



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Collins

**Respondent:** Everest 2020 Limited

**HELD AT:** Cardiff (In public; via CVP)      **ON:** 3<sup>rd</sup> April 2024

**BEFORE:** Employment Judge Anderson

## REPRESENTATION:

**Claimant:** In Person

**Respondent:** Mr Charity (HR Consultant)

# JUDGMENT

1. The Claimant was not a disabled person within the meaning of s.6 Equality Act 2010 in the relevant period of March 2023.
2. His claim of failure to make reasonable adjustments is not well-founded and is dismissed.
3. All other claims remain and will continue to a full hearing.

Following Judgment being delivered orally at the hearing, written reasons were requested. These written reasons are therefore provided in accordance with Rule 62(3) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

# REASONS

## Introduction

1. This is my Judgment in respect of the Public Preliminary Hearing that took place before me today.
2. The issues for determination today had been previously defined at a preliminary hearing in February. The issues previously identified for determination were as follows:

Did the claimant have a disability as defined in the Equality Act 2010 when the alleged discrimination happened? In particular:

- (a) did they have a physical or mental impairment;
  - (b) did the impairment have a substantial adverse effect on their ability to do normal day-to-day activities;
  - (c) if not, would the impairment have had a substantial adverse effect on their ability to do normal day-to-day activities if they had not had medical treatment; and
  - (d) had the substantial adverse effect already lasted 12 months or was it likely to?
3. The above issues arise in the context of a claim for unfair and wrongful dismissal that is already listed for hearing in May 2024. The Claimant does not claim his dismissal was discriminatory and those points are separate from the disability claim. In respect of disability discrimination he relies upon a single PCP regarding being prevented from a flexible return from sick leave and the adjustment of being allowed to have a staged return. On any analysis this is a discrete claim and most relevant to today's purposes a particularly discrete period for considering whether the Claimant was a disabled person.
  4. At the outset, I discussed with the parties what the 'relevant period' was in this matter. The earliest date by which a reasonable adjustment could have been made was the start of March 2023. The Respondent says that on the specific facts there was only a narrow window in the month of March which

adjustments could be made as other events (which ultimately are part of the unfair dismissal claim) took over. The Claimant's position was that adjustments could have been made up to the point he lost his job in July.

5. I decided to construe this point broadly. It is the Claimant's case and I would therefore look at the broadest period on the basis of the claim that he wished to put forward. This does not however require an 'all or nothing approach' – it is still for the Tribunal to make a finding as to whether the Claimant has proven he was disabled at any point within that period. I have determined the correct relevant period below.

### **Procedural Matters**

6. The hearing took place by way of CVP.
7. The Claimant gave sworn evidence based on his disability impact statement. He was cross-examined. As he was unrepresented, he was then given an opportunity to clarify anything that needed to be clarified following his evidence
8. There was a bundle of documents before me which included the Claimant's GP history and correspondence from his GP and MIND.

### **Facts**

9. I made the following findings of fact on the balance of probabilities. I have sought only to make findings in respect of the questions before me. I have attempted wherever possible to not stray into questions relevant to the full hearing, however the chronology of events regarding the Claimant's potential return to work in March 2023 is inevitably related to the claim that is being made for reasonable adjustments and the need to identify the relevant period for the purposes of establishing disability for the purposes of s.6 Equality Act 2010.
10. I accept the Claimant's evidence that in December 2022 he began to have difficulty sleeping and also had periods of anxiety during the day. It was his hope at the time that the Christmas break would resolve the issues. He describes the situation as getting worse in January 2023 and he sought medical advice on 1<sup>st</sup> February 2023. He was signed off work for four weeks. The diagnosis on the fit note states "Delayed Bereavement Reaction."
11. The Claimant saw his GP on the 22<sup>nd</sup> February. The Claimant was undertaking a course of Cognitive Behavioural Therapy "CBT". This was beneficial to the Claimant. It was the view of the GP and the Claimant that he could return to work from the 1<sup>st</sup> March 2023 on a phased return basis.

12. The Claimant did not return to work. It is the Respondent's case that on the 23<sup>rd</sup> February, Mr Wilson reported 22 performance and conduct issues to the Managing Director.
13. The evidence provided to me regarding this period is limited. It is right to say that the Claimant wished to have a phased return and it is right to say that the Respondent did not grant this. Based upon the ET 3, the Respondents position is that it was investigating the allegations.
14. On the 10<sup>th</sup> March 2023, the Claimant received an email from the Respondent. That email referenced discussing a phased return but also referenced possible performance and conduct issues and also possible redundancy.
15. I make no findings on the timing of the allegations against the Claimant, the range of points raised or the provenance of any of the points. These are all matters for the full hearing.
16. A Teams meeting took place on the 14<sup>th</sup> March with the Claimant. One of the issues to be discussed was a phased return. At least ostensibly by this date, a phased return was still theoretically possible. The meeting also discussed the other points raised by the 10<sup>th</sup> March correspondence.
17. By the 15<sup>th</sup> March, the Respondent's position with regard to a phased return had solidified and it was not providing for a phased return.
18. Up to the 15<sup>th</sup> March 2023, I find that the Claimant's symptoms were variable. I consider this in more detail as part of my conclusions below.
19. From the 25<sup>th</sup> April 2023 the Claimants fit notes refer to 'stress at work'. Prior to that, the notes reference bereavement. However, it is clear from the documents provided by both Mind and the GP together with the Claimant's medical records that the 'stress at work' started in early March when the Claimant was unable to return to work, coupled with the fact of allegations against him and the possibility of a redundancy situation and that from this point this was causative of the Claimant's absence.
20. Further processes then ensue, including the raising of a grievance by the Claimant. Ultimately, the Claimant was dismissed with an effective date of termination of 17<sup>th</sup> July 2023. I have deliberately not made findings of fact as

to the chronology of events in this period and the limited nature of the disability discrimination claim.

### **The Law**

21. It is the Claimant's burden of proof to prove that he is a disabled person within the meaning of s.6 Equality Act 2010.

22. Section 6 Equality Act provides:

#### **Disability**

(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.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect.

#### **Schedule 1 – Part 1 of the Equality Act 2010 Provides**

2(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.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

23. I also have had regard to the EHRC Guidance on matters to be taken into account in determining questions related to the definition of disability.

24. Over the years there has been significant case law with regards to the definition of disability. A number of points are now settled in law.

25. Substantial is to be taken as meaning "more than minor or trivial".

26. In SCA Packing v Boyle [2009] IRLR 746 the House of Lords held that in considering whether an impairment is "likely" to recur, "likely" means "could well happen".

27. In J v DLA Piper UK Ltd [2010] IRLR 936 Underhill P considered the nature of reactive mental illnesses and how they related to the definition of disability.

28. It is essential that each case is judged on its own facts rather than viewing the facts within individual case law as a prescriptive set of rules or absolutes.

## **Conclusions**

29. Turning firstly to the issue of impairment, the Respondent invites me to note the change in medical diagnosis from initially the reaction to bereavement and then as stated in the subsequent fit notes as 'stress at work'.

30. I do not accept this submission. It is clear that there is a common thread, which is the Claimant's adverse reaction to events. There is no need for the impairment to be clinically well recognised.

31. I find that the Claimant did have an impairment. It was a mental impairment. The label of that impairment differed on different weeks. Essentially, the Claimant has had a series of adverse reactions to life events. Initially, this was due to bereavement and subsequently this was caused by adverse events at work.
32. The Claimant had CBT treatment which improved the initial period of reaction. This is a treatment and the effect of this treatment must be discounted for the purposes of assessing whether the Claimant was disabled at the relevant time.
33. I find that the CBT treatment did assist the Claimant to some extent and in relation to the specific challenge that he was facing at that time, namely bereavement. I base this on the oral evidence of the Claimant. If the Claimant did not have this treatment then it is likely that his symptoms would have persisted for a longer period. I do not have any specific evidence placed before me as to what would have happened had the CBT not been undertaken.
34. In terms of chronology however, I do see from the Mind letter that the Claimant referred himself for CBT again one month following completion of the previous course of CBT. This letter reports the main stressor being 'harassment and stress being applied by the management of his employment and also refers to a refusal to allow a phased return. This is supportive of the situation being a reactive one. This also causes difficulty for the Claimant as it describes one of the causes of his subsequent symptoms as being the refusal of a phased return. I.e. the symptoms occur after the basis for the claim.
35. The GP letter is also supportive of the same chronology. It refers to a review on the 1<sup>st</sup> February 2023 and undertaking CBT. It then refers to a review on the 22<sup>nd</sup> February 2023, referencing good progress being made. The letter indicates that the GP is supportive of the Claimant being able to do a phased return.
36. There are then references to reviews on the 14<sup>th</sup> and 27<sup>th</sup> March, referencing problems with a phased return and the possibility of redundancy or a performance review.
37. By the 27<sup>th</sup> March, his symptoms had deteriorated and the Claimant was again suffering what the GP describes as physical symptoms including panic and anxiety.

38. I pause to note at this point that, beyond the CBT treatment, no wider medication was prescribed within the relevant period. Subsequent to the relevant period, the Claimant was prescribed medication – I am not permitted to take this later event into account. The absence of other treatment or prescribed medication is a factor that I can take into account when weighing up the severity and effect of the impairment in the relevant period. It is relevant but is far from determinative.
39. In the teams meeting on the 14<sup>th</sup> March the Claimant also describes receiving the letter of the 10<sup>th</sup> March as a ‘shock’ and set me back a little bit’. The GP’s entry for that day describes having a ‘bit of a rubbish night but feeling ok’
40. I would also note that the symptoms described in the Claimant’s impact statement under the heading of ‘effects of the impairment’ cover the period of Jan 2023 through to the summer of 2023. The statement does not suggest that all of these symptoms were being experienced prior to CBT or during March 2023. This also sits with the contemporaneous medical records.
41. For the purposes of this case, from December 2022, I accept that the Claimant had some disrupted sleep, which then got worse. He began CBT, which alleviated the symptoms. Within this time, there may have been time limited, more serious individual periods of symptoms such as breathlessness, or low mood and feelings of unworthiness. These symptoms were not consistent nor were they continuous. The Claimant’s cognitive abilities, e.g. concentrating or performing daily tasks would have been impacted on occasion. The Claimant’s ability to carry out day to day activities was not consistently impacted.
42. It is clear from J v DLA Piper that I must not automatically assume that reactive illnesses are presumed to recur. I must look at the evidence placed before me. In the present case, I do not have the evidence placed before me that in March 2023, it was likely that this impairment would last for 12 months. All of the medical, documentary and oral evidence points at this point in time to the situation being purely reactive and capable of alleviation once the circumstances causing the reaction had ceased.
43. Furthermore, it is not as straightforward as starting the clock in December 2022 for the purposes of counting 12 months. The evidence before me is that the effect of the Claimant’s condition was variable. I have to discount the effect of the CBT, which I have done, which would have left the Claimant



continuing to have variable symptoms for a longer period, the precise nature of which (referring to the period) has not been evidenced before me. I do not find that even discounting the CBT means that in March 2023 it was likely that the Claimant's impairment would last 12 months.

44. At this point in time (March 2023), the impact of the symptoms on the Claimant was not sufficient to meet the threshold for a long term substantial adverse effect on his ability to carry out day to day activities.
45. In terms of recurrence, these were reactions to adverse life circumstances. It was more likely than not that the symptoms would alleviate when the circumstances changed.
46. Given the nature of the claim made, I find that the relevant period is only the period in which there could be alleged to be a failure to allow a phased return to work. On the agreed dates, the Claimant's GP was advising that a phased return was possible from a consultation on the 22<sup>nd</sup> February 2023, giving a date of the 1<sup>st</sup> March for such a return. By 10<sup>th</sup> March 2023, it was apparent that the Respondent was writing in potentially serious terms to the Claimant raising serious conduct issues and the possibility of redundancy. There is a Teams meeting on the 14<sup>th</sup> March during which a phased return is discussed between the parties, but it is clear that by the 15<sup>th</sup> March, the Respondent's position is that a phased return was not going to be granted. This crystallises the time limit for a reasonable adjustment claim (c.f. Matuszowicz v Kingston upon Hull City Council [2009] IRLR 288). Therefore the 'relevant period' given the very narrow nature of the claim that is made is the 1<sup>st</sup> March to the 15<sup>th</sup> March 2023.
47. If I am wrong in that conclusion and the relevant period is the longer period up to the end of the Claimant's employment, then I do not find that this alters the outcome of this Judgment. The threshold is still not met. Such a longer period would need to take into account the Claimant's initial reaction to being refused a phased return and also having his employment placed at risk by the Respondent. In this longer period, the Claimant continued to correspond with the Respondent including the pursuing of a grievance. These are not determinative, but they are relevant. The Claimant had an adverse reaction but nothing has been proven to me that indicates a long term substantial adverse effect on the ability to carry out day to day activities. It was the period after the Claimant's dismissal that matters significantly escalated.
48. It is essential to note that I am only considering the relevant period. I am not permitted to take into account what happened after that period. Therefore, I am not permitted to take into account any suggestion as to the effect of the

dismissal on the Claimant nor am I permitted to take into account the Claimant's subsequent cancer diagnosis. In stating this, in no way do I seek to lessen the impact or seriousness of these events on the Claimant.

49. I recognise that disability is not a particularly high bar. I have carefully considered my findings based on the evidence before me.

50. I have therefore determined that the Claimant was not a disabled person at the relevant time as defined by section 6 Equality Act 2010.

51. Whilst I this did not form part of my consideration, if it is of any comfort to the Claimant, his disability discrimination claim was in relation to a single discrete point regarding his return to work. He is still able to argue the vast majority of his case irrespective of this Judgment. I say nothing about the wider strengths or weaknesses of that case.

52. Secondly, I recognise that this Judgment will be disappointing to the Claimant. Nothing in this Judgment suggests that he in any way sought to mislead me. It is simply a question of applying facts to the law. In particular, I am not permitted to take into account the Claimant's ill health after the ending of his employment in determining whether he was a disabled person at the relevant time.

### **Postscript**

53. Following Judgment, the parties discussed with the Tribunal whether any further case management was required.

54. I decided to keep the listing at three days, notwithstanding this Judgment. Post dismissal, the Claimant has been diagnosed with cancer and is commencing chemotherapy. It is entirely possible that he will need extra breaks and shortening the listing could run the risk of the Claimant feeling time pressured.

55. The full hearing will now be a Judge sitting alone.

56. The next point was whether it was possible for the May hearing to go ahead at all. The Claimant has his third dose of chemotherapy at the end of the week prior to the 28<sup>th</sup> May. It is the Claimant's case. The Claimant is the party

seeking a remedy. It is the Claimant's position that he wants the case to go ahead. No application for a postponement was made before me today. The Respondents position is that it does not oppose a medically related postponement and re-listing of the hearing.

57. The Claimant is going to speak to his medical practitioners and seek their view. He understands that a prompt application for a postponement will enable the matter to be relisted more quickly.

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Employment Judge Anderson

8<sup>th</sup> April 2024

JUDGMENT SENT TO THE PARTIES ON 8 April 2024

FOR THE TRIBUNAL OFFICE Mr N Roche

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