



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Miss L Muratha

Veolia Energy UK Ltd

REASONS FOR THE JUDGMENT OF THE EMPLOYMENT TRIBUNAL GIVEN ON 10 JULY 2024

Introduction

1. The Claimant was employed by the Respondent, a company specialising in waste, water and energy management services, for a period of just under four years ending with her summary dismissal on 4 July 2023 on the stated ground of gross misconduct. At the time of her leaving she held the role of Facilities Management Lead.

2. By her claim form presented on 20 November 2023, the Claimant brought a number of claims including complaints of discrimination arising from disability and disability-related harassment. All claims are resisted. The defences to those based on or related to disability include the Respondent's denial that she was at any material time disabled within the meaning of the Equality Act 2010.

3. The disability relied upon is anxiety and depression and stress.

4. Pursuant to a case management order of Employment Judge Woodhead made on 5 February 2024 the matter came before me on 10 July in the form of a public preliminary hearing held by CVP to determine the question whether, at any material time, the Claimant was disabled within the meaning of the Equality Act 2010 ('the 2010 Act').

5. It was agreed that for the purposes of this dispute the relevant period, during which the acts of disability discrimination and disability-related harassment are alleged to have occurred, was between 30 March 2023 and 5 September 2023. I will refer to it below as 'the relevant period'.

6. The Claimant appeared in person and the Respondent was represented by Mr Jason Braier, counsel. The Claimant gave evidence by means of her Disability Impact Statement ('DIS') dated 13 May 2024 and was cross-examined. A bundle of documents was put before me. I also had the benefit of Mr Braier's skeleton argument and a bundle of authorities.

7. The hearing occupied the morning. Following the lunchtime adjournment, I gave an oral judgment with reasons dismissing the disability discrimination and disability-related harassment complaints on the basis that the Claimant had failed to demonstrate that she had been disabled within the meaning of the 2010 Act at any material time. Thereafter, the proceedings took the form of a private preliminary hearing for case management to deal with residual procedural matters. The resulting case management order has already been sent the parties.

8. These written reasons for the judgment on the preliminary issue are given pursuant to an oral request by the Claimant made at the hearing.

The Law

9. The 2010 Act s6 materially provides:

(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.

10. 'Substantial' means more than minor or trivial (s212(1)).

11. Schedule 1 to the 2010 Act contains further provisions supplementing the s6 definition of disability. By para 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.

12. Although the statutory language is clear, the Employment Appeal Tribunal (EAT) has felt the need to stress that the 'long-term' requirement applies to the *effects* of the relevant impairment, not the impairment itself: see *The Guinness Partnership v Szymoniak* (UKEAT/0065/17), para 15.

13. By para 2(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 the effect is 'likely to recur'.

14. Para 5 enacts the important 'deduced effects' principle, requiring the Tribunal to disregard the effect of treatment being applied to the relevant impairment where, but for it, the impairment would be likely to have an effect satisfying s6(1)(b).

15. Para 5A, inserted by a recent amendment, reinforces established case-law by specifying that the reference to ability to carry out normal day-to-day activities extends to a person's ability 'to participate fully and effectively in working life on an equal basis with other workers'.

16. In these contexts, something is 'likely' if it 'could well happen': see the statutory Guidance on the Meaning of Disability 2011, para C3, based on *SCA Packaging Ltd v Boyle* [2009] IRLR 746 HL.

17. The burden of proving disability is on the claimant: see *eg Tesco Stores Ltd v Tennant* [2020] IRLR 363 EAT, para 11.

18. Whether or not a person has a disability has to be judged as at the date of the alleged discriminatory act. It is not open to the claimant to rely on hindsight to establish disability at the relevant time. Evidence about the nature, extent, duration or effect of the impairment after the relevant time must be disregarded: see *Richmond Adult Community College v McDougall* [2008] IRLR 227 EAT, paras 24, 35 and *All Answers Ltd v W* [2021] IRLR 612 EAT, para 26.

19. In a frequently-cited passage in *J v DLA Piper UK LLP* [2010] ICR 1052, the EAT (Underhill P and members) passed these comments (footnotes removed):

41 The facts of the present case make it necessary to make two general points about depression as an impairment. ...

42 The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness or, if you prefer, a mental condition, which is conveniently referred to as clinical depression and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or, if the jargon may be forgiven, adverse life events. ... We accept that it may be a difficult distinction to apply in a particular case ... Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived.

...

45 The second general point that we need to make about depression as a disability concerns the question of recurrence. ... We proceed by considering two extreme examples. Take first the case of a woman who suffers a depressive illness in her early twenties. The illness lasts for over a year and has a serious impact on her ability to carry out normal day-to-day activities. But she makes a complete recovery and is thereafter symptom-free for 30 years, at which point she suffers a second depressive illness. It appears to be the case that statistically the fact of the earlier illness means that she was more likely than a person without such a history to suffer a further episode of depression. Nevertheless it does not seem to us that for that reason alone she can be said during the intervening 30 years to be suffering from a mental impairment (presumably to be characterised as "vulnerability to depression" or something of that kind): rather the model is of someone who has suffered two distinct illnesses, or impairments, at different points in her life. Our second example is of a woman who over, say, a five-year period suffers several short episodes of depression which have a substantial adverse impact on her ability to carry out normal day-to-day activities but who between those episodes is symptom-free and does not require treatment. In such a case it may be appropriate, though the question is one on which medical evidence would be required, to regard her as suffering from a mental impairment throughout the period in question, *ie* even

between episodes: the model would be not of a number of discrete illnesses but of a single condition producing recurrent symptomatic episodes. In the former case, the issue of whether the second illness amounted to a disability would fall to be answered simply by reference to the degree and duration of the adverse effects of that illness. But in the latter, the woman could, if the medical evidence supported the diagnosis of a condition producing recurrent symptomatic episodes, properly claim to be disabled throughout the period: even if each individual episode were too short for its adverse effects (including “deduced effects”) to be regarded as “long-term” she could invoke paragraph 2(2) of Schedule 1 (provided she could show that the effects were “likely to recur”): see para 8(2) above.

20. Mr Braier also drew my attention to a number of reported decisions of the higher courts stressing the value of expert evidence in resolving disputes about disability especially in the context of mental health conditions, and the difficulties which claimants may face (particularly in relation to issues of likely duration and risk of recurrence) without such evidence. These include *Royal Bank of Scotland Plc v Morris* (UKEAT/0436/10/MAA, unreported, 12 March 2012, para 62-63), *Igweike v TSB Bank plc* [2020] IRLR 267 EAT, para 50 and *Veitch v Sky Red Group Ltd v* [2010] NICA 39 (Northern Ireland Court of Appeal), para 19).

The Facts

21. Prior to the relevant period, the Claimant had an excellent sickness record and no history of any mental health problem.

22. She told me, and I accept, that as a consequence of an allegation against her of workplace bullying first made in February 2023 (which allegation she strenuously disputes), she suffered significant emotional distress. She consulted her GP on 29 and 30 March 2023, where she gave an account of experiencing severe stress over the preceding three weeks arising out of the workplace issues. She was diagnosed with an acute stress reaction and prescribed antidepressant medication. She was shocked by the prescription and the GP interpreted her as signalling that she was not willing to take the medication. Nonetheless, I accept her evidence that she did in fact take it. The GP signed her off sick, initially for two weeks and immediately thereafter for a further two weeks, to 24 April 2023.

23. On returning to work on 25 April 2023, and having expressed herself ready for a gradual reintegration into the workplace, the Claimant was immediately suspended pending further investigation into the bullying allegation. She did not return to work thereafter. She told me that the suspension and continuation of the investigation exacerbated her ‘mental health struggles’ (Disability Impact Statement (DIS, para 3).

24. On 7 July 2023, three days after her dismissal, she saw her GP again. The diagnosis of an acute stress reaction was repeated and there was a discussion about talking therapy.

25. In her evidence the Claimant stated (DIS, para 8): ‘Previously, before March 2023, I loved the outdoors, walking, going to the gym, travelling abroad and within the UK and doing a lot of fun stuff with family and friends. Now I am overwhelmed with sadness, stress and always anxious.’ She also gave evidence describing the adverse impact of the disciplinary process on her mood, her sleep, her confidence,

her ability to engage with others and her performance of routine day-to-day activities and chores.

26. I accept all of the Claimant's evidence as a fair reflection of her perception of her condition and symptoms during the relevant period and thereafter.

27. The only independent professional evidence consists of the GP notes. These are sparse (the only consultations during the relevant period were those on 29 and 30 March and 7 July 2023) but consistent in classifying the Claimant's condition as amounting to a reaction to a stressful workplace situation and, at all relevant times, inconsistent with the notion that she was suffering from a mental health disorder. The first reference in the notes to a disorder is dated 15 November 2023, well after the end of the relevant period, (specifically, the term used is a 'mixed anxiety and depressive disorder').

28. There is nothing to indicate that the GP has ever considered, or been asked to consider, whether at any point in the relevant period, the Claimant's condition was 'likely' to amount to an impairment, much less an impairment the adverse effects of which on her ability to undertake normal day-to-day activities was 'likely' to last for 12 months or more.

Analysis and Conclusions

29. The first requirement for the Claimant to meet is to demonstrate that she was subject to an 'impairment'. Having regard to the distinction drawn by the EAT in the *DLA Piper* case, I am satisfied that that she falls well short of establishing a qualifying impairment or mental health condition at any point in the relevant period. As the case-law demonstrates, it is not open to her to seek to prove her case by means of hindsight. The contemporary evidence in the GP notes puts the case firmly in the category of a 'reaction to life events' rather than a mental illness (whether given the name of depression or not). The prescription of medication does not argue for a different view. It is entirely consistent with the GP's analysis, throughout the relevant period, that the Claimant was suffering from an acute, but short-term, reaction to distressing events. There was no prior history of any medical condition, which might have argued for a different analysis on the 'impairment' question. If, since the relevant time, she has become subject to a disabling state, that does not assist with the Tribunal's task of attaching a proper explanation for, and classification of, her symptoms at the relevant time.

30. Even if I am wrong on the 'impairment' issue, I am in no doubt that the Claimant fails on the 'long-term' requirement. Understandably, she points to the entire history and argues that, viewed from the current standpoint, it is plain that she was and remains disabled by a significant mental health condition. But, as I was at pains to stress to her, the law takes a somewhat technical approach, dictated by the stipulation, in conditions of less than 12 months duration, that the adverse effects must have been 'likely', at the time of any alleged act of disability discrimination, to continue at least up to the 12-month threshold. The fact that something happens cannot by itself justify the conclusion that, months earlier, it was 'likely' to happen. Even allowing for the low bar which the statutory test sets ('likely' meaning only that something 'might well happen'), a claimant (on whom the

burden rests to show 'likelihood') must provide some evidential foundation for her argument. Mere assertion does not amount to an evidential foundation. Nor is there any evidential foundation to be derived from the GP notes. As already stated, they argue firmly against the proposition that, during the relevant period, the effects were 'likely' to last 12 months or more. They are only consistent with the GP having the view that the condition (whatever its precise character) was reactive and short-term in nature. As I have noted above, the case-law points to the particular difficulties which claimants face in meeting the statutory test for disability in mental health condition cases. A claimant relying on her own, necessarily interested, opinion is unlikely without more to pass the test, certainly where there is a dispute about the 'likelihood' at some point in the past of relevant effects or symptoms being experienced over a significant subsequent period. In such a case, an independent, professional judgement is likely to be required to satisfy the Tribunal that the statutory language is met. But here, as already stated, the only medical judgements available in evidence are those of the GP, of which none substantiate the proposition that at any point during the relevant period there was a 'likelihood' of the long-term requirement being satisfied. To the contrary, the GP notes point consistently (if necessarily implicitly) to the author regarding that requirement as *not* being met.

31. I repeat: I accept the broad tenor of Claimant's evidence. She was a sincere witness. Moreover, I do not for a moment discount the possibility that, by the time she signed the DIS in May this year, she had met all the requirements under the statutory definition of disability. But I make no finding about that because, whether it is so or not, it cannot help her in the current proceedings.

Outcome

32. For all of the reasons stated, I hold that the Claimant fails to establish that she was disabled at any point during the relevant period. It follows that all complaints of disability discrimination and disability-related harassment must be dismissed, the Tribunal having no jurisdiction to entertain them.

EMPLOYMENT JUDGE SNELSON

Date: 22 July 2024

Reasons entered in the Register and copies sent to the parties on 23 July 2024..

..... for Office of the Tribunals