



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr J McAuley

AND

Respondent
SSE Plc

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY
By CVP Video Platform

ON

11 July 2024

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Did Not Attend

For the Respondent: Mr R MacKenzie, Solicitor

JUDGMENT

The judgment of the tribunal is that the claimant was not a disabled person at the material times and his claims of disability discrimination are hereby dismissed.

RESERVED REASONS

1. This is the judgment following a preliminary hearing to determine whether the claimant was a disabled person at the material times.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 185 pages, the contents of which I have recorded.
3. The claimant failed to attend this hearing. This follows a consistent pattern of non-compliance or partial compliance with Tribunal orders, and the claimant's failure to attend a previous hearing. For the respondent I have heard brief submissions from Mr MacKenzie.
4. Rule 47:
5. The Employment Tribunal Rules of Procedure 2013 are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and are referred to in this judgment as "the Rules".

6. Rule 47 provides: “If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim, or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party’s absence.”
7. The claimant was clearly aware of this hearing this morning, because he had written to the Tribunal objecting to a further application to strike out his claim which the respondent wished to pursue at this hearing. The claimant did not make any application to postpone this hearing, and nor did he inform the respondent or the Tribunal office that he was unable to attend. As noted above, this followed a consistent pattern of non-compliance or partial compliance with Tribunal orders, and the claimant’s failure to attend a previous hearing. The claimant had also complied partially with an order to provide a Disability Impact Statement, and medical evidence upon which he chose to rely, and that information was before me. I therefore decided to proceed with this hearing in the claimant’s absence.
8. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions which were or had been made by and on behalf of the respective parties.
9. The Facts:
10. The background and issues in this case have been set out in detail in two case management orders. The First Order was made by Employment Judge Livesey on 28 November 2023. The Second Order was made by Employment Judge Bax on 8 May 2024. Employment Judge Bax set out a very detailed procedural history in that Second Order which includes a history of repeated non-compliance or partial compliance by the claimant in response to the Tribunal orders.
11. The dispute between the parties is a simple one. In short, the claimant was engaged by the respondent as a Project Manager between 4 July 2022 and 31 October 2022. The respondent says that it made a written offer of employment to the claimant which was clearly conditional upon him satisfying a number of pre-employment checks. That process of pre-employment vetting was contracted out to a third party. The claimant was unable to fulfil the necessary requirements and the third party reported that the claimant was either unwilling or unable to comply with the respondent’s specified requirements. The respondent therefore withdrew its offer of employment. The respondent asserts that the position is no more complicated than that.
12. The claimant asserts that he confided in a manager namely Mr Redfern on 24 October 2022 that he suffered from mental health issues, and although Mr Redfern was supportive, the respondent confirmed that it had withdrawn his offer of employment shortly thereafter on 28 October 2022. This was despite the fact that the respondent knew in late September 2022 that the claimant had not complied with the pre-vetting requirements. The claimant pursues claims of direct disability discrimination, and discrimination arising from disability, under sections 13 and 15 of the Equality Act 2010.
13. The respondent asserts that the claim has no merit because the claimant was unable or unwilling to comply with the precondition of appropriate vetting, and that was why his temporary engagement was terminated, and the respondent also disputes that the claimant was a disabled person. This preliminary hearing has been listed to determine whether or not the claimant was a disabled person at the times to material to this claim, namely between 4 July 2022 and 31 October 2022.
14. The claimant has (eventually) produced a Disability Impact Statement as ordered by the tribunal. He has also produced a photograph of a pack of tablets which he says he has been prescribed. These are Mirtazapine 15 mg tablets issued in the claimant’s name dated 31 October 2023. Mirtazapine is an antidepressant which is only issued on prescription.
15. In his Disability Impact Statement the claimant asserts that “an already poor state of mental health” was made worse by the respondent’s decision to terminate his engagement was made. He states: “This experience with SSE has unfortunately both lengthened and deepened the depressive state I was in when I first made my initial disclosure to my line manager”. He goes on to explain how this episode then had a subsequent negative impact on his mental health.

16. The difficulty which the claimant faces is that he has given no evidence which addresses whether or not he was a disabled person during the times material to this claim, namely between 4 July 2022 and 31 October 2022. This is despite repeated and clear orders from the tribunal that he would need to explain the impairment relied upon, when this was first diagnosed, what impact it had at the relevant times on his normal day-to-day activities, and that this information should be supported by extracts from his GP notes or other medical information to address those contentions.
17. The claimant has quite simply failed to comply with these directions and to supply this information. He does refer vaguely to a pre-existing mental health condition, and a depressive state. However, apart from this he has not adduced any evidence as to what the impairment is upon which he relies, when it was diagnosed, or what impact it is said to have had on his normal day-to-day activities between 4 July 2022 and 31 October 2022. The claimant's statement does refer to mental health issues after the termination of his engagement with the respondent, and a failure to attend the gym as regularly as he used to. However, this refers to the period after the termination of his engagement, and it is not relevant for this claim. In addition, the only medical evidence adduced is a copy of the prescription label on the pack of mirtazapine tablets, but this is dated 31 October 2023, a year after the events in question, and this does not assist the decision as to whether the claimant was disabled at the relevant times. There is no other medical evidence of any nature.
18. Having established the above facts, I now apply the law.
19. The Law:
20. The claimant alleges discrimination because of his disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct disability discrimination, and discrimination arising from a disability.
21. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
22. In addition, schedule 1(5) EqA provides that – (i) 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. (ii) "Measures" includes, in particular, medical treatment and the use of prostheses or other aid.
23. Under section 212(1) EqA "substantial" means more than minor or trivial.
24. The Secretary of State has published Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011) ("the Statutory Guidance"), which I have considered. Section B provides guidance on the meaning of "substantial adverse effect". This repeats section 212(1) EqA and confirms that "substantial" means more than minor or trivial. In it also addresses factors such as the time taken to carry out an activity; the way in which an activity is carried out; and curative effects of an impairment. Section D provides guidance on the meaning of "normal day-to-day activities". The EqA does not define what is to be regarded as a "normal day-to-day activity", but in general the Statutory Guidance states that it includes things which people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, and carrying out household tasks.
25. The Appendix to the Statutory Guidance provides "an illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities". These include: "difficulty operating a computer, for example, because of physical restrictions in using the keyboard, a visual impairment or a learning disability; inability to convert or give instructions orally; difficulty understanding or following simple verbal instructions; persistent and significant difficulty in reading or understanding written material where this is in the person's

- native written language, for example because of a mental impairment; and persistent distractibility or difficulty concentrating.”
26. This Appendix to this Code also says that normal day-to-day activities are those activities which are carried out by most men or women on a fairly regular and frequent basis. Day-to-day activities include activities such as walking, driving, using public transport, cooking, eating, typing, writing, going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction, or forming social relationships, nourishing and care for oneself. This is not an exhaustive list.
 27. I have considered the cases of Seccombe v Reed in Partnership Ltd UKEAT/0213/00; Goodwin v Patent Office [1999] ICR 302; Sobhi v Commissioner of Police of the Metropolis UKEAT/0518/12/BA; J v DLA Piper UK LLP [2010] ICR 1052; SCA Packaging v Boyle [2009] ICR 1056; McDougall v Richmond Adult Community College [2008] ICR 431 Environment Agency v Rowan [2008] IRLR 20 EAT; Abadeh v British Telecom plc [2001] IRLR 23.
 28. The following comments are taken from the judgment of HHJ Tayler in Seccombe v Reed in Partnership Ltd: In Goodwin v Patent Office Morison J set out for conditions that require consideration when assessing whether as a person is disabled, at page 308B: “The words of the section require a tribunal to look at the evidence by reference to four conditions. (1) The impairment condition. Does the applicant have an impairment which is either mental or physical? (2) The adverse effect condition. Does the impairment affect the applicant’s ability to carry out normal day-to-day activities in one of the respects set out in paragraph 4(1) of Schedule 1 to the Act, and does it have an adverse effect? (3) The substantial condition. Is the adverse effect (upon the applicant’s ability) substantial? (4) The long term condition. Is the adverse effect (upon the applicant’s ability) long term?”
 29. While it is good practice to deal with each of the conditions identified by Morison J in Goodwin separately, there may be occasions on which it is permissible to focus on the question of whether there is substantial adverse effect on day-to-day activities without having to establish the precise medical nature of the impairment before so doing: Underhill J so held in J v DLA Piper UK LLP.
 30. Decision:
 31. The question to be determined today is whether the claimant was a disabled person at the times material to this claim, namely between 4 July 2022 and 31 October 2022. Apart from asserting that he had a mental health condition, possibly depression, the claimant has given no evidence as to the nature and effect of the disputed disability between these times. The claimant has given no evidence himself as to when the condition was diagnosed, and whether it had a substantial adverse effect on his normal day-to-day activities. In addition, the claimant has produced no medical evidence to support his contention other than a pack of prescription tablets which were issued a year after the events in question.
 32. The burden of proof is on the claimant to establish that he was a disabled person at the relevant times, and he has failed to do so. I therefore conclude that the claimant was not a disabled person at the times material to this claim. Accordingly, his claims for direct disability discrimination, and for discrimination arising from disability, are not well founded, and they are both hereby dismissed.

Employment Judge N J Roper
Dated 11 July 2024

Judgement sent to parties on
24 July 2024
Jade Lobb