



EMPLOYMENT TRIBUNALS

Claimant

Mr David Lee

Respondent

Midlands Pallets Ltd

v

Heard at: Bury St Edmunds **On:** 7 August 2023

Before: Employment Judge K J Palmer (Sitting alone)

Appearances

For the Claimant: Jayne Lee (Sister)

For the Respondent: Mrs Kaye (Counsel)

RESERVED JUDGMENT PURSUANT TO A PUBLIC PRELIMINARY HEARING

The Claimant is not a disabled person under s 6 of the Equality Act 2010. His claims in Disability Discrimination fall away and are dismissed.

Reasons

1. This matter came before me today, pursuant to a telephone Preliminary Hearing (closed) before Employment Judge M Warren on 16 August 2023.

Background

2. Mr Lee was employed by the Respondent between 5 May 2021 and 18 April 2022. He provides his job title as "Yardsman". The Respondents describe him as a "Pallet repairer". He was dismissed, purportedly by reason of gross misconduct on 18 April 2022. After early conciliation between 25 May and 6 June 2022 the Claimant issued these proceedings on 25 June 2022, claiming disability discrimination, breach of contract, notice pay, wages and holiday pay.
3. By an Order dated 9 October 2022, Mr Lee was required to provide an Impact Statement and the medical evidence upon which he relies in relation

to his claim to be a disabled person by 7 November 2022. This deadline was extended to 31 January 2023. The Respondent's position at this hearing is that they do not accept that the Claimant meets the definition of a disabled person. The Claimant relies on depression and anxiety.

4. The Claimant has a history of recreational drug use, including heroin. The Respondent's case is that they dismissed the Claimant by reason of misconduct. The dismissal was effected on 18 April 2022.
5. They rely on the Claimant's recreational drug use as the misconduct.
6. The Claimant does not have two years continuous employment to pursue an Ordinary Unfair Dismissal claim.
7. I am very grateful to my colleague, EJ Warren, who in his summary set out the issues. I do not propose to repeat his explanation but it is encapsulated in his summary at paragraphs 14-19 inclusive. The Claimant's claims in disability discrimination are, as yet, not clearly defined but appear to be Direct Disability Discrimination under s.13 of the Equality Act 2010 and a claim for Disability Related Discrimination contrary to s.15 of the Equality Act 2010. No formal list of issues has, as yet, been identified and there is little clarity as to the Claimant's other claims.
8. What is certain and was pointed out by EJ Warren, is that if the Claimant is found not to be a disabled person for the purposes of the Equality Act, then a substantial part of his claims fall away.
9. EJ Warren prudently listed the matter for a Full Merits Hearing which is to take place at the Cambridge Employment Tribunal between 11 and 13 March 2024.
10. He then listed this Preliminary Hearing to determine whether or not the Claimant was a disabled person as defined in the Equality Act at the material time. The material time is the period of the Claimant's employment ending with his dismissal on 18 April 2022.
11. In his summary at paragraph 12, EJ Warren gives some very helpful guidance to the Claimant in light of the fact that he is a litigant in person. EJ Warren summarises that guidance at paragraphs 12.1, 12.2 and 12.3. He states as follows:

“12.1 A person will meet the definition of disability within the Equality Act 2010 if:

As at the date of the alleged act of discrimination, (in this case, the date of dismissal on 18 April 2022), he had suffered mental ill health which had a substantial adverse impact on his ability to undertake day to day activities which had, at that point, either lasted for 12 months or could be said, as at that point, to be likely to last for more than 12 months. The Tribunal needs evidence as to whether or not this is the case for the Claimant as at 18 April 2022.

12.2 A person may also meet the definition of disability if they have suffered an impairment which has a substantial adverse impact on their ability to undertake normal day to day activities, where that effect has ceased but is likely to recur. Thus, in the context of this case if, in 2006 or at any time subsequently, Mr Lee has, as a result of his depression, suffered an impairment which has had a substantial adverse effect on his ability to carry out normal day to day activities which has ceased from time to time, but which could be said to be likely to recur, he would meet the definition. The Tribunal will need evidence as to whether that could be said of Mr Lee's mental health at any point since 2006."

12.3 Addiction to any substance is specifically excluded from the definition of disability, unless it is the result of taking medically prescribed drugs. Further clarification is therefore necessary in respect of the GP's passing reference to "dependant on opioids". Is Mr Lee dependant upon opioids as a consequence of taking prescribed drugs? If not, are his mental health issues a consequence of such dependency or vice versa?

12. These are helpful guidance points to bear in mind in this case.

13. The Claimant was required by the Tribunal to provide evidence of his disability. He purported to do this and I have before me a bundle running to some 178 pages. Key documents are the Claimant's Disability Impact Statement and the medical evidence provided by the Claimant. Having seen this the Respondents do not accept that the Claimant is disabled for the purposes of s.6 of the Equality Act 2010. It therefore falls to me to determine this today.

14. I heard evidence from the Claimant and submissions from Counsel for the Respondent and from Ms Lee, the Claimant's sister.

The Law

Disability

15. For the purposes of pursuing discrimination claims on the basis of the protected characteristic of disability, a Claimant must satisfy the tests under s.6 of the Equality Act 2010 (EQA) :

6. Disability

(1) 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.

16. When considering whether a person is disabled under s.6 EQA 2010, the supplementary provisions for determining that disability appear in part 1 of

Schedule 1 to the Equality Act 2010. Guidance is also given in the Disability Discrimination (Meaning of Disability) Regulations 1996 and the Equality Act 2010 (Disability Regulations 2010) as well as the Government Guidance on matters to be taken into account when determining questions relating to the Definition of Disability (2011), Tribunals must take this guidance into account when they consider it to be relevant.

17. In this case, the Claimant relies on depression and anxiety. The material time is the period up to and including 18 April 2022.
18. The Tribunal is also assisted by various Authorities. Guidance as to how a Tribunal should approach the question of assessing disability under s.6 was first set out in the case of Goodwin v the Patent Office [1999] IRLR4 EAT. This was a case under the old legislation but the guidance remains equally relevant today in interpreting the meaning of s.6 of the EQA. The guidance has been specifically approved in more recent cases, most notably J v DLA Piper (UK) LLP [2010] I.C.R 1052 EAT.
19. That guidance tells us that tribunals are required to look at the evidence before them by reference to four different questions (or conditions as the EAT termed them);
 1. Did the Claimant have a mental and/or physical impairment? “The impairment condition”;
 2. Did the impairment affect the Claimant’s ability to carry out normal day to day activities? The “adverse effect condition”;
 3. Was the adverse condition substantial? The “substantial condition”;
and
 4. Was the adverse condition long term? The “long term condition”.
20. In the DLA Piper case, the then President of the EAT, Mr Justice Underhill, observed that it was good practice for Employment Tribunals to state their conclusions separately on the questions of impairment and adverse affect and in respect of the latter their findings on substantiality and long term effect. However, in reaching those conclusions, Tribunals should not feel compelled to proceed by rigid consecutive stages. Specifically, in cases where the existence of an impairment is disputed, it would make sense for a Tribunal to start by making findings about whether the Claimant’s ability to carry out normal day to day activities is adversely affected on a long-term basis and then to consider the question of impairment in the light of those findings.
21. It must be remembered that this is a case pursued by the Claimant. The burden of proof is on the Claimant to prove, on the balance of probabilities, that he satisfies the definition of disability as set out in s.6.
22. It is the Claimant’s responsibility to adduce evidence to sufficiently discharge this burden. Failure to adduce sufficient evidence is unlikely to

discharge the burden. Whilst the threshold is not a high bar, the burden still remains on the Claimant.

The present case.

23. I heard evidence from the Claimant who was cross-examined by Mrs Kaye on the documents before me, specifically his Disability Impact Statement. Under cross-examination the Claimant admits and accepts that he has been a recreational drug user for a period of time, including amphetamines, ecstasy, heroin and alcohol. The Claimant said that he has been suffering from depression since 2006. On cross-examination the Claimant confirmed that he had been in and out of regular employment since 2006 but that he has been mainly employed. He was a little vague and admitted that he was not good with dates and that his memory was not perfect. He confirmed, however, that he had usually been driving to work. He said that when he was a teenager he did use amphetamines and ecstasy. Also alcohol but said he has not taken alcohol for two years. He was questioned about prescribed medication. The documents before me illustrate that there were gaps in antidepressant medication and that these gaps were significant. The Claimant said that the prescribed medicine made him sleep constantly and therefore he stopped taking them from time to time.
24. He was asked whether the breaks occurred when he was in regular employment and he said "yes". He was asked whether such breaks occurred when he could regularly drive himself to work and he said yes.
25. He confirmed that at some point in 2021 he split up with his partner and moved back in with his mother. He said he thought that was about September 2021.
26. His Disability Impact Statement is very short. He refers to his mother dying in January of 2022 and he said he suffered with considerable grief as a result. He explained that he was unable to get washed and would continue to sit at his mother's grave and grieve. He said he was put on medication to deal with depression and was seeing a counsellor for several weeks.
27. He said he became homeless and his mental state became worse. He said that losing his job added to his stress levels. He attempted suicide by attaching a pipe to his car exhaust.
28. He was taken to various documents in the bundle. In particular, at page 133 there appeared a report from a company called Change Grow Live. This report was dated 9 March 2022, not long before the Claimant's dismissal. The report diagnosed the Claimant as having a mental and behavioural disorder due to the use of heroin. It details substance use and gives a short history of the Claimant's recreational drug use, including his use of crack cocaine in 2020 and the subsequent use of heroin. He says he has not injected drugs but has only smoked them. He says he has stopped all drug use on the 1 January 2022 but relapsed when his mother died in March

2022. He confirms that he has been smoking crack heroin and spending £30 a day and has used an illicit espranor.

29. When questioned about this, he opined that £30 per day was not a lot. When asked whether he could possibly work in such circumstances he said that he didn't take the drugs whilst at work but only when he was off sick. He confirmed that this was at the time when he couldn't function and was living in his car. He was grieving his mother's death. He said that shortly thereafter he was sacked and that made him angry.
30. On 20 April 2022 he attended A&E. There was a report in the bundle. He was referred by his brothers, who found him in his car, vomiting. This was at the time that he had tried to kill himself. The report details that the Claimant was trying to detox from smoking heroin.
31. In support of the Claimant's claim that he is disabled, he produced various documents including a letter dated 30 December 2022, confirming that he was taking Fluoxetine for his mental health. It said that this had restarted in January 2022 after being stable for six years or so. It says the trigger was the passing of his Mother. It refers to the suicidal ideations in April 2022. Attached were a number of sick notes, all relating to different periods of time, mainly after the Claimant had been dismissed. Only one relates to a period of sickness prior to dismissal. I heard submissions from both Mrs Kaye, on behalf of the Respondent and from the Claimant's sister.
32. Mrs Kaye reminded me that it was the Claimant's burden to persuade the Tribunal that depression, in this case, falls within the meaning of the Act. She reminded me that addiction is not protected and is, in fact, expressly excluded.
33. She said, that on the evidence before me, I cannot conclude that the Claimant was a disabled person for the purposes of the Act at the material time which was April 2022. She says that nothing after April 2022, which is when any evidence of depression has been raised, is relevant. She invites me to conclude that the Claimant's mental health issues and difficulties in the material period, at the material time related to his recreational drug use and his reaction to the unfortunate life stresses surrounding him, including the death of his Mother. She said it is clear from the evidence that from 8 January 2022 to 9 March 2022, there was a significant recreational drug use where the Claimant was non-functioning. She said that evidence shows that during the period from January to his dismissal he was attempting to stop taking drugs and was detoxing. This is not depression and anxiety to be recognised as a disability under the Act. She referred me to the assessment by the Acute Liaison Mental Health Service at Kettering General Hospital on 20 April 2022. That is shortly after his dismissal. That assessment refers to the Claimant's recreational drug use. In it, he admits to taking heroin the day before yesterday which would have been 18 April 2022. He also said he had been drinking heavily yesterday the 19 April.
34. She invited me therefore to conclude that I simply did not have sufficient evidence before me to determine that the Claimant's difficulties with mental

health were attributable to depression and anxiety rather than recreational drug use.

35. Ms Lee, on behalf of the Claimant, submitted that when a person is using substances then prescription drugs cannot be on repeat. She explained that there were breaks within the period. She said there were times when he could not go into work. She said he was desperately trying to stop his recreational abuse. The passing of their Mother had created a terrible time in his life. He was hospitalised shortly after the loss of his job. She said his admission was due to his comedown from taking Heroin.

Conclusions

36. I have carefully sifted the evidence which I have heard. In fact, I was sufficiently exercised by what I heard to take time to truly consider the questions before me. That was the reason that I reserved this decision.
37. It is impossible not to feel genuine and considerable sympathy for the Claimant's plight and what he has been through. The loss of his Mother, his difficulties with addition and recreational drug use, the loss of his home and his job are all events which have caused him considerable difficulties.
38. However, I have to put aside those sympathies and apply the legal test to the evidence before me. I cannot be persuaded by my own personal sympathies towards the Claimant but when applying the test that I must to determine whether the Claimant is disabled under the Act.
39. Applying the four stage test set out above, based on the evidence , I conclude that the Claimant has, at some time between 2006 and the material time, suffered from a mental impairment, the kind of which qualifies as a disability under the Equality Act 2010.
40. Unfortunately, the Claimant has not produced sufficient evidence to enable me to answer the remaining three questions and determine that he is disabled. I do not have sufficient evidence as to the impact of the impairment on the Appellant's ability to carry out normal day to day activities. I have no doubt that the Claimant's day to day activities were affected but it is impossible on the evidence before me to determine that this was as a result of any depression or anxiety out with his recreational drug use. The same must be said of the question relating to whether the adverse condition was substantial and whether it was long-term. I find myself persuaded by the submissions of Mrs Kaye set out in paragraph 33 above.
41. The evidence before me relating to periods of depression and anxiety is almost exclusively post-termination. The evidence before me is supportive of the suggestion that the Claimant's issues at the material time were largely brought on by his recreational drug use and external forces in his life such as the sad death of his Mother. On the Claimant's own evidence in his impact statement and under cross examination there is insufficient evidence

that the impacts he was suffering from were as a result of depression and anxiety rather than recreational drug use.

42. At the material period during employment between the beginning of 2022 and the date of dismissal, the Claimant's difficulties on the evidence appear to be mainly due to his life circumstances, including the loss of his Mother and the fact that those life circumstances triggered recreational drug abuse, including heroin and other substances.
43. Addiction to substance is specifically excluded from the definition of disability.
44. Applying the helpful guidance in the summary of EJ Warren, I conclude that the Claimant has not adduced sufficient evidence before me today to meet the threshold required for me to answer the four limb test outlined in the Authorities in his favour. I cannot answer the second third and fourth limbs of that test in the Claimant's favour.
45. For the reasons I have set out I find that the Claimant is not a disabled person for the purposes of s.6 of the Equality Act 2010. His claims in disability discrimination fall away and are dismissed.

Remaining claims

46. The Claimant still has remaining claims for breach of contract, notice pay (which may be the same as the breach of contract claim), wages and holiday pay.
47. These have, as yet, not been clarified.
48. There remains a Full Merits Hearing listed for March of next year.
49. It is necessary for there to be a further Telephone Preliminary Hearing to be listed for two hours to determine the remaining claims and the issues which are to be before the Tribunal at the Full Merits Hearing.
50. It may be that that the Judge who conducts that hearing determines that in light of the Claimant's disability discrimination claims falling away, the Full Merits Hearing can be shortened. That is a matter for the Judge in question.
51. I have accordingly secured a two hour Telephone Preliminary Hearing on the date specified below.

ORDERS
**Pursuant to Rule 56 of the Employment Tribunal Rules
of Procedure**

Preliminary hearing to take place by telephone.

1. That there be a further Preliminary Hearing in private to take place by telephone with two hours allowed. The purpose of this Preliminary Hearing is to consider Case Management of the Claimant's remaining claims through to the Full Merit Hearing.

2. The Hearing will take place at **2.00pm on Monday 11 December 2022. Two hours is allowed.** It will be a Preliminary Hearing by telephone hearing

Employment Judge K J Palmer

Date: 2 November 2023

Sent to the parties on: 2 November 2023.

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For the Tribunal Office