



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Rafal Nowak

v

Matthew Clark Ltd

RECORD OF A PUBLIC PRELIMINARY HEARING

Heard at: Watford
On: 18 June 2024
Before: Employment Judge Alliott

Appearances

For the Claimant: In person (with an interpreter: Polish)
For the Respondent: Ms Kay (counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant was not a disabled person within the meaning of s.6 of the Equality Act 2010 by reason of the mental impairment of PTSD or the physical impairment of a leg condition arising from an open fracture of his left leg on 23 June 2023 or both together at the relevant time.

REASONS

Introduction

1. The claimant was employed by the respondent as a Warehouse Operator on either 1 February or 20 March 2021. By a claim form presented on 4 October 2023 the claimant presents claims of disability discrimination and unauthorised deduction of wages.
2. This public preliminary hearing was ordered by Employment Judge George on 8 March 2024 to consider the following issues:
 - 2.1 Whether the claimant was a disabled person within the meaning of s.6 of the Equality Act 2010 by reason of the mental impairment of PTSD or the physical impairment of a leg condition arising from an open fracture of his left leg on 25 June 2023.
 - 2.2 Any application by the claimant to amend his claim to add a complaint of race discrimination .

2.3 Preparation orders for the final hearing.

The law

3. Section 6 of the Equality Act 2010 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.”

4. Schedule 1 to the Equality Act 2010 provides as follows:-

“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...”

5. As per the guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) at:

“C3 The meaning of “likely” is relevant when determining:

- Whether an impairment has a long-term effect...
- In these contexts, “likely”, should be interpreted as meaning that it could well happen.

C4 In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example general state of health or age).”

6. As per the IDS Handbook on disability at 2.178:

“The question of whether the effects of the impairment are likely to last more than 12 months is an objective test based on all the contemporaneous evidence, not just that before the employer.”

7. And at 2.179:

“It is important to note that the issue of how long an impairment is likely to last should be determined at the date of the discriminatory act and not at the date of the tribunal hearing.”

The evidence

8. I had a three page email dated 26 April 2024 which I treated as the claimant's witness statement and which he confirmed on oath. The claimant gave oral evidence.
9. I had a preliminary hearing bundle of 128 pages.

The facts

10. On 23 June 2023 the claimant sustained an open fracture to his left tibia and fibula. He had been attacked in the street by a stranger.
11. The claim form is dated 4 October 2023. Most of the alleged discriminatory treatment occurred in August/September 2023 but the reasonable adjustments claim runs up to the date of the claim form. I have therefore taken the relevant time to be between 23 June and 4 October 2023, a period of approximately three and a half months.
12. The medical evidence presented by the claimant is incomplete, especially as regards his GP records.
13. I have photographs of the claimant's leg whilst he was in hospital and x-rays of the internal fixation rod and screws. The injury was clearly a bad one. The claimant was discharged on 25 June 2023.
14. The medical documents show that on 1 August 2023 the claimant had an acute episode of leg pain. He attended an Urgent Care Centre and was referred to A&E where he was prescribed medication.
15. The GP records produced by the claimant are four pages long. The record of consultations between June and October 2023 has not been produced. All I have is the "problems active" summary. This shows:
 - 15.1 18 July 2023: Symptoms of depression.
 - 15.2 20 July 2023: Mental health review.
 - 15.3 28 July 2023: Pain lower limb.
 - 15.4 1 August 2023: Pain lower limb.
 - 15.5 7 August 2023: Depressed mood
Anxiety
Suicidal thoughts
 - 15.6 8 August 2023: Open fracture of tibia and fibula
16. There is no other entry until 3 April 2024 when the following is recorded:

"3 April 2024

Problem - Mixed anxiety and depressive disorder (first).

History - Currently based in hotel.

PTSD – experiencing flashbacks, flashback of screaming, was victim of violence in street and hit with baseball bat as did not offer a cigarette – 24 June 2023.

Was under IAPT but did not have address and therefore IAPT declined.

...

Has good days and bad days.

Mood is declining.

Struggled to talk to people in streets.

Fearful when hears loud noises.

Feels teary.

Appetite low.

Sleep dysregulated.

Medication – Mirtazapine

...

Problem – PTSD – Post Traumatic Stress Disorder (first)”

17. The claimant could not tell me when he went to IAPT (talking therapy) for the first time.
18. In his impact statement the claimant has sought to set out the effect his impairments have had on his life. Unfortunately, he has not concentrated on the relevant period, ie prior to 4 October 2023.
19. There were two significant events as far as the claimant was concerned after his leg injury. On 6 August 2023 his contractual sick pay ceased and he only received statutory sick pay thereafter. On 28 October 2023 he was made homeless as he could not afford his rent.
20. In his impact statement the claimant describes the effects on his life as follows:-

“(b) The impact of disability on my everyday life was very huge, it completely changed my life because I experience very strong and long lasting pain in my legs, I have problems with moving, bathing, preparing meals, taking clothes, getting dressed and shopping for food. These problems still occur in my life to this day. Shortly after the incident, I was diagnosed with PTSD, which limited my trust and causes anxiety in front of strangers, talking, leaving the house and using public transport.”

21. Later in the statement the claimant sets out the position as follows:-

“(g) The consequences that occurred after my employer cut my pay without informing me in advance and deprived me of time to apply for universal credit were terrible. It started with problems with the owner of the house where I was renting a room because I could not obtain from him the

document I needed to obtain housing benefit which it turned into his aggression towards me, I was harassed by him and his friends at different times of the day and evening, forcibly entering my room, threatening me with beatings, threatening me that if I leave the house, they will throw away my things and change the locks on the doors, as a consequence of which I became a homeless person, walking on crutches with mental problems, despite reporting the whole matter to the police, I did not receive any help from them because when I heard in a conversation with a policeman that nothing had happened to me so far and they could not help me and that I should inform them when I did. In real danger, which exhausted me mentally, the effects that I experience to this day were the lack of money for the basic necessities of life, ie pensions, food, travel to doctors and hospitals, lack of money for bills, the feeling of loneliness and abandonment by the company and the team of which I felt a part. The cut in my salary resulted in me becoming homeless for the winter, which worsened my mental health and slowed down my treatment due to the lack of a place to live, I also stopped trusting other people, including the person from my company, I became a withdrawn person, I experienced terrible humiliation and humiliation related to with the effects of decisions made by my managers, who to this day put pressure on me by organising meetings in the company to talk to them about the state of my mental and physical health and recovery, threatening me with disciplinary consequences. After my salary was cut, I experienced the nightmare of homelessness and disability at the same time, and the humiliation and lack of compassion from managers became a problem for them.”

22. I find the claimant clearly had a physical impairment of an open fracture of the left tibia and fibula.
23. I find that in the short term that has to have had a substantial adverse impact on the claimant’s ability to undertake day to day activities such as walking, bathing, dressing, preparing meals and shopping.
24. However, the claimant was a young man (33 at the time) and in my judgment, the expectation at the relevant time is that he would make a full recovery well within 12 months. As such, I find that it was not likely that the substantial adverse effects would last more than 12 months, ie, that it could not well happen.
25. Consequently, I find that the claimant was not disabled by reason of his leg injury at the relevant time.
26. I find that the claimant had the mental impairment of PTSD in April 2024 when it was diagnosed. Nevertheless, I have to consider when he can be said to have developed the impairment. A diagnosis is not crucial and I have to consider the effects on the claimant. There is some evidence in the GP notes of depression in July and August 2024. However, I do not have the details or what, if any treatment was as given. The context is the claimant’s nasty leg injury and it is understandable that that would cause him to be depressed. However, in my judgment, the expectation would be that his mental state would improve along with his physical state.
27. In addition, from what the claimant has said and the GP notes, it is clear to me that the claimant’s mental condition deteriorated after he became

homeless and over the winter of 2023/2024 leading up to his diagnosis in April 2024 of PTSD. The adverse effects of his PTSD that the claimant refers to are:-

- “ • Limited my trust.
- Causes anxiety in front of strangers.
- Talking.
- Leaving the house.
- Using public transport.”

28. I find that those could constitute substantial adverse effects on the claimant's ability to undertake normal day to day activities. However, as described by the claimant and in accordance with the entry on the GP records, I find that those adverse effects only started manifesting themselves in anything other than a minor way after 4 October 2023. Consequently, I do not find that the claimant has shown that there was substantial adverse effects on his ability to undertake day to day activities prior to 4 October 2023.
29. I find that at the relevant time the claimant probably did not have the mental impairment of PTSD. Depression is a term used to cover a variety of symptoms from mild to severe and I have no medical evidence as to what the context of the entries on the claimant's GP notes was. Even if it was sufficient to constitute a mental impairment, I find that it was not likely to last more than 12 months, ie that it could not well happen. No treatment was sought after 7 August 2023 until April 2024. The expectation would be that as his life events improved so would his mental health. Consequently, I find that the claimant was not disabled by reason of a mental impairment at the relevant time.
30. The following case management orders were made.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. **Full merits hearing**
 - 1.1 The claim has been listed for a full merits hearing to deal with the claimant's unauthorised deduction of wages claims to be heard in person at **Watford Employment Tribunal, 2nd Floor, Radius House, 51 Clarendon Road, Watford, WD17 1HP, on 4 September 2024, starting at 10am.** The time estimate is half a day. A Polish interpreter is required.
2. **Amendment**
 - 2.1 The claimant has not made an application to amend his claim to add a complaint of race discrimination .
3. **Respondent's disclosure**

- 3.1 By **4pm, 16 July 2024**, the respondent is to disclose to the claimant copies of all relevant documents dealing with the days and hours that he worked from November 2022, his rate of pay and what he was paid. The respondent's disclosure should also contain the claimant's contract of employment.

4. Claimant's disclosure/schedule of loss/witness statement

- 4.1 By **4pm, 13 August 2024**, the claimant must send to the respondent the following:

4.1.1 A schedule of loss, namely a document setting out how much in money the claimant is claiming for loss of earnings or any other losses. The schedule of loss must include the following:

4.1.1.1 The amount, if any, that the claimant is claiming in respect of overtime worked but not paid for prior to 25 June 2023 setting out: The dates on which overtime was worked, the number of hours worked, and the gross and net rate of pay at which the overtime was payable under his contract.

4.1.1.2 The amount of company sick pay which he is claiming the respondent should have paid him.

4.1.1.3 Any other claim.

4.1.1.4 Any documents that the claimant relies upon in support of his claims.

4.1.1.5 A witness statement explaining when he says he worked and was not paid and why he says he should be paid sick pay.

5. Respondent's witness evidence

- 5.1 Any witness statement and documents from the respondent in response to the claimant's claims should be sent to the claimant by **4pm, 27 August 2024**.

6. Hearing bundle

- 6.1 The respondent is to send an electronic copy of the hearing bundle to the tribunal not less than one day before the hearing and is to bring two hard copies to the hearing.

7. Other matters

- 7.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.

- 7.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.
- 7.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.
- 7.4 **Public access to employment tribunal decisions**
All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.
- 7.5 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**
- 7.6 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

Employment Judge Alliott

Date: 1 July 2024

Sent to the parties on: 06/08/2024

For the Tribunal Office

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>