



EMPLOYMENT TRIBUNALS

Claimant

Mr P Copley

v

Respondent

London Warrant Enforcement Limited

Heard at: London Central (via CVP)

On: 26 February 2024

Before: Employment Judge Fredericks-Bowyer

Appearances

For the claimant: Mr Medlock (Lay Representative)

For the respondent: Mr Barry (Counsel)

RESERVED JUDGMENT ON PRELIMINARY ISSUE

The claimant was disabled by symptoms associated with fibromyalgia during the time of his employment at the respondent (between 29 September 2022 and 30 May 2023).

REASONS

Introduction

1. This is my reserved judgment following a morning hearing to determine whether or not the claimant was disabled during the course of his employment.
2. The claimant was employed as an Enforcement Officer by the respondent from 29 September 2022 to 30 May 2023. The claimant alleges that the respondent discriminated against him by not making adjustments to his role and for something arising from his disability. His claimed disability is fibromyalgia and the symptoms that it causes.

3. The claimant was represented at the hearing by Mr Medlock, and gave evidence himself in support of his contention that he was disabled. His evidence was challenged through cross examination by Mr Barry, the barrister representing the respondent. Each party then made submissions in support of their position.
4. I had access to a bundle of documents which ran to 58 pages. Page references in this judgment refer to page numbers of that bundle.

Issue to determine

5. The case was managed on 13 December 2023 by Employment Judge Segal KC, who listed this hearing today. The only issue for this hearing is whether, during the course of his employment, the claimant was disabled as defined by section 6 Equality Act 2010.

Relevant law

6. A person (P) has a disability they meet the criteria set out in section 6 Equality Act 2010:-

“(1) 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 do normal day to day activities.”*

7. The claimant bears the burden of showing me that he meets this definition, on the balance of probabilities (Morgan v Staffordshire University [2002] IRLR 190). When determining the question of disability, I must take account of such guidance as I think necessary (paragraph 12, Schedule 1 Equality Act 2010). I consider it is necessary to take into account the government guidance “*Guidance on matters to be taken into Account in Determining Questions Relating to the Definition of Disability*” (“**Guidance**”). Such guidance is guidance only and should not be taken too literally or used to adopt a checklist approach (Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19).
8. In Goodwin v Patent Office [1999] ICR 302, it was held that there are four limbs to the definition of disability and this is reflected in the legislation:-
 - 8.1. Does the person have a physical or mental impairment?
 - 8.2. Does that impairment have an adverse effect on their ability to carry out normal everyday activities?
 - 8.3. Is that effect substantial?
 - 8.4. Is that effect longterm?
9. The term ‘substantial’ is defined under s212 Equality Act 2010 as being “*more than minor or trivial*”. These terms are not synonymous, and it might be that an impairment is found to have a more than trivial effect, but still not a minor one (Anwar v Tower Hamlets College EAT 0091/10). Greater clarity is offered by an Employment Appeal

Tribunal chaired by Langstaff J in Aderemi v London and South Eastern Railway Limited [2012] UKEAT/316/12:

“unless the matter can be classified with the heading “trivial” or “insubstantial”, it must be treated as substantial”.

10. Normal day to day activities are things people do on a regular basis such as shopping, reading, writing, conversing, getting washed and dressed, preparing food, eating, carrying out household tasks, walking and travelling, socialising and working (Guidance, D2 to D9). Normal day to day activities must be interpreted as including activities relevant to professional life (Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763). I must focus on what the claimant could not do, or could only do with difficulty, when considering this question (Elliot v Dorset County Council [2021] IRLR 880 EAT).

11. Paragraph 2(1) Schedule 1 Equality Act 2010 says:-

“(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 at 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 everyday activities, it is to be treated as continuing to have that effect if that effect is likely to recur.”

12. For current impairments which have not lasted 12 months, I should decide whether the substantial adverse effects of the condition are likely to last for at least 12 months, where ‘likely’ is defined as “could well happen” (C3 Guidance). ‘Could well happen’ is the meaning of ‘likely’ in respect of disability in the Equality Act 2010.

13. The issue of how long an impairment is likely to last is determined at the date of the alleged discriminatory act and not the date of the tribunal hearing (McDougall v Richmond Adult Community College [2008] ICR 431, CA). Subsequent events should not be taken into account.

14. An impairment is treated as having a substantial adverse effect if it ‘could well happen’ that the substantial adverse effect could occur if the person who may be disabled stopped implementing supportive or preventive measures, such as medical treatment (SCA Packaging Limited v Boyle [2009] ICR 1056).

Findings of fact

15. The relevant facts, as I find them on the balance of probabilities, are as follows. There is no conflict in the facts because the claimant alone has presented evidence. My findings are based on my assessment of the evidence given. The claimant was employed from 29 September 2022 to 30 May 2023. This is the period of time I am focusing on.

16. The claimant was diagnosed with fibromyalgia in 2020. He had experienced symptoms of being 'run down' and 'tired' for years leading up to the diagnosis. The claimant says, and I accept, that in that period prior to diagnosis he would have 'flare ups' which led him to spend days in bed with pain and flu symptoms (but without a runny nose). The claimant says, and I accept, that these flare ups have continued to arise despite medication and throughout his experience of the impairment to the present day. Naturally, I find that these flare ups did affect the claimant during the course of his employment. I also consider that the condition is managed but not resolved by medication, and the claimant would be in even greater difficulty if he was not medicated.
17. The claimant says, and I accept, that his impairment led him to consider that he was unable to do a regular employed job due to the periodic symptoms experienced which rendered him unable to work. For this reason, he chose to become self-employed. The claimant says that this issue was ameliorated by his medication but on a bad day he would choose to work from home rather than do any physical work. This is how he needed to work when working at the respondent.
18. The claimant struggled to reference his responses to questioning into the time frame of his employment. His responses tended to begin in 2020 and then meander through to the present day very quickly. The claimant presented a lot of evidence about his deteriorated condition now. One persistent feature, the claimant says as a result of fibromyalgia, has been brain fog. The claimant said that this affected him during his employment. This meant that the claimant needed to write messages and notes for himself. His wife did the cooking for the family because of his lack of concentration, but where the claimant needed to do that, he would use written instructions. He also said that the condition and symptoms affect him socially because his friends "*were never sure of the Perry they were going to get*".
19. The claimant provided two pieces of documentary evidence to support his contention that he was disabled –
- 19.1. The first is two pages of a Personal Independence Payment letter from 9 May 2023. This assessment corresponds with the time of employment. The assessment awarded the claimant '2 points' for the category "preparing food". It awarded no points for 'eating and drinking' and 'managing your treatments'. The claimant did not provide the rest of the document and is unsure what other points he was awarded. He was awarded the standard rate of PIP. He thinks that he was awarded 'a couple of points less' than the previous time, but is not sure what for. He cannot remember what caused him to be awarded 2 points for "preparing food".
- 19.2. The second is a letter from his GP setting out that the claimant was diagnosed in 2020 and that he is prescribed duloxetine 30mg per day. It also says he has a history of depression, diabetes and gout. He has been referred for an ADHD assessment. The claimant described a persistent history of poor memory, poor concentration and finding it difficult to complete tasks.

Conclusions

Does the claimant have a mental or physical impairment?

20. It is accepted that the claimant has fibromyalgia, which comes with both mental and physical symptoms.

Does that impairment have an adverse effect on their ability to carry out normal everyday activities?

21. I have found that the claimant's impairment was the subject of flare ups throughout his employment which could be so debilitating that the claimant would need to be in bed for significant periods of time. He is necessarily unable to carry out normal everyday activities during those flare ups.

22. Outside of those times, in an effort to manage the condition, the claimant adapted his working habit so that he took self-employed ones which allowed some control over his working. I consider that this was action taken because holding down a regular job was impossible or, at least, extremely difficult in the period of the claimant's employment.

23. At the same time, the claimant also struggled with 'brain fog' and concentration which meant that he could not do simple tasks as might be expected, without support. In particular, the claimant mentioned not being able to cook meals without support (and he qualified for PIP on this ground), not shopping alone for risk of forgetting something, and not managing accounts because it was difficult to do so.

Is that adverse effect substantial?

24. Mr Barry submits that the claimant's description about needing support for cooking and organisation is some way beneath 'minor' and would not justify a finding of disability. I would agree if those were the only effects of the impairment. Those issues are found together with chronic pain and flare ups of fatigue which were present even with medication.

25. In my judgment, the adverse effects found in the paragraphs above cannot be categorised as 'trivial' or 'insubstantial'. The condition affects all aspects of the claimant's life, and has done since diagnosis. It rendered him unable to take part in any form of everyday life during episodes of flare up. The adverse effect is, in my view, substantial, and has been throughout the period of employment.

Is that adverse effect long-term?

26. Fibromyalgia is a permanent condition without cure. The substantial adverse effect for the claimant is long-term.

Overall conclusion and consequences

27. At the time of his employment, the claimant fulfilled the requirements set out by section 6 Equality Act 2010. He was disabled, and therefore does have the standing

to bring his claims for failure to make reasonable adjustments and discrimination arising from a disability.

28. The claim proceeds to trial on 22, 23 and 24 April 2024.

Employment Judge Fredericks-Bowyer

Date: 27 February 2024

Sent to the parties on:

11 March 2024

For the tribunal office: