EMPLOYMENT TRIBUNALS

Claimant: Mr J Lubran

Respondent: Powys County Council

Heard at: Cardiff Employment Tribunal **On:** 24/05/2024

Before: Employment Judge Lloyd-Lawrie

Representation
Claimant: In person
Respondent: Mr Howells, Counsel

RESERVED JUDGMENT

The Claimant was not disabled, by way of mental impairment, for the purposes of these proceedings. The Claimant was disabled, by way of physical impairment, as accepted by the Respondent and thus his claims for disability discrimination, as related to his back issue, continue.

The Claimant's request to add claims under section 44 of the Employment Rights Act are refused.

REASONS

Background

1. The hearing had been listed to consider three matters; (i) whether to allow the Claimant to amend his claim, (ii) whether the Claimant was disabled for the purposes of section 6 of the Equality Act 2010 ("Act") and (iii) for further case management.

2. Due to needing more time to consider matters one and two, it was decided that it would be better for my reserved judgement to be issued before further case management was undertaken. There is now a case management hearing listed for 10am on 25th June 2024. Notice of hearing will come out separately.

3. I will deal with the issue of disability first.

4. At the start of the hearing, Mr Howells conceded that the Claimant's back condition amounted to a physical impairment and that the Claimant was disabled by this in the time to be considered namely 15/12/2017-12/05/2023.

5. The issue in relation to disability in front of me was therefore whether the Claimant was disabled by way of mental impairment in the period the alleged discrimination was alleged to have occurred over. I considered the Claimant's disability impact statement and his oral evidence. I also considered the documents in the preliminary hearing bundle to which my attention was drawn and in the 2 sets of medical evidence that I was provided by the Claimant, both before and during the hearing.

Law

6. Section 6 of the Act, which deals with the definition of "disability", provides as follows:

   "*6 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."

7. With regard to the constituent elements of that definition, Part 1 of Schedule 1 of the Act provides as follows in relation to "long-term effects":

   "*2 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."

8. Section 212 of the Act provides that, "*"substantial" means more than minor or trivial*".

9. Paragraph 12 of Schedule 1 of the Act notes that, "*In determining whether a person is a disabled person, [a Tribunal] must take account of such guidance as it thinks relevant*". In that regard, the Government has issued

'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ("the Guidance") under S.6(5) of the Act.

10. The Appendix to the Guidance sets out illustrative and non-exhaustive lists of factors which, if experienced by a person, it would be reasonable and not reasonable to regard as having a substantial adverse effect on normal day-to-day activities. The list of factors which might point to a substantial adverse effect includes the following:

    - "*persistent general low motivation or loss of interest in everyday activities*" and

    - *Difficulty in getting dressed, for example, because of physical restrictions, a lack of understanding of the concept, or low motivation*

11. The EAT said, in *Goodwin v Patent Office* [1999] ICR 302, that the words used to define disability (in what was then section 1(1) of the Disability Discrimination Act 1995, which is now section 6(1) of the Act) require tribunals to look at the evidence by reference to four different questions (or "conditions", as the EAT termed them):

    • Did the claimant have a mental and/or physical impairment? (the 'impairment condition')

    • Did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition')

    • Was the adverse condition substantial? (the 'substantial condition'), and

    • Was the adverse condition long term? (the 'long-term condition').

    These four questions should be posed sequentially and not together.

12. The burden of proof in establishing disability lies on a claimant, but there is no onus on a claimant to adduce medical evidence to establish each of the four conditions comprising the test set out in Goodwin.

13. In *Ministry of Defence v Hay* [2008] ICR 1247, the EAT held that an "impairment" could be an illness or the result of an illness, and that it was not necessary to determine its precise medical cause. The statutory approach, said the EAT, "*is self-evidently a functional one directed towards what a claimant cannot, or can no longer, do at a practical level*". The EAT further confirmed, in *J v DLA Piper UK LLP* [2010] ICR 1052, that it is not always essential to identify a specific "impairment", if the existence of one can be established from the evidence of an adverse effect on the claimant's abilities.

Findings

14. I set out my findings relevant to the issue of disability, reached on the balance of probability, below.

Mental Impairment

15. The Claimant in his disability impact statement defined his claimed mental impairment as “stress/ anxiety/PTSD”. Under cross examination, he conceded that he had received no formal diagnosis of PTSD but that his counsellor had said that she thought he met the definition for it and thus referred him to an online resource for the same. As stated above, the lack of an ability to identify a specific impairment is not a bar to a person being found to have a mental impairment.

16. The Claimant in closing submissions, asked that if I found that he had not provided enough evidence to find that he had a mental impairment, that I then order an expert to be instructed, rather than make a finding. As pointed out in the hearing, the case was listed for hearing today to deal with the issue of disability. Directions had been issued giving dates for service of documents relating to disability in January 2024. As it was, the Claimant served some medical documents 3 days before hearing and some others during the hearing. The question of disability is a legal, not a medical one under the Equality Act. No request had been made prior to hearing for consent to obtain an expert report, nor did I consider that one was necessary based on medical evidence being available. I therefore advised that the matter had been heard and that I would be making a decision on disability after the hearing.

17. The case of J v DLA Piper UK LLP, cited above, is also authority that the correct approach to the issue of impairment in cases involving mental disability is still the cases of College of Ripon and York St John v Hobbs [2002] IRLA 185 and McNicol v Balfour Beatty Rail Maintenance Ltd [2002] ICR 1498. These state that there are distinctions between clinical depression and reactions to stress or other adverse circumstances producing similar symptoms.

18. The Claimant’s medical records show recordings of “stress at work” and set out, in general, the current stressors that the Claimant was dealing with at that time, including both work and private life issues. Further, the Claimants Occupational Health reports that 28/08/2020 and 17/03/2021 both indicate that the opinion of those medical professions was that the Claimant had no medical psychological condition but instead had stress as a response to the way he perceived he had been treated at work. Both reports highlighting his ability to manage other aspects of his life as justifications of their findings.

19. The Claimant accepted under cross examination that he broadly agreed with the findings of the occupational health doctors.

20. Looking through the Claimant’s GP notes, all refences to stress consistently demonstrate that the Claimant was having reaction to what he perceived to be adverse circumstances rather than having an underlying mental impairment that was triggering his feelings of stress. It is of course the case that stress at work can trigger a mental impairment or can be the cause of the impairment, however, from the medical evidence in front of me, provided by both parties, it is clear that this was not the case for the Claimant. Therefore, in line with the case law cited, the Claimant did not have a mental impairment during the period to be considered.

21. If I am wrong in that finding, I go on to consider the impact on the Claimant's day to day activities.

Impact on day-to-day activities

22. In terms of the impact of the Claimant's conditions on his day-to-day activities, his oral evidence was, at times, contrary to his written evidence. The Claimant conceded in oral evidence that if talking about eating, sleeping, food shopping and playing with his children was what was being considered, he could do those things. This is in line with the entries in the Claimant's GP evidence and in the Claimant's Occupational Health records. For example, an entry of Dr Coleman on 10/06/2020 has a comment "feels generally confident he can win his case and not depressed. Keeping to a routine- seeing children, exercising. Just doesn't feel that he can go to work whilst this is going on. In the report of Occupational Health Physician Dr Thomas, it is said "He clearly has very high levels of self-worth, is able to enjoy life events such as spending time with his children and it is only when he thinks about work when he starts to feel stress. He feels anxious when thinking about the amount of work he has to do regarding the case but does not have any pathological anxiety. He seems to be functioning reasonably well in day to day life, again most notably when not thinking about work. He is not on any psychological treatment and I do not feel any would be indicated at this point".

23. I therefore find that the Claimant was not suffering a substantial impact on his day-to-day activities in the relevant period as the evidence, which he agreed when put to him, demonstrated that he could carry out normal day-to-day activities. In submissions, he did state that it was harder for him to do so that others in the hearing room, however, this was not said in evidence and his answers to cross examination demonstrated an ability that was far in excess of that set out in his disability impact statement.

Conclusions on disability

24. Consequently, I did not consider that the Claimant was disabled by way of mental impairment for the purposes of these claims.

Potential Amendment/Clarification of claim

25. The Claimant issued his ET1 on 18/09/2023. He did tick the box of "I am making another type of claim which the Employment Tribunal can deal with". The Claimant wrote in his claim that although he was not formally represented by legal council, he had had helpful advice from his high street solicitor. The Claimant included a summary of his points stating at the end "this unfair dismissal is the main trigger for this claim. I will not list every unmitigated impropriety contributing to the deterioration of our relationship on this form. The list above I hope is sufficient to lodge this claim, but is far from exhaustive. The evidence bundle for a hearing will be voluminous and unassailable". I find that no health and safety detriment claim was included in his original ET1 claim.

26. The Claimant attended a case management hearing with Employment Judge Harfield on 01 December 2023 where she clearly had spent a great deal of time ascertaining what claims that the Claimant was trying to bring in order to write the list of issues. The Claimants Particulars of Claim originally ran to just less than 1.5 sides of A4. The list of issues prepared by Judge Harfield ran to over 10 sides of A4 and included the specific claims that she would have been told by the Claimant during that hearing from hearing what he was complaining of. No section 44 Employment Rights Act claim was included. That list of issues was sent to the parties on 08 December 2023.

27. The Claimant on 12 February 2024 sent to the Tribunal an amended list of issues. This included a section 44 claim for health and safety detriment.

28. The Respondent provided an updated ET3 on 11 March 2024 dealing with the claims as set out in the case management hearing and providing all, bar the section 44 claim, of the Claimant's amended list of issues.

29. Employment Judge Mason held a further preliminary hearing on 21 March 2024. During this hearing, it was ordered that some of the Claimant's claims were unclear and that therefore, the Claimant should be given a further opportunity to set out his claims. Further, it was found that the section 44 claim may need an application to amend and a public hearing would be listed to hear that.

30. The Claimant then provided further and better particulars which lead to a third draft of the Respondent's grounds of resistance being prepared and submitted to the Tribunal.

31. The Claimant's primary position is that in line with Selkent Bus Company Ltd v Moor 1996 ICR 836 the amendment he sought was a relabeling and therefore was not a new claim. The Respondent took the opposing position.

32. I find that the section 44 detriment claims were not previously before the Tribunal. I find that they were not before the Tribunal until 12 February 2024. Although the dates of the detriments are not set out, the last date that they could have applied would have been 12/05/2023, as that was the date that they were submitted. The claims therefore are vastly out of time.

33. In line with Vaughan v Moality Paternerhip 2021 ICR 535, EAT, I have kept at the forefront of my mind at all times the need to balance the injustice and hardship in allowing or refusing the application.

34. I find that the nature of the amendment means that a new cause of action will be added. I find that the section 44 claim being advanced is very much out of time and I find that the Claimant was already afforded an opportunity to orally explain his claims to an Employment Judge who took great case in setting out in legal terms what his claim was, after he had pointed out his difficulties in doing so in his ET1 form. I find that the Claimant did not explain the health and safety claim as part of that. I find that the Claimant received the case management order with the list of issues on 8 December 2023.

35. The Claimant did respond with any changes to the list of issues in time as

he responded on 12 February 2024.

36. I however find that the Claimant has not clarified claims already made but has sought to add a new claim. I find that the Claimant could and should have included all claims on his ET1. He was given the opportunity to have a preliminary hearing for case management where he then was allowed to orally describe his claims. This, I find, alleviates the difficulty in not having a legal representative as the Employment Judge labels the claims based on the oral submissions of the Claimant.

37. I find that although he replied to the Case Management Order in time, the hardship to the Respondent in allowing the amendment, which would involve, I accept, a fourth draft of their grounds of resistance, is greater than that to the Claimant who has claims linked to detriment for protected disclosures which, in part, deal with the same or similar issues. I find that the Claimant should not be permitted to add claims under section 44 of the Employment Rights Act as these claims should and could have been made earlier in the proceedings and could have been made in time. I note that the Claimant did state that he had taken legal advice before submitting his claim, albeit that he was not formally instructed. I find that this is also relevant.

Conclusion on the Amendment application

38. The Claimant's section 44 claims do require an application to amend. That application is refused as the hardship to the Respondent outweighs the hardship to the Claimant in refusing the same.

Employment Judge Lloyd-Lawrie

Date 24/05/2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 29 May 2024

FOR EMPLOYMENT TRIBUNALS Mr N Roche

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