



EMPLOYMENT TRIBUNALS

Claimant: Mr Martin Lovett

Respondent: Master Butchers Epsom Ltd

Heard at: London South, by CVP

On: 23 April 2024

Before: Employment Judge Rice-Birchall

Representation

Claimant: In person

Respondent: No appearance

JUDGMENT

1. At the relevant times the claimant was a disabled person as defined by section 6 of the Equality Act 2010 because of depression and anxiety.
2. The complaints of failure to make reasonable adjustments and harassment can therefore proceed.
3. The hearing listed for **15, 16 and 17 May 2024** will go ahead as listed.

REASONS

The hearing

1. This hearing was listed for the Tribunal to determine whether or not the claimant was a disabled person within the meaning of the Equality Act 2010. The parties were notified of the hearing on 23 January 2024.
2. The respondent failed to attend the hearing. The clerk called the respondent twice and emailed. Someone at the respondent said they would assign someone new to the case, but no one attended or contacted the Tribunal. They were told the hearing would start at 1030am.
3. The Tribunal decided to proceed in the absence of the respondent under rule 47 of the Employment Tribunal Rules which allows the Tribunal to proceed with the hearing in the absence of a party, having considered any information which is available to it and after reasonable enquiry.

The evidence

4. The Tribunal had the benefit of some limited medical evidence which the claimant had sent into the Tribunal and also heard oral evidence from the claimant.

The findings of fact on the balance of probability

5. The claimant relies on depression and anxiety.
6. The claimant has suffered with his mental health, on and off, all of his life but was diagnosed with depression in his late teens/early twenties, around 2000. He recalls having low moods as a child for no apparent reason. As a young adult, the claimant's symptoms became unbearable. Things would happen to him which should not have been insurmountable, but his depression would not allow him to deal with them.
7. Sometimes he manages to function relatively normally, but at other times, when he is having a depressive "episode" he cannot. If anything, stressful happens, that is likely to be a trigger for a depressive episode. He describes the episodes as occurring irregularly but with some frequency.
8. When he has an episode, the claimant is very tired and sleeps for 13-14 hours each day. He has mood swings. In those times, anything beyond necessity is too much and he cannot work. The claimant says he has trained himself over the years to be able to do "the basics". He can look after the children and keep the house tidy, but working is out of the question, particularly as the anxiety makes his handshake. As a butcher he cannot therefore work as it is too dangerous.
9. Though he is able to do the basics, those basics are done with great difficulty. He would also need to gear himself up to perform everyday tasks such as the dishes. The claimant becomes tired very quickly as he is forcing himself to do things he doesn't want to do. At the end of the day his whole-body aches with the effort of performing minor tasks.
10. The claimant also described that he would be unable to get on a train during an episode and would have to "steady himself" for over an hour before an activity such as taking the children to the park.
15. There is no hard and fast rule over how regularly the claimant will have an episode and be unable to work, or over how long the episode will last. By way of example, the claimant did not have any time off two years ago but needed three weeks off a year ago. He is currently signed off sick from work and has been for the last five months. This is typical of the pattern that has recurred over the years.

Medical history

16. The claimant's medical records first refer to depression in 2005.

17. In June 2010, the doctor has written: “He has been feeling low for the last 3 weeks, not sleeping well. PMH od depression 5 years ago was on antidepressant, started him on Citalopram.”
18. In February 2011 the doctor has written: “History of recurrent depression. Been feeling low last few months. Acutely exacerbated by recent events.... Can't remember last time he ate or slept (in last 4 days as opposed to longer term). Has had counselling in the past with good effect – feels he desperately needs some form of talking therapy again. Citalopram helped in the past – restarted today.”
19. The medical records show that he consulted the doctor again in November 2014 when the claimant reported, inter alia, trouble concentrating; thoughts that he would be better off dead or of self-harming; feeling a failure; and feeling down depressed and hopeless.
20. The claimant does not often see his doctor as there is nothing they can do, other than prescribe medication and/or therapy. He has taken citalopram in the past, but is currently taking mirtazapine, which was prescribed approximately three years ago. He is unsure of the effect of the medication. He has also tried therapy, including Cognitive Behavioural Therapy. The claimant's condition is a lifelong condition from which he will always suffer.

The law: Disability Discrimination: is the claimant disabled?

21. S6 EqA 2010 [The burden of proof is on a claimant to show that;]
 - (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.
22. Schedule 1, para 2 EqA 2010 Long-term effects
 - (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 day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
23. Recurring condition: Likely to recur means' that 'it could well happen' (para C3 of the Equality Act 2020 Guidance). The Guidance (para C6) states that the effects are to be treated as long term if they are likely to recur beyond 12 months after the first occurrence (see para C6). The example is given of a young man with bipolar affective disorder, a recurring form of depression. His first episode occurred in months one and two of a 13-month period. The second episode took place in month 13. This will satisfy the requirements of the definition of disability in respect of the meaning of 'long-term' because the adverse effects have recurred beyond 12 months after the first occurrence and are therefore treated as having continued for the whole period.

24. By contrast, the Guidance gives an example of a woman who has two discrete episodes of depression within a ten-month period. Even though she has experienced two episodes of depression, she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression that is likely to recur beyond the 12-month period. However, if there was evidence to show that the two episodes did arise from an underlying condition of depression the effects of which are likely to recur beyond the 12-month period she would satisfy the long-term requirement.
25. In **Swift v Chief Constable of Wiltshire Constabulary** 2004 ICR 909, EAT, the EAT emphasised that the question for the tribunal is not whether the impairment itself is likely to recur but whether the substantial adverse effect of the impairment is likely to recur. It suggested that four questions should be asked:
- a. Was there at some stage an impairment which had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?
 - b. Did the impairment cease to have such an effect and, if so, when?
 - c. What was the substantial adverse effect?
 - d. Is that substantial adverse effect likely to recur?
26. The likelihood of the recurrence of a disability must be assessed at the date of the act of discrimination, and the tribunal must disregard recurrences that take place after the alleged discriminatory act (**McDougall v Richmond Adult Community College** [2008] IRLR 227).
27. In **Sullivan v Bury Street Capital Ltd** [2021] EWCA Civ 1694, although the tribunal found that there was a substantial adverse effect on the employee's ability to carry out normal day-to-day activities during episodes lasting from May to September in 2013 and from April to July in 2017, the Court of Appeal held that it was entitled to find that in neither case was it likely that the substantial adverse effect would continue for at least 12 months or recur so as to constitute a substantial and long-term adverse effect within the meaning of the EqA 2010.
28. Schedule 1, para 5 EqA 2010: Effect of medical treatment:
- (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 and the use of a prosthesis or other aid.
 - (3) Sub-paragraph (1) does not apply— (a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed; (b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

29. Substantial adverse effect/ day to day life: the word substantial means more than minor or trivial (s212 EqA 2010).
30. The activities affected must be "normal". The Guidance states at paragraph 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."
31. Timing of assessment: the time at which to assess disability is the date of the alleged discriminatory act (**Cruickshank v VAW Motorcast Ltd** 2002 ICR 729, EAT). This includes the question of how long an impairment is likely to last (**McDougall v Richmond Adult Community College** 2008 ICR 431, CA), which should also be determined at the relevant date rather than the date of the tribunal hearing. Anything that occurs after the date of the discriminatory act will not be relevant (Equality Act 2010 Guidance, para C4).
32. Impairment: In the case of **J v DLA Piper** 2010 ICR 1052, EAT, the EAT identified the correct approach to determining disability; (para 40) Accordingly in our view the correct approach is as follows:
- (1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.
 - (2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para. 38 above, 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 to consider the question of impairment in the light of those findings.
 - (3) These observations are not intended to, and we do not believe that they do, conflict with the terms of the Guidance or with the authorities referred to above.

Conclusions

33. The Tribunal reminds itself that the relevant date for the purpose of this assessment is December 2022 when the claimant faced disciplinary proceedings.

Impairment

34. The claimant has a mental impairment of depression and anxiety. This is evidenced by the claimant's medical records which show depression in 2005; 2010; 2011 and 2014. Whilst there was no reference to anxiety in the medical records, the claimant's evidence that anxiety was a mental impairment was accepted, as he explained that he becomes anxious when

taking the children to the park or when taking a train journey, and that he cannot work because his hands shake.

Adverse effect

35. The effect of the claimant's anxiety and depression on his day-to-day activities is a substantial adverse effect. The anxiety and depression are considered cumulatively as they go hand in hand.

36. During a depressive episode, working becomes impossible: anxiety makes his hands shake and he is unable to catch a train. He sleeps 13-14 hours per day. Whilst he has learnt to function on a day-to-day basis, he needs to push himself every day to perform normal day to day activities such as washing up. Those activities make him exhausted. He is unable just to go to the park with the children as it would take him over an hour to prepare himself for the trip.

37. The Tribunal concludes that that is a substantial adverse effect on the claimant's day to day activities.

Medication

38. The claimant has tried a number of different medications, including citalopram, which he said did not suit him. He is currently on mirtazapine.

Long term/recurring

39. The claimant's condition is a recurring condition which has a substantial adverse effect during depressive episodes and those episodes are likely to recur, as they have over a number of years.

40. At various times, the claimant's depression and anxiety has had a substantial adverse effect on the claimant's ability to carry out normal day to day activities. This includes in 2005; 2010; 2011; and 2014. Although there is no specific evidence as to recurrences during the period 2014-2023 the Tribunal is satisfied that the claimant's evidence that the episodes recur irregularly but frequently is accepted. In particular, he was prescribed mirtazapine around three years ago.

41. In between depressive episodes the claimant can function relatively normally.

42. The Tribunal finds that the substantial adverse effect is likely to recur, as it already has done on numerous occasions throughout the claimant's life and that these episodes are part of an underlying condition of depression that is likely to recur beyond the 12-month period.

Employment Judge Rice-Birchall

Date: 23 April 2024

JUDGMENT & REASONS SENT TO THE PARTIES

ON

2nd May 2024

P Wing

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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