



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mr C. Apuhin

Eastleigh Care Homes HR Limited

Held at: Exeter by Video

On: 11 April 2024

Before: Employment Judge Smail

Appearances

Claimant: In Person

Respondent: Mr J. Anderson (Counsel)

JUDGMENT having been sent to the parties on 25 April 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS ON THE ISSUE OF DISABILITY

1. By claim forms presented on 23 May 2023 and 15 June 2023 the claimant claims protected disclosure dismissal and detriments, wrongful dismissal and disability discrimination. He has also applied by way of amendment to add to these claims including the claim of disability discrimination. We will concern ourselves later with the issue of the amendment. I will turn to the preliminary issue as to whether at any relevant time the claimant was a disabled person.
2. He was employed by the respondent between 9 March 2021 and 27 February 2023 as an Assistant Practitioner.
3. The issues were identified at a preliminary hearing before Employment Judge Livesey on 22 January 2024. He ordered the present preliminary hearing to

be held in public to decide amongst other things whether the claimant was a disabled person at any material time for the purposes of the case.

4. The claimant is from the Philippines. He suggests that he has been suffering stress and anxiety as soon as he arrived in this country from the Philippines in 2019. He points to difficulties for example, with immigration status. He says his continuing state of anxiety and depression led to the identification in August or September of 2023 of ADHD or ADD (Attention Deficit Disorder). He asserts a continuous mental impairment from at the latest arriving in this country and ongoing until this day. That is his position by way of assertion. There is evidential corroboration neither for the assertion that he was disabled with stress and anxiety from 2019 nor that he suffers from ADHD or ADD from August or September 2023.
5. Because the claimant is prone to assert the case he wishes to present irrespective of supporting documentation, I have been careful to analyse the documents that have been provided to me in this extensive bundle for today's hearing. The claimant had at one point asked for an interpreter for this hearing. That was not maintained by him today; indeed his English is more than adequate for his position and his evidence on all matters to be fully understood.

The definition of Disability

6. This is contained in Section 6 and Schedule 1 to the Equality Act 2010. Section 6 provides:

A Person (P) has a disability if (a) P has a physical or mental impairment (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities. That definition is expanded upon in Schedule 1.

Paragraph 2 of Schedule 1 deals with long-term effects. 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. 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.

Paragraph 5 of Schedule 1 deals with the effect of medical treatment. 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 have been taken to treat or correct it, and (b) but for that it would be likely to have that effect.

Paragraph 8 deals with progressive conditions. This paragraph applies to a Person (P) if (a) P has a progressive condition (b) as a result of that condition P has an impairment which has or had an effect on P's ability to carry out normal day-to-day activities but (c) the effect is not a substantial adverse effect. P is to be taken to have an impairment which has a

substantial adverse effect if the condition is likely to result in P having such an impairment.

Facts relevant to the issue of disability

7. When living in Luton the claimant and his family experienced an aggravated burglary at his home on 30 December 2020. He had a reaction to that trauma and was referred to the Bedfordshire Mental Health and Wellbeing Service. That was a therapeutic service. He was signed off from his then work with stress between 1 February 2021 and 21 April 2021.
8. On 16 February 2021, he was recorded as feeling distressed and suicidal and consideration was given by the Bedfordshire Mental Health and Wellbeing Service to referring the claimant to the community mental health team. A letter dated 16 February 2021, recorded that the claimant was on a waiting list for the first steps to trauma recovery group that was based on cognitive behavioural therapy. Whilst they were waiting for that support, there would be a monthly waitlist review to check on the claimant.
9. The claimant was offered CBT, three episodes. It is unclear whether he undertook any. He has a recollection of starting but not completing the course so he may have had one or two episodes. A letter in June 2021 from the Bedfordshire service records that he was discharged from their service in June 2021. This was because he had moved to Devon in April 2021 and had secured employment, the subject of this claim. That was one episode of unpleasant trauma-related stress. The effect seems to have lasted for no longer than the date of the burglary in December 2020 up to the move to Devon in April 2021. The claimant then started his employment where the employer maintained a comprehensive record of his absences. There appears to have been no relevant absence related to any issue of mental health until 11 February 2023. The table of absences tells us the following:

29 August 2021	No childcare
5 September 2021	No childcare
13 November 2021	Headache
21 November 2021	Child unwell
23 – 30 March 2022	Covid
16 – 22 May 2022	Shared parental leave
8 June 2022	Rang into say he had to take his wife to hospital and could not work his shift
31 July 2022	Wife was unwell with a temperature so needs to look after children.
3 August 2022	Flu like symptoms

12 – 13 October 2022	Rang in sick with severe headache and vomiting.
31 October 2022	Has a high temperature
29 – 30 October 2022	Cover for his shift as he needs to look after children.
16 – 20 November 2022	Messaged Kelly to say his body is heavy so could not work his shift.
18 November 2022	Messaged Kelly to say he was unwell and could not do his shift. Kelly advised him to ring into the home and follow Eastleigh policy.
26 – 27 November 2022	Messaged CJ to say that he was unable to do his shift as he had fever, cough and headache.
17 – 18 December 2022	Fever
11 February 2023	He was suspended.
21 February 2023	A fit note was received for mental health and stress reasons.

10. Between April 2021 and October 2022 there is no documentary support in respect of any absence related to any mental health reason.
11. Following the family's arrival in Devon, in the subsequent months problems developed in the claimant's relationship with his wife. This culminated on or about 27 September 2022 when the claimant was issued with a domestic violence prevention order. That led to disciplinary proceedings at work. The respondent says they learnt of the domestic violence protection order on 8 February 2023. It learnt that the children of the family had been taken into care. The respondent says that as part of the investigation following notification of the DVPO, allegations of victimising and intimidating aggressive behaviour by the claimant towards other staff came to light. He was suspended and ultimately dismissed for gross misconduct.
12. The claimant says that this disciplinary process was down to the fact that he had made protected disclosures. That is an important part of the case that he brings. For present purposes, whatever the reason for the disciplinary process and dismissal, I have to look at the state of play of the evidence on the question of disability. In particular, the documentary evidence that is contained in this comprehensive bundle before me.

13. The claimant was prescribed with antidepressants on 3 October 2022. He declined then an offer of CBT. He was prescribed sertraline 50mg and zopiclone to help with sleep. In November 2022, the nature of the antidepressant changed, and it changed on a further occasion. From 3 October 2022 onwards the claimant has been on antidepressants.

14. There is a letter from the claimant's GP dated 2 June 2023 which states

"To whom it may concern

I confirm that Mr Apuhin is suffering from reactive depression secondary to severe stress relating to his family and work situation. He is being treated as at 2 June 2023 with citalopram 40mg daily (maximum dose) and PRN Zopiclone to help with sleep disturbance."

15. There is an occupational health letter from Dr Sarangi, Consultant Occupational Physician dated 12 October 2023. A matron of temporary staffing had referred the claimant to occupational health and Dr Sarangi tells us:

"Christopher is a 34 year old gentleman who works as a healthcare assistant on the staff and he has been working in this role from summer 2022 onwards on a zero hour contract. I am aware from Christopher's history on consultation that he has been on sick leave from August 2023 onwards with a GP's sick certificate diagnosis of reactive depression, which is ongoing. Christopher started antidepressant medication during 2022 and he started on anxiety on medication propranolol two to four weeks ago.

He had struggled with psychological difficulties related to there being a domestic violence related issue in his family. His spouse is living separately and currently he has a foster care arrangement for his three children ages 1, 3 and 10 from February – July 2023."

16. The position, then, is that the claimant has been suffering from a reactive depression since 3 October 2022 and has been medicated for it. I do not find on the balance of probability that the impairment that he has suffered from 3 October 2022 is an example of a reoccurrence of the same impairment that he suffered between December 2020 and April 2021. These are different impairments. I find the first was a reaction to the trauma of the aggravated burglary. The present is a reactive depressive episode to the family and work situation in which he finds himself. The present impairment is not a reoccurrence in my finding of the earlier one nor is there any evidence that the claimant is suffering from a progressive condition. These are separate impairments for separate reasons. I am satisfied that absent the claimant taking medication from 3 October 2022, the adverse effects of the depressive reaction would be likely to lead to substantial adverse effects on normal day-to-day activities.

17. The relevant issue for present purposes is the issue of long-term. The most important matter the claimant wishes to put before the Tribunal - and he

wishes to do this in an amendment but nonetheless he wishes to put it before us - as an act of disability discrimination is the dismissal. He was dismissed in February 2023 and appealed unsuccessfully against that in March 2023. Was he a disabled person in February or March 2023 or in any period going backwards in time between then and 3 October 2022. This involves the question of determining whether it was likely that this depressive reaction would last for twelve months or more.

18. October 2022 - March 2023, was it the case five months on that one could say it could well last twelve months or more? In my judgement that is significantly too early for it to be capable of determination that this reactive condition was likely to last twelve months or more. At nine months into the episode, it may well be sensible to say that the depressive reaction could well last twelve months or more. As at any point in October 2022, November and December 2022, January February and March 2023, it was too early in my judgment to say it is likely that this depressive episode would last twelve months or more, even if the test is 'could well'. 'Likely' does not mean 'perhaps'.
19. Accordingly, it is my ruling that at any relevant time relevant for the purposes of this case, the claimant was not a disabled person with the consequence that all of his claims of disability discrimination are dismissed and any application to amend the claim in respect of disability discrimination is also dismissed for the fundamental reason that the claimant was not a disabled person within the meaning of the Equality Act 2010 at any relevant time.

Employment Judge Smail

Date 19 May 2024

REASONS SENT TO THE PARTIES ON

6th June 2024

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