



THE EMPLOYMENT TRIBUNAL

Claimant: Mr Ian Escudier
Respondent: Coca-Cola Europacific Partners Great Britain Limited
Heard at: London South Employment Tribunal by CVP
On: 4 December 2023
Before: Employment Judge Martin

Appearances

For the Claimant: In person
For the Respondent: Mr Kendall - Counsel

REASONS

1. The Tribunal gave oral judgment on 4 December 2023. The Judgment however was not promulgated at that time. The Claimant has now asked for written reasons, and I considered it was in the interests of justice for them to be provided.
2. In considering whether the Claimant was disabled due to Cope Syncope and anxiety and depression I have adopted the staged process in determining whether a person is disabled as defined in the Equality Act 2010. The Respondent accepts that the Claimant is disabled due to deafness and tinnitus.
3. The law is as follows: “*a person has a disability if he or she has a physical or mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities*”.
4. In Goodwin v Patents Office 1999 ICR 302 the EAT gave guidance on the proper approach to adopt when applying the DDA’s provisions. This guidance is relevant when deciding matters under the Equality Act 2010. The guidance requires a Tribunal when determining disability to look at the evidence by reference to 4 different questions or conditions.
 - a. Did the Claimant other mental physical impairment?
 - b. Did the activities affect the Claimant's ability to carry out normal day-to-day activities?

- c. was the adverse effect substantial?
 - d. Was the adverse condition long-term?
5. In Wigginton v Cowrie and others t/a Baxter international (A partnership) the EAT held that these four questions should be dealt with sequentially and not together.
 6. In Cruickshank v VAW Motorcast Limited 2002 ICR 729 the EAT held that the time to assess the disability is the date of the alleged discriminatory act. In Richmond adult community college v McDougall 2008 ICR 431 the Court of Appeal held that the date of the discriminatory act is also the material time when determining whether the impairment has a long-term effect.
 7. The burden of proof is on the Claimant to show that he or she has satisfied the definition.
 8. Turning to the four elements of the definition:
 - a. An impairment can be physical or mental. There is no requirement for the impairment to have a specific diagnosis.
 - b. The words "substantial adverse effect" is defined in section 212(1) Equality Act as meaning "more than minor or trivial". Whether a particular impairment has a substantial effect is a matter for the Tribunal to decide. The focus should be on what the Claimant cannot do, or can only do with difficulty as set out in Leonard v Southern Derbyshire Chamber of Commerce 2001 IRLR 19 EAT.
 - c. Appendix 1 of the EHRC Employment Code states that "normal day-to-day activities are activities that are carried out by most men and women on a fairly regular and frequent basis, and gives examples of walking, driving, typing and forming social relationships. Account should be given of how far the activities are carried out on a normal frequent basis. The guidance emphasises that in this context, "normal" should be given its everyday meaning. In Goodwin v Patent Office the EAT considered that there was no need to specify what constitutes a day-to-day activity on the basis that, whilst it is difficult to define, it is easily recognised. In this case the ET stressed that the enquiry is focused on normal daily activities, not on particular circumstances.
 - d. Paragraph 2(1) of schedule 1 of the Equality Act 2010 says that the effect of impairment is "long-term" if it:
 - has lasted for at least 12 months;
 - is likely to last released 12 months; or
 - is likely to last the rest of the life of the person affected.

"Likely" in this context has been defined by the House of Lords in the case of

- SCA Packaging Ltd v Boyle 2009 ICR 1056 as something that is a real possibility in the sense that it "could well happen" rather than something that is probable or "more likely than not".
9. Whether an individual is a disabled person is a legal and not a medical decision. The legal decision is made having regard to the evidence and the medical information before the Tribunal. I had before me the Claimant's GP records going back to 2016. Reference was made by the Claimant about going to BUPA rather than his GP. There are no medical records from BUPA. Any records should have been disclosed so they could be put into the bundle. As they were not, I am not able to take them into account.
 10. With no disrespect to the Claimant, he said he has problems with his memory. For that reason, it is important that I consider the documentary evidence very carefully.
 11. I am considering two impairments. Cough Syncope and anxiety and depression. I have considered them separately.
 12. **Cough Syncope** – this impairment has different symptoms. Dizziness and issues with an arm, which last about 30 seconds and loss of consciousness which is short term but means the Claimant must rest afterwards.
 13. I am looking at the evidence I have at the time of these issues. Not how the Claimant is currently. The only medical evidence is from a neurologist who examined the Claimant in June 2022. This raised the possibility of the Claimant having Cough Syncope. It was formally diagnosed in May 2023 after the termination of his employment.
 14. The Respondent accepts the Claimant has this impairment and that when there is an episode it is very unpleasant for the Claimant. The Claimant's evidence was that he had dizzy spells everyday. It was unclear from his evidence whether he was referring to how he is now, or how he was at the relevant time.
 15. I accept the Respondent's submission that the episodes of dizziness are very short lasting only about 30 seconds and that this does not have a substantial adverse impact on the Claimant's ability to carry out normal day to day activities. Once the dizzy spell is over it appears he can resume his normal day to day activities.
 16. The medical evidence is that the Claimant lost consciousness on about 5 occasions over the course of a year. Whilst I accept that the aftermath of this incident is that the Claimant must rest for a short while, he is then able to continue his normal day to day activities.
 17. I do not find that there is a substantial adverse impact on his ability to carry out normal day to day activities at the relevant time.
 18. I also do not find that at the relevant time that the condition was long term. I do

not accept that the Claimant would have lost consciousness and not gone to see his GP or seek other medical help. This is something so out of the ordinary that medical assistance would inevitably have been sought if it had happened earlier.

19. There is no medical evidence to suggest that it was likely to last more than twelve months. It is not a medical condition I am familiar with, and I would expect there to be evidence about this but there is none.
20. I do not find cough Syncope to be a disability as defined in the Equality Act 2010.

Depression and anxiety

21. The Claimant was absent from work for five months from February 2022 to July 2022 with depression and anxiety. In this period, I find that the impairment had a substantial impact on the Claimant's ability to carry out his normal day to day activities.
22. Before me are medical notes from 2016. Up to this time (February 2022) there is no reference to the Claimant being depressed or anxious although he says it is a long-term problem.
23. The Claimant returned to work and from the return-to-work documentation he is telling his employer that he is now well. After a two-month phased return he was able to return to full duties and working his usual shifts.
24. The Respondent accepts that the Claimant has or had this impairment. It disputes whether, after the Claimant returned to work it had a substantial adverse impact on his ability to carry out his normal day to day activities and whether it was long term.
25. I accept that there is a lead up to the moment when a person with depression and or anxiety will contact his or her GP. I therefore accept that the Claimant's symptoms are most likely to have started in the weeks before he saw his GP in February 2022. My concern is what happened when the Claimant returned to work. The documentary evidence is that he was coping well with his work and his day-to-day interactions in the workplace. He does not say in his impact statement how depression and anxiety affects him in his normal life. He is focussing on his work environment. Many of the matters he refers to in the work environment relate to his deafness/tinnitus, which the Respondent accepts are disabilities. It is striking how little there is about his mental impairment. The document prepared on the Claimant's behalf by Mr Sater does not assist to any great degree.
26. It may well be that the Claimant was experiencing symptoms after he returned to work. However, he has not been able to describe how this affected his normal day to day activities outside the time he was signed off work.
27. I have great sympathy for the Claimant, and it is with some reluctance that I

have to come to the conclusion that on the evidence I have before me, I do not find that at the relevant time the Claimant was disabled. I am aware the Claimant was prescribed Citalopram, and he is still taking it. I am not a medical expert so it would not be appropriate for me to guess at what the effect would be if the Claimant was not taking this medication. There is no medical evidence in the bundle, so this is something I am unable to consider.

28. The full merits hearing will consider the Claimant's disability discrimination claim in relation to deafness and tinnitus only.

Employment Judge Martin
Date: 5 February 2024

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