



EMPLOYMENT TRIBUNALS

Claimant: Mr A Velicko

Respondent: NIC Services Group Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Watford Employment Tribunal (by CVP)

On: 13 December 2023 and in chambers on 21 & 29 December 2023

Before: Employment Judge Kelly (sitting alone)

Appearances

For the claimant: Ms Wisniewska, HR Consultant

For the respondent: Ms Gumbs of counsel

RESERVED DECISION

1. The preliminary hearing was to consider if the claimant had a disability under the Equality Act 2010 (EQA) at the relevant time or during part of it. The relevant time was identified as being June 2021 to January 2023. The medical condition relied on by the claimant were depression and anxiety.
2. The respondent accepted that the claimant had this condition but did not accept that it had a long term substantial effect on the claimant's ability to carry out day to day activities.
3. In the hearing, the Tribunal was assisted by an interpreter in the Lithuanian language, Ms Dikiene. The claimant said he only required interpretation when being questioned by Miss Gumbs. We informed the claimant that he could ask for interpretation at any other time during the hearing and he did ask for it outside the cross examination period from time to time.
4. To accommodate the claimant's medical condition, frequent breaks were provided.

5. The claimant relied on a disability impact statement and also gave oral evidence. He was cross examined. We heard submissions from both parties.

Relevant facts

6. The claimant was an assistant facilities manager.
7. According to the claimant's GP record:
 - 7.1 He first presented to his GP with 'stress at work (First)' on 9 June 2021. The GP notes record that the claimant reported that it was affecting his relationship with his wife, that he 'feels broken', had a low mood and poor sleep, anhedonia, reduced concentration and appetite and was anxious. He declined anti depressants and wanted time off work. The claimant was issued with a fit note 9 to 23 June.
 - 7.2 On 22 Jun 2021, there was another consultation with the GP who recorded 'Mixed anxiety and depressive disorder (First)'. The claimant was tired all the time, had a low mood, preferred being alone, was unhappy, had 'anhidonia'. He began medication, 50mg sertraline. The claimant was issued with a fit note 22 June to 20 July.
 - 7.3 There was a further consultation on 16 July regarding the same condition.
 - 7.4 There was a consultation on 20 July when the claimant was awaiting CBT. He still felt low, anxious, fatigue, panicky when thought about work. The sertraline had had no effect. The claimant was going to see his family abroad which he thought would benefit his mental health. The claimant was issued with a fit note 20 July to 7 September.
 - 7.5 There was a consultation 7 Sep 2021. The claimant now felt calm after taking sertraline. His mood was still low but not as low as previously. His sleep was still poor and he awaited CBT. The dose of sertraline was increased to 100mg. The claimant was issued with a fit note 7 September to 30 September.
 - 7.6 There were further reviews with no details provided and no details of fit notes, until 29 Oct 2023 when the diagnosis was depression and a fit note issued 29 Oct to 30 Nov 21.
 - 7.7 A consultation on 3 Nov 2021 related to a road traffic accident and the claimant also asked for sleeping pills because he was unable to sleep due to stress, but these were not prescribed.
 - 7.8 On 30 Nov 21, a fit note for depressive disorder was issued from 30 Nov 2021 to 2 Jan 2022.
 - 7.9 On 5 Jan 2022, a fit note was issued from 2 January for 2 weeks with depression; and on 18 Jan 21, a fit note for 'depression' from 17 to 25 January.

- 7.10 There was a consultation on 27 January when the claimant was getting counselling. A month's sick note was issued.
- 7.11 On 28 February, there were no new symptoms. A fit note from 26 February to 31 March for depression was issued.
- 7.12 On 31 March, the claimant wanted sleeping pills, which were not prescribed, and a sick note for depression was issued for a month. The claimant was having psychotherapy and had made life style changes to help with his mood/stress. He was prescribed 150mg sertraline.
- 7.13 On 31 March 2022, the notes record 'long standing depression'. In May 2022, the history is recorded as 'long term depression'. These are the first time the notes record the condition as long standing or long term.
- 7.14 Thereafter, the claimant continued on sertraline (or a similar replacement) and monthly fit notes. In June 2022, the claimant requested sleeping tablets again and was getting maximum 4 hours of sleep per night. Medication apparently to assist sleeping was prescribed. The claimant was going to Lithuania on 20 July and was going to access therapy there. On 5 September, his mood score was 4/10. At this point, the claimant was on a waiting list for UK psychotherapy.
- 7.15 On 28 Sep 2022, the claimant reported that he found the psychotherapy in Lithuania useful, 'Mental health gets much better when off work'. The GP advised the claimant that if he continued off work returning would be exceptionally difficult and advised him to consider returning to work, but the claimant insisted that he needed to get counselling to support him with this, for which he was on a waiting list. The GP suggested that he consider changing his employment.
- 7.16 The claimant remained signed off work and on previously prescribed medication until January 2023 (and thereafter).
8. The claimant produced a letter from a therapist of 7 August 2023 saying they started therapy on 7 April 2023. As this post dates the relevant period, we will not consider it further.
9. In his impact statement, among other things, the claimant:
 - 9.1 Recorded that it was during the period of 6 months from December 2020 that he felt like he became someone different. He did not want to talk to anyone, he just wanted to spend time on his own, he felt very low, anxious and irritable, his relationship with his wife became strained due to personality changes, he spent less time with his daughter.
 - 9.2 Said that he felt slightly better in 2021 when having 6 weeks' counselling but as soon as it ended, he went back to feeling low again, not being able to sleep and feeling panicky.

- 9.3 Noted his car accident in November 2021 which he put down to not being able to focus properly due to his mental health condition which meant he was distracted.
10. In the hearing, the claimant gave the following evidence:
- 10.1 He first noticed his symptoms in the middle of March 2021. He lost interest in everything. He spent much less time with his child. He preferred to stay alone. He did not want to socialize. He would come home from work and sit alone in the garden for two or three hours drinking tea and smoking instead of doing usual activities. He struggled to clean the house, garden, shop, or do soft play or playground activities with his child.
- 10.2 He started sleeping poorly in March 2021.
- 10.3 He gave as an example of his reduced concentration, he would start washing the dishes and then realise he had stopped doing it.
- 10.4 He self certificated off work at the end of May 2021.
- 10.5 From June 2021, he struggled to eat much and his weight reduced.
- 10.6 From June 2021, he became antisocial and did not want to spend time with friends, such as meeting up to play pool or go around town. When he went anywhere with a lot of people, he felt everyone was watching him and felt uncomfortable. Therefore, he did not want to go to the gym, shopping or travelling around the UK. He stopped telling jokes.
- 10.7 He stopped participating in his hobbies of metal detection and going to the gym from June 2021.
- 10.8 There was a small improvement in November 2022 when he started private psychotherapy.
- 10.9 The symptoms did not stop. That was why the claimant continued to receive treatment.
- 10.10 Regarding the 'Mental health gets much better when off work' comment in the GP notes, the claimant said he felt better after his sessions with a psychotherapist, but that did not necessarily mean his mental health had improved. After the sessions ended, he again felt he needed help.

Relevant law

11. Section 6(1) EQA sets out the statutory definition of disability: a physical or mental impairment which has a substantial and long-term adverse effect on the employee's ability to carry out normal day-to-day activities. We will use 'SAE' below to mean a substantial effect on the claimant's ability to carry out normal day-to-day activities.

12. Section 212(1) EQA defines 'substantial' as 'more than minor or trivial'.
13. This is supplemented by Schedule 1 Part 1 EQA 'Determination of Disability' which says:
 - 13.1 The effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected.
 - 13.2 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.
 - 13.3 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—
 - 13.3.1 measures are being taken to treat or correct it, and
 - 13.3.2 but for that, it would be likely to have that effect.
 - 13.4 "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.
14. When considering disability, the Tribunal must take the statutory guidance, "Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability" ("Guidance"). Guidance is also found in the EHRC Employment Code.
15. The Guidance says that:
 - 15.1 (C3) 'likely' means 'it could well happen';
 - 15.2 (C4) In assessing the likelihood of an effect lasting for 12 months, account should be taken of circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood.
 - 15.3 (C7) It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.
 - 15.4 (D3) In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a

conversation or 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, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

16. The burden of proof lies on the claimant to demonstrate that he has a disability under EQA.

Conclusions

17. The respondent suggested that effects of the medical condition relied on by the claimant which were not recorded in the GP notes did not happen. However, we accept that a GP does not necessarily record everything which a patient tells them about symptoms. We consider that the claimant's description of the effect of his medical condition on his day to day activities is generally supported by the GP record and accept his account.
18. We accept that from March 2021, the claimant struggled to sleep, socialise, clean the house, garden, shop, or do soft play or playground activities with his child. All of these are normal day to day activities. From June 2021, he struggled to eat and travel in the UK and stopped participating in hobbies like going to the gym and metal detecting. These are all normal day to day activities. While metal detecting may not be what most people do as a hobby, participating in a hobby is a normal day to day activity.
19. We accept that from the end of May 2021, the claimant could not work, which is a normal day to day activity. The claimant was an assistant facilities manager which is a job which is not out of the ordinary. We accept that the claimant would have had to have self certified for one week prior to getting a fit note.
20. We accept that any improvements were due to the medication and counselling which the claimant received and, when the counselling stopped, his condition got worse again. If the claimant's condition had materially improved, one would expect to see a reduction in treatment. On the contrary, by the end of the relevant period, the claimant was on 150mg of his medication and on a waiting list for further psychotherapy. We accept the claimant's evidence that the medical condition continued to have a SAE in spite of treatments to the end of the relevant period. We accept that the GP's suggestion on 28 Sep 2022 that the claimant should return to work does not mean that the claimant was no longer suffering a SAE; the comments were made in the context of the well known premise that the longer an employee is off work, the harder it will be for them to return to work. The GP did not stop fit notes or medication at that point.
21. The claimant did not say when in March he started to experience the SAE, and we will take the SAE as starting in the middle of the month of March, that is 15 March 2021. We conclude that from 15 March 2021 to the end of the relevant period, the claimant's impairment had a SAE.

- 22. This leaves the question of when the effect of the impairment became long term. We accept that there was nothing to suggest that, when the claimant started to suffer the impairment in March 2021, it could well be that the effect would continue for at least 12 months. There is nothing in the record of the claimant's first consultation with his GP that suggested the GP thought this was going to be a long term impairment.
- 23. We have found that, by 15 March 2022, the effect of the claimant's impairment had lasted 12 months. On that basis, on 15 March 2022, it had become long term. In principle, there should be a point in time between March 2021 and March 2022 when it became likely that the effect of the impairment would last at least 12 months. Pin pointing when that was is difficult.
 - 23.1 Initially the fit notes were issued for 2 weeks and then 3 weeks. Then they went to monthly in October 2021. We do not consider that issuing one month long fit notes is sufficient on its own to show the effect of the impairment was likely to last at least 12 months. The GP notes do not start to record the condition as long term until 31 March 2022.
 - 23.2 Ultimately, it is for the claimant to prove his case on this. The claimant failed to produce any medical evidence on when the effect of the impairment became likely to last at least 12 months.
- 24. We conclude that we do not have the evidence to determine that there was a date earlier than 15 March 2022 when the effect of the impairment was likely to continue for at least 12 months.
- 25. Accordingly, in relation to the relevant period, we find that the claimant had a disability under the EA by reason of depression and anxiety from 15 March 2022 to 31 January 2023.

**Signed electronically by me
29 December 2023**

Employment Judge Kelly

Signed on: 29 December 2023

Sent to the parties on:

22 January 2024.....
For the Tribunal Office:

.....