



EMPLOYMENT TRIBUNALS

Claimant: PH

Respondents: Eden Horticulture Ltd

RECORD OF A PUBLIC PRELIMINARY HEARING

Heard at: Birmingham (CVP) **On:** 01 June 2023

Before: Employment Judge Hena

Appearances

For the claimant: In Person

For the respondent: Ms Del Priore, (Counsel), Ms Croft (Instructing Solicitor)

JUDGMENT

The Tribunal makes the following decision in relation to the preliminary issues heard at the Public Preliminary Hearing:

1. The claimant suffered a mental impairment which meets the definition of a disability as defined in Section 6 of the Equality Act 2010 at the time of the events the claim was about. I find the evidence distinguishes the claimant's circumstances from those in the cases of *J v DLA Piper UK LLP* [2010] ICR 1052 and *Mr Igweike v TSB Bank* [2019]. The Tribunal decided:
 - A) The claimant suffered a mental impairment of anxiety at the time of the claimed discrimination took place.
 - B) That this anxiety had a substantial adverse effect on his ability to carry out his day-to-day activities and when he returned to the work place

he needed significant help from his then partner to present himself at work but this impacted his home life.

- C) The effects of the anxiety were likely to last at least 12 months from when he first informed the respondent of his condition in September 2021.

PRELIMINARY FINDING

The Tribunal made a preliminary finding on the claimant's two strike out applications against the respondent's response for late filing. It was accepted that the respondent had good reason, namely the liquidation of their instructed firm, in December 2022 to file papers late and it does not meet the high threshold to warrant strike out. With regards to the second strike out application it is found the respondent served the skeleton argument within 7 days of today's hearing.

WRITTEN REASONS

Claims and Issues

1. The issues in this matter are as follows:
 - 1.1. Whether there is merit in the Claimants Strike Out application against the Respondent for failure to comply with the Tribunal directions and serving bundles late.
 - 1.2. If the Tribunal accepts to determine the Strike Out application whether the respondent failed to comply with Tribunal directions and their response should be struck out?
 - 1.3. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:
 - 1.3.1 Did he have a physical or mental impairment: anxiety and depression?
 - 1.3.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?
 - 1.3.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

- 1.3.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?
 - 1.3.5 What the effects of the impairment long term? The Tribunal will decide:
 - (a) Did they last at least 12 months, or were they likely to last at least 12 months?
 - (b) If not, were they likely to reoccur?
- 1.4. The consideration of Case Management Orders, and the listing of the Final Hearing if relevant.

Background

2. The claimant was employed by the respondent, Eden Horticulture Limited, as an Accounts and Sales Manager, from April 2017 until February 2022. Early conciliation started on the 31 March 2022 and ended on the 10 May 2022. The claim form was presented on the 23 May 2022.
3. The claim is about unfair dismissal, direct disability discrimination, failure to make reasonable adjustments and potentially a breach of contract claim.
4. The matter came before Employment Judge Beck on the 7 December 2022, where the claimant informed the tribunal that he had made a strike out application in respect of respondents late filing of the bundle and case management agenda. The respondent in response explained that the delay was because he had moved firms of solicitors one week ago as his previous firm had gone into liquidation, he had had difficulty retrieving his file from his previous firm. Due to this he was forced to make up a bundle himself for the hearing. The tribunal and the respondent had not received notification of the claimant's application for strike out.
5. The Tribunal was also missing a 6–7-page document the claimant has submitted which set out all the incidents of disability discrimination in this matter. In respect of the potential breach of contract claim, the claimant indicated at the hearing that he believed this was payable during his employment before dismissal. The respondent confirmed that they understood the position to be that the claimant was saying if he had not been unfairly dismissed, he would have received his bonus/car/watch. Whilst the claim form did not explicitly refer to breach of contract claim there were references to a breach of contract and Employment Judge Beck directed the claimant to clarify this aspect of his claim.
6. The matter has been listed for a preliminary hearing to determine whether a) the claimant's application for strike out should be considered and b) whether the claimant has a disability as per section 6 of the Equality Act 2010.

Evidence

7. The tribunal heard evidence from the claimant, Mr Bough for the respondent, and Ms Harris for the respondent, unfortunately matters were delayed due to a connection issue and it was agreed by both parties that the claimant could attend the hearing via the telephone.
8. PH's oral evidence can be summarised as follows:
 - That he enjoyed his job role and that this did not cause him difficulties, although it could be stressful.
 - That he did become worried in August 2021 due to the meeting as to risk when prior to this has an impeccable work record, he felt it was common reaction to be worried about something like this.
 - The claimant admitted the first time he sought medical help for his anxiety was on 23 September 2021 but this was not bound up with the disciplinary threat. He couldn't make the appointment and he was told he needed to see his GP due to an RTA which occurred whilst working for the respondent.
 - The claimant made clear his medical records do not indicate his illness is to do with a disciplinary proceeding.
 - The claimant's evidence was that after his sick note of 5 November 2021, which he says the doctor gave him and he did not request, he did not see a doctor for the remainder of 2021 due to the state of depression he was in.
 - He agreed to let the sick note expire in January 2022 and returned to work and he did not do a phased return.
 - The claimant said he declined seeing Occupational Health as he lost faith in the respondent and the Dr referred him to an organisation where he had counselling.
 - The claimant admitted he did not go and see his GP for depression from Jan – Dec 2022 but did see them about other issues and going to work.
 - He said during this period he could barely dress for work and his partner would help him do this and that people at work would comment they were surprised he was at work as he looked awful.
 - The claimant maintained that documents said that his mood was exacerbated by anxiety and isolation at work, as well as the disciplinary process.
 - The claimant claims his symptoms were in fact worse in January 2022 as he was barely able to get out of bed to go to the toilet and unable to leave rooms. This is despite being at work, but, he was clear he was not in a normal state to work.
 - The claimant said he was impacted by his symptoms in that he found it difficult to care for his children and take them to their afterschool clubs. He said that his partner also moved out as it got so bad. He said before he was taking medication, he was very sporty and going out.

- He also said he started taking sleeping tablets in 2022 but the type of tablets changed in that time as some are addictive if taken for a long period of time.
- The claimant said the management team for the respondent knew he was struggling but made it worse as conditions such as his (anxiety etc) were frowned upon as not considered masculine. He said his colleagues were told not to message him and that from being the 'go to' person, it just stopped.
- He wanted the respondent to make adjustments such as checking if he was ok, involving him with what was happening at work, seeing if it was suitable if he could work from home.

9. Mr Baugh's oral evidence can be summarised as follows:

- Mr Baugh set out his qualifications and how long he had worked in the HR field.
- He agreed that the claimant has a clean record, no warnings, no lateness and very little sick leave.
- He also said the claimant was well received by everyone in the workplace, always friendly and would say 'hello' and ask to be updated. He could not say whether he was the 'go to' person nor that he was the most experienced.
- He was aware that the claimant had a period of stress absence and that when he returned to work, he was not qualified to assess such a condition, but he went on with the claimant's appearance and the fact he did not mention anything about how he was feeling.
- He was not aware that the claimant was on medication and admitted he possibly should have asked him whether he was. He felt he was fit to return to work as he returned to work, he assumed it, but did not ask.
- He felt it was relevant to point out that the claimant completed a health questionnaire 2-3 years prior which said he had no disabilities, but that this had not been provided in the bundle as evidence.
- Whilst he is not qualified to assess anxiety and depression, he said he had come across members of staff in his career that suffered from such conditions and knew what they looked like, and that the claimant did not come across like them.
- He admitted in one meeting with the claimant he had said that he was struggling mentally but he did not consider him to be disabled. He did offer for him to see OH and counselling, but the claimant refused. He also felt in the meeting the claimant's appearance was relaxed as was his manner.
- He also said he saw the claimant's medical notes about his condition and that he is not above a doctor in relation to these conditions.
- He admits the claimant suffered from anxiety and depression but that during the relevant period the claimant looked fine.

10. Ms Harris' oral evidence can be summarised as follows:

- She confirmed she has no HR and medical qualifications, and her recollection of the meeting is not that good.
- She recalls going for a cigarette break during the meeting but she is not sure she said 'you look like you need a cigarette break', she may have said something like this as he usually went for a break and not because of his appearance.
- Ms Harris made clear she was just the note taker at the meeting and did not take note of appearances.
- Ms Harris agreed that she and the claimant were friends.
- Ms Harris stood by her witness statement that the claimant was sarcastic at the meeting as she gasped at times during the meeting and remembered thinking he should not have said that. She also said he was aggressive but that this is not in her witness statement.
- She then changed her evidence to say perhaps sarcasm was not the right word and as the note taker she cannot give an example of what the claimant said that she found shocking.
- Ms Harris agreed she did not exactly know what sarcasm meant, but when the respondent's barrister asked her, she was able to explain what she felt by the term sarcasm.
- Ms Harris denied, saying apologizing to the claimant during the cigarette break and saying she did not want to be the note taker and would try and get someone else to do it.
- Ms Harris in reply to the Tribunal was able to describe shocking moments such as the claimant replying to Mr Baugh in the meeting with personal attacks such as his relationship. She agreed that this was not in her statement.

11. Both parties made clear and detailed closing submissions referring to the legal tests and the evidence to support their positions

Fact Findings

12. The Tribunal found the following in relation to the issues:

12.1. ***Did he have a physical or mental impairment: anxiety and depression?***

12.1.1. The claimant's medical records show that he first saw a doctor regarding his symptoms on 23 September 2021 and the records/notes go on until January 2022. This covers the relevant period of time and evidences a mental impairment of anxiety and depression at that relevant time.

12.1.2. The claimant's case can be distinguished from the case of *J v DLA Piper UK LLP [2010] ICR 1052*, in that he has medical evidence from the relevant time that records difficulties he was having at work. In particular the entry at the end of 23 September 2021 it is noted that his colleagues stopped calling him and that this did not used to be the case. It states he felt he was being blackballed and managed out of the company. There would have been a build of these things occurring before he felt symptoms and went to his GP. It is this period of time that the claimant alleges there were acts of discrimination because of his disability.

12.1.3. The evidence presented does not amount to a reaction to the disciplinary matter and I accept from the oral evidence heard from the witnesses that there was a cultural shift which begins to make the claimant feel unwell and cause an impairment.

12.2. *Did it have a substantial adverse effect on his ability to carry out day-to-day activities?*

12.2.1. I found the claimant do be credible in his evidence as to the impact his symptoms had on his personal and work life. He had to go on leave due to his symptoms which is something Mr Baugh said he had previously had very little sick leave.

12.2.2. Further to this I accept his evidence that whilst he returned to work from January 2022 his home life in particular was disrupted and that he required support to attend and function at work.

12.2.3. I did not find Mr Baugh and Ms Harris to be qualified to be able to diagnose the claimant to have been well during that period. In particular, Mr Baugh was fully aware of why the claimant had taken sick leave prior to his return in January 2022 and did not make basic enquiries about why he was not mentally coping, which he accepts the claimant described to him and whether he was on medication that could impact his work during that period.

12.3. *If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?*

12.3.1. There is medical evidence, which I accept, that the claimant was taking medication to manage his condition. He also states he was referred to counselling to assist him.

12.3.2. The claimant did not accept Mr Baugh's suggestion he see Occupation Health and see a counsellor, but I accept at that point the relationship with the respondent, his condition and the situation with colleagues was such that the claimant lost trust in accepting these referrals.

12.4. ***Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?***

12.4.1. I find that if the claimant was not taking the medication and having other treatment the result would be his condition would have had a substantial adverse effect on his ability to carry out his day-to-day activities. It was already severely impacting his personal life with his partner and children, without medication it would have also worsened the impact on him in the workplace.

12.4.2. Whilst both Mr Baugh and Ms Harris said the claimant looked well upon his return to work and did not appear unwell, Mr Baugh admits that he did not ask if he was on medication, I find this reduces the weight of his evidence as he admits his comparators are two people who he worked with previously who visibly looked unwell and the claimant did not match their appearance. If he had probed further when the claimant admitted his mental health struggles, then perhaps more weight could be placed on his evidence.

12.4.3. As above I find the weight to be placed on Ms Harris' evidence to be reduced in that she remembered little of the meeting where she was note taker and that she had no recollection as to the claimant's appearance. Even if she did, I find the weight of her opinion is reduced, as she is not qualified to assess whether someone has an impairment as described by the claimant.

12.5. ***Were the effects of the impairment long term? The Tribunal will decide: (a) Did they last at least 12 months, or were they likely to last at least 12 months? (b) If not, were they likely to reoccur?***

12.5.1. The respondent relied upon the case of *Mr I Igweike v TSB Bank [2019]*, in particular paragraph 40, it notes that case law establishes the burden on establishing disability is upon the claimant. It also states that in some cases, in particular for mental impairments that findings can only be made with medical evidence. Further in paragraph 41 of the decision it states that issues such a mental impairment can be so subtle that without an expert report proper findings cannot be made.

12.5.2. However, in the above case the claimant refused to obtain an expert report, in preliminary hearings it was suggested both parties instruct a joint expert for the purposes of establishing if there was a disability, and the likely duration of the disability etc, but the claimant refused choosing to rely on his medical notes only. There was no such discussion in this case, the respondent has not raised the need for an expert report for the claimant to reject this. The case notes that this is not always a requirement and paragraph 42 states it is for an Employment Tribunal to assess an impairment on the evidence before it and that where there is an adverse reaction to circumstances the reactions/symptoms are not usually long lived.

12.5.3. This is not a case where the claimant had a long-term absence or refused to return back to work unless circumstances changed. The condition was not so subtle in that from September 2021 he set out to his GP that it was not only a disciplinary process at work but there was a wider cultural change at his workplace that was impacting him. Further to this the claimant was someone from the respondent's own evidence that he had a previously clean record with little sick leave.

12.5.4. The impairment commenced in September 2021 when the claimant first notified the respondent. Upon return in work in January 2022 he still expressed he was mentally struggling, despite his rejection of being assessed by Occupational Health in the same meeting, the respondent had an indication that this was not an issue that would just go away. Further they chose not to ask any further questions about these struggles he had, the medication he was taking to manage his struggles and any other treatment he was receiving.

Rule 50 is in place in respect of the Claimant and he should not be identified by his name and only the initials PH.

Employment Judge A. Hena
01 August 2024