorder, as recorded by her GP, on 4 June 2018 (page 17 of the Bundle). Since then, she has been prescribed and has taken Citalopram, starting out at 10mg in June 2018,,increasing to 30mg in 2020, back to 10mg in 2021 and on to 20mg since the middle of 2022.
26. The effect of the depression, the mental impairment, on Miss O'Mara's day to day activities at the material time included that she has found it difficult to get out of bed and wanted to sleep in all the time. She would avoid leaving the house whenever she could, avoided contact with other people and avoided socialising. She found it difficult and would have to force herself to get up and wash herself and get dressed, she lacked appetite and had no motivation to complete household chores. She found it difficult to concentrate or retain information, she felt numb, worthless and believed that she had no place on earth. She felt constantly sad and she felt confused and alone. She would force herself to go to work and in her words "*pretend to be a clown*" and to crack jokes and try and convince people that she was the happiest person around. Whereas inside, she said, she felt completely broken and being eaten alive from the inside out.
27. During her time working for the Respondent, Miss O'Mara would find it difficult to concentrate and tried to avoid interacting with other members of staff. During the worse periods, she would have difficulty retaining information for long and would struggle to focus on day to day tasks. She would have suicidal thoughts. There were times when she did not take her Citalopram; the mental impairment was such that it caused her to forget to take it during deep episodes, that would snowball and a period of time would go by when she did not take her medication. When that happened, she would go through her darkest times of feeling suicidal and unable to do anything at all, whether that be at work or at home.
28. I accept Miss O'Mara's evidence of this description of her living with depression. That is, putting on the appearance as much as possible of being happy and cheerful, but inwardly not so and outside of the working environment, being unable to carry on as normal and during periods of time not be able to do anything at all.

Conclusions

29. I find that Miss O'Mara does indeed meet the definition of a disabled person:
 - 29.1. She had a mental impairment, depression;
 - 29.2. It effected her ability to carry out day to day activities, in the manner described above;

29.3. That effect was substantial, there is nothing trivial about what I describe, it way beyond the general low mood most people suffer from time to time, and

29.4. It was long term, having lasted at least since 2018

Employment Judge M Warren

Date: 4 October 2023

Sent to the parties on: .9 October 2023.

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For the Tribunal Office.