



EMPLOYMENT TRIBUNALS

Claimant: Mr P Cox
Respondent: Harland & Wolff (Appledore) Limited

Heard at: Exeter by Video On: 10 April 2024

Before: Employment Judge Smail

Representation
Claimant: In Person
Respondent: Miss F Maclellan (Solicitor)

RESERVED JUDGMENT ON THE PRELIMINARY ISSUE OF DISABILITY

1. At all material times the Claimant was disabled within the meaning of the Equality Act 2010 with sleep apnoea. This was a recurrent condition leading to severe fatigue interfering with the normal day to day activities of living including working.
2. The extent to which this disability is relevant to the issues for the full merits hearing is a matter for the Tribunal conducting that hearing.
3. The time for exchanging witness statements for the full merits hearing is extended by 1 week only to 12 June 2024

REASONS

1. By a claim form presented on 31 July 2023, the claimant claims disability discrimination. He was employed by the respondent at the Appledore ship building yard as a Welding Engineer between 14 November 2022 and 10 March 2023, a period of nearly four months. He does not have the two years required to claim unfair dismissal. He was dismissed for capability based on attendance. He was off work from 28 November 2022 – 22 January 2023

owing to flu, a period of eight weeks. He was off for one day on 15 February 2023, the reason given being a need to rest. He was off between 20 – 24 February 2023 owing to covid. The attendance at the beginning of his employment was therefore most unfortunate. The respondent decided simply to terminate the employment.

2. The claimant needs to have been a disabled person as a precondition to claiming disability discrimination.
3. The claimant was asked to nominate the disabilities alleged at a preliminary hearing in front of Employment Judge Self on 14 November 2023. He nominated:
 - a. obstructive sleep apnoea
 - b. rhinitis medicamentosa (nasal congestion)
 - c. asthma
 - d. diabetes
 - e. long covid.
4. We have also looked at whether flu could be contended as a disability.
5. Since that preliminary hearing, and in the days and weeks leading up to this preliminary hearing in public, the claimant has sought to add dyslexia to the list of disabilities. He in effect applies for an amendment to add that to the claim.
6. I decline to allow the claimant to add in dyslexia. Whilst he asserts the condition, he provides no professional or other satisfactory evidence confirming his dyslexia. Fundamentally, dyslexia is in no way related to the absences for which he was dismissed. So even if he were dyslexic, that would not be relevant.

The Law

7. Disability is defined by Section 6 of the Equality Act 2010:
 - (1) There needs to be a physical or mental impairment.
 - (2) The impairment needs to have an adverse effect on the ability of the claimant to carry out normal day-to-day activities.
 - (3) The adverse effect needs to be substantial which means more than minimal or trivial.
 - (4) The adverse effect has to be long-term.
8. Long-term is defined in Schedule 1 of the Act at paragraph 2. The effect of an impairment is long-term if -
 - a. It has lasted for at least twelve months.
 - b. It is likely to last for at least twelve months.
 - c. It is likely to last for the rest of the life of the person affected.

Findings of Fact relevant to the preliminary issue

9. When the claimant applied for this job he filled in a health questionnaire. He was asked a series of questions about relevant medical conditions. He denied having any relevant medical condition by ticking the 'no' boxes in respect of all the listed conditions. This he did on 9 November 2022. If he had any relevant medical condition, this form therefore did not put the respondent on notice of it.
10. For the absence of 28 November 2022 – 22 January 2023 the claimant provided sick notes saying "influenza", "confirmed influenza", "influenza, long recovery". Long recovery is to be understood as a long recovery from influenza. In emails to the respondent, he talked about having "long flu" like "long covid".
11. He attended an absence review meeting on 17 January 2023. The claimant was recorded as saying that he understood there were quite a lot of cases taking twelve weeks to recover from flu, like long covid. He did not want to risk getting pneumonia, he still had pain in the chest and his breathing was not clear. He still had an infection on the lungs and there is a reference to him not using an inhaler.
12. He was asked to come to an important meeting on 23 and 24 January 2023, he said he would attend.
13. He was asked whether his doctor felt that the illness had left anything which might re-occur. He answered no. It was a viral matter recovery from which was taking a while to get over. Further rest was envisaged as likely.
14. The claimant then worked from 23 January – 14 February 2023, and then from 16 February – 17 February 2023. From 20 February 2023 he was off with covid up to and including 24 February 2023.
15. He returned to work on 27 February 2023 and worked until 3 March 2023 when he was given one week's notice of dismissal with no requirement to attend work.

Influenza

16. The period of flu therefore was 28 November 2022 – 22 January 2023. In my judgment it fails the definition or test of disability because at the relevant times of the claimant's employment, the effects of it were not likely to last at least twelve months. It was not likely to last longer than the eight weeks the period of recovery had taken.

Covid

17. The same goes for the covid period. The claimant does not establish that he had long covid over and above the period of his absence, that is to say one week. The covid also fails the definition or test for disability in that at the time of the dismissal, it was not likely that the adverse effects of covid would last twelve months. The effects lasted no more than the five days assuming that there were relevant adverse effects.

18. We have a message sent by the claimant at the end of the period of covid. The claimant informed the respondent he had been speaking to the doctor about returning to work. He was still covid positive but feeling pretty good compared to the flu he had. He was envisaging returning the following Monday. He was still complaining of shortness of breath.

Diabetes

19. In May 2023, the claimant was diagnosed with Type 2 diabetes. He tells me that back in 2017 he did have one relatively high sugar reading in a blood test; diabetes was not diagnosed however till May 2023. It is possible of course that he was diabetic in March 2023 as well. He may have been pre-diabetic equally. There is no evidence of any substantial adverse effect on normal day to day activities, however. He was not disabled at the relevant time with diabetes.

Sleep Apnoea

20. The Claimant has suffered from sleep apnoea at latest from May 2017. The earliest references in the medical notes are to 2009, albeit without any detail. There are GP entries relating to May 2017 and subsequently where drowsiness at work was affecting his ability to work. In October and November 2018 here are fit notes for fatigue secondary to obstructive sleep apnoea. Altered hours and duties were recommended. On 27 November 2019 his GP wrote an ENT referral mostly for tonsillitis but recording the Claimant had a significant history of obstructive sleep apnoea. He was noted to have large obstructive inferior turbinates, a long uvula and a crowded oropharynx. The Claimant has been obese for a long time. In November 2018 his BMI was 40. He has regularly been advised to lose weight. There is no evidence that this has been achieved. He regularly suffers from shortness of breath.
21. He has long been provided by a CPAP machine. He has regularly resisted using it because of mask discomfort.
22. I am satisfied on the balance of probability that the Claimant's sleep apnoea amounts to a recurrent disability which has a substantial adverse effect on normal day to day activities. On a recurrent basis it has prevented him from functioning during the day, whether working or otherwise. He has periodically not been able to attend work. He has been unable to concentrate. He has been prone to fall asleep. The impairment has lasted on and off for more than 12 months.

Asthma

23. The Claimant had asthma as a child and was prescribed inhalers. It set in when he was 13. It has been asymptomatic for much of his life. Asthma has been re-diagnosed from May 2023. He has been re-prescribed inhalers. During his employment the Claimant does not prove that asthma played any role. I wondered whether it might have contributed to the extended recovery from 'flu. There is no medical support for that view in the medical records, however. So the Claimant has been historically disabled with asthma (why else the inhalers) but there is no evidence that the historic disability played any role during this employment.

24. I see that the Claimant had suspected tuberculosis in March 2019. Breathing challenges are indeed a theme. Sleep apnoea is part of that.

Rhinitis

25. There is a reference to congested nose in the GP records for July 2017. At that point he had not been working for 2 months because of persistent fatigue. He had been through several steroid nasal sprays without benefit.
26. It seems that the rhinitis does not add anything to the fatigue associated with sleep apnoea. It might be part of it. It does not seem independently to interfere with normal day to day activities. I do not find that rhinitis is an independent disability. It is part of the sleep apnoea.

Obesity and Smoking

27. There are references to a BMI of 40 and historic references to smoking 40 a day. The Claimant has been a smoker for 30 years. He stated he was on 8-10 a day in May 2023. These factors provide context for the sleep apnoea and resulting fatigue.

Employment Judge Smail
Date 12 May 2024

JUDGMENT & REASONS SENT TO THE PARTIES
21 May 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.