



EMPLOYMENT TRIBUNALS

Claimant

Miss D Hider v

Respondent

Elmes Homecare UK Limited

Heard at: London South (via CVP)

On: 24 May 2024

Before: Employment Judge Fredericks-Bowyer

Appearances

For the claimant: Did not attend

For the respondent: Mr A Tinnion (Counsel)

JUDGMENT AT PUBLIC PRELIMINARY HEARING

1. The claimant has not satisfied the Tribunal that she was disabled at any point of time to which her claim relates and so her disability discrimination claims are dismissed.
2. The claimant's constructive dismissal claim is unaffected by this judgment.

REASONS

Introduction

1. These reasons are produced because the claimant did not attend the hearing, and so did not take her opportunity to hear the decision and reasons which was given in the hearing. The claimant will have been informed of my decision through the promulgation of case management orders, and this judgment and reasons follow from the orders issued which were consequential to the decision. It was important to get the case moving with directions, which was why this judgment and the orders have not been issued simultaneously.

2. Mr Tinnion represented the respondent at the hearing. The hearing continued in the absence of the claimant, who advised of her non-attendance by e-mail in the early morning before the hearing, and then could not be contacted by the time of the hearing itself. Before continuing, the following factors were taken into account:-
 - 2.1. The claimant knew of the hearing but had decided not to attend;
 - 2.2. The claimant cited a health issue but provided no medical evidence;
 - 2.3. The claimant invited the Judge to decide how to proceed, and did not make an application to postpone the hearing;
 - 2.4. The disability issue could still be considered because the claimant's witness statement and evidence was before the Tribunal;
 - 2.5. The matter has made little progress since it was issued and there was no indication that a re-convened hearing would be more effective; and
 - 2.6. Mr Tinnion was able to highlight points in evidence which may have assisted the claimant if she was present, as part of his duty as an officer of the court.
3. For the hearing, I had access to a bundle of documents which ran to 160 pages. Page references in this judgment relate to the pages in that bundle. The claimant's disability impact statement and supporting evidence was shown to me at pages 74 to 87.

Issues

4. The sole issue for this hearing, outside any required case management, was to determine whether, at the time that this case is concerned with, the claimant met the definition of a disabled person under section 6 Equality Act 2010.

Relevant law on disability

5. A person (P) has a disability they meet the criteria set out in section 6 Equality Act 2010:-

“(1) 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 do normal day to day activities.”

6. The claimant bears the burden of showing me that she meets this definition, on the balance of probabilities (Morgan v Staffordshire University [2002] IRLR 190; Tesco Stores Limited v Tennant [2020] IRLR 363). When determining the question of disability, I must take account of such guidance as I think necessary (paragraph 12, Schedule 1 Equality Act 2010). I consider it is necessary to take into account the government guidance “*Guidance on matters to be taken into Account in Determining Questions Relating to the Definition of Disability*” (“**Guidance**”). Such guidance is

guidance only and should not be taken too literally or used to adopt a checklist approach (Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19).

7. In Goodwin v Patent Office [1999] ICR 302, it was held that there are four limbs to the definition of disability and this is reflected in the legislation:-

7.1. Does the person have a physical or mental impairment?

7.2. Does that impairment have an adverse effect on their ability to carry out normal everyday activities?

7.3. Is that effect substantial?

7.4. Is that effect long-term?

8. The term 'substantial' is defined under s212 Equality Act 2010 as being "more than minor or trivial". Normal day to day activities are things people do on a regular basis such as shopping, reading, writing, conversing, getting washed and dressed, preparing food, eating, carrying out household tasks, walking and travelling, socialising and working (Guidance, D2 to D9). Normal day to day activities must be interpreted as including activities relevant to professional life (Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763).

9. It is important to appreciate that the effect of the impairment must be substantial and long-term. It is not sufficient to assert that there is a long term impairment in itself without demonstrating the nature of any substantial adverse effect caused by the impairment.

10. Paragraph 2(1) Schedule 1 Equality Act 2010 says:-

"(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.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal everyday activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

11. For current impairments which have not lasted 12 months, I should decide whether the substantial adverse effects of the condition are likely to last for at least 12 months, where 'likely' is defined as "could well happen" (C3 Guidance). 'Could well happen' is the meaning of 'likely' in respect of disability in the Equality Act 2010.

12. The issue of how long an impairment is likely to last is determined at the date of the alleged discriminatory act and not the date of the tribunal hearing (McDougall v Richmond Adult Community College [2008] ICR 431, CA). Subsequent events should not be taken into account.

13. An impairment is treated as having a substantial adverse effect if it 'could well happen' that the substantial adverse effect could occur if the person who may be disabled stopped implementing supportive or preventive measures, such as medical treatment (SCA Packaging Limited v Boyle [2009] ICR 1056).

14. There is particular case law relating to the impairments depression and anxiety (both of which are often claimed alongside 'stress'). I must not merely seek out a medical diagnosis and end an analysis on the basis there either is or is not one. In Nissa v Waverly Education Foundation Limited UKEAT/0135/18, HHJ Eady QC (as was) said:-

"the correct question was to consider what the effects of the impairments were at the material time and to consider whether there was information before the ET which showed that viewed at that time it could well happen that the effects of the impairments would last for more than 12 months".

15. The question to be determined is whether or not the claimant was disabled at the time to which the disability claim relates, and it must put itself into that time to resolve the Goodwin questions (All Answers Ltd v W [2021] IRLR 612). In that case, Lewis LJ said:-

"A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months".

The claimant's claimed disabilities

16. When bringing her claim, the claimant gave no information about the disabilities she relied upon and selected 'No' when asked to confirm if she was disabled for the purposes of bringing a claim in the Employment Tribunal. She was then asked in correspondence to confirm her disabilities but did not do so.

17. The case came before Employment Judge Tsamados in a case management hearing on 22 January 2024. His case management summary records what the claimant told him about her claimed disabilities at paragraph 31.4:-

"The claimant relies on the impairment of depression and in addition mentioned that she had a disfiguring rash. She was diagnosed with depression at the end of January or beginning of February 2023. She stated that the depression was so bad that she could not even get out of bed[,] that the respondent knew about both conditions, she had lost 8 stone, and that depression had come about as a result of the harassment and bullying she suffered from work."

18. The claimant covered both claimed disabilities in the written and documentary evidence found in the bundle.

19. The claim covers a period from August 2022 (when the claimant says that colleagues were instructed not to tell her she was omitted from the company wide pay rise) until her resignation on or around 27 February 2023 (this may be a disputed date in the proceedings). The claimant alleges various events throughout this period amount to disability discrimination. This is the period of time within which the claimant must establish she is disabled in order for any of those allegations to form part of a disability related claim against the respondent.

Findings of fact about disability

20. The relevant facts, as I find them on the balance of probabilities, are as follows.

21. The claimant sadly lost her niece in autumn 2022. Her niece worked at the respondent. The claimant says that she started to isolate herself in November 2022 and limit social interaction – including missing Christmas family events. At the same time, she says that a disfiguring rash started to develop all over her face and body. I accept this evidence from the claimant, having no cause to disbelieve it, and having seen the photographs in the bundle of the rash from pages 79 to 81.

22. The claimant continued to work normally following this bereavement through to 20 January 2023. In the last week of January, she was permitted to work from home as a result of the rash which she considers is a disability. The claimant was then signed off 'not fit to work' for the period from 2 February 2023 to 24 February 2023 (page 87). The fit note records that the claimant was not fit to work as a result of "*bereavement and depression*".

23. The claimant says that she was prescribed mirtazapine and in daily contact with her doctor because of concern about her mental health. The respondent challenges this element of her written evidence, noting that it is not supported with any documentary evidence even though the claimant had been directed to and given time to provide relevant GP notes for the hearing bundle. She had not done so, and I was asked to draw an adverse inference from the failure to provide evidence about prescriptions and GP conversations.

24. I consider that the claimant ought to have provided evidence of these matters if they are in existence. Even if obtaining GP notes were a challenge, the claimant could, in my view, have provided evidence of the medication she says she takes for her mental health condition. She has not done so, and I find that the failure to provide that evidence is because the claimant was not, in fact, prescribed mirtazapine or in daily contact with her GP at this time.

25. I accept the claimant's evidence that her rash led to her not wishing to be seen in public. I accept her evidence that the only time she left her house around November and December 2022 (outside of attending work) was to attend job interviews elsewhere. The claimant provides no evidence about the continuation of the rash or the cause of it, but it is evidently not present in the picture of her she disclosed on page 86 to support her claim about weight loss.

26. I accept the claimant's account that she lost a significant amount of weight across the relevant period, having seen photographs illustrating that issue.

27. The claimant says that she was diagnosed with depression in February 2023. She has produced no evidence that she was diagnosed with the chronic condition of depression. The only evidence disclosed is the fit note recording that she was not fit for work because of 'bereavement and depression'. In the absence of any supporting evidence, which I consider would have been disclosed if in existence, I do not find as a fact that the claimant was diagnosed with chronic depression in February 2023.
28. It is more likely than not, in my view, that the claimant was certified as having an acute episode of depression caused by the bereavement which was also referenced in the fit note. This is a fact that I find on the basis of the evidence presented to me.
29. I was presented with evidence from each party about the claimant's condition following the end of her employment. This is not evidence that I can take into account for the reasons highlighted in the relevant law section above. I therefore make no findings about the claimant's claimed disabilities following her resignation towards the very end of February 2023.

Conclusions on disability

Did the claimant have a mental or physical impairment during the time of her employment?

30. I accept that the claimant had a significant rash from November 2022, which resolved in the evidence she provided to the Tribunal for this hearing. I accept the claimant suffered symptoms of depression during the relevant period and was told by her GP that she should be signed off work with bereavement and depression.

Does that impairment have an adverse effect on their ability to carry out normal everyday activities?

31. I have accepted the combination of the claimant's evidence that the rash caused her to withdraw from social interactions and avoid going out unless she needed to. I accept that her depression left her feeling low and less inclined to go out or do activities. These are adverse effects.

32. I have also found that the claimant did continue to work up until 3 February 2023. She was, on her own evidence, applying for other roles and attending interviews. She gave no evidence of any other adverse effect on other normal day to day activities outside of socialising. There is no evidence of that the claimant was unable to do everything necessary to meet her needs, such as shop, work, and look after her own needs.

Is that adverse effect substantial?

33. In my judgment, withdrawal from social situations and avoiding going outside are adverse effects which are more than minor or trivial. Even if I consider the claimant could take care of her own necessities, normal day to day activities go some way in excess of that. I consider that the adverse effects caused by a combination of the conditions is substantial.

Is that adverse effect long-term?

34. I must consider the claimant's position at the time to which her claim relates. The conditions arose from November 2022. I must consider, at the time between November 2022 and February 2023, whether it was likely (looking forward from that time) that the substantial adverse effects from the conditions would last for at least 12 months.
35. The claimant's evidence shows that the rash had resolved during the time to which her evidence relates (the relevant time). I do not consider the rash had a long-term substantial adverse effect. The claimant describes experiencing grief upon the loss of her niece. There is then very little about the effects of depression in her evidence until being signed off work with her GP with what I have found to be an acute episode of depression caused by the bereavement also cited.
36. I consider that, when assessed by the GP, the claimant had been suffering symptoms of depression since November 2022. That is a three-month period. I am required to consider the likelihood that social withdrawal and an inability to work would last a further 9 months after seeing the GP. I am not satisfied that that was likely at the time based on the evidence before me. There are no GP notes of conversations or any referrals from which I could draw that inference. Indeed, the opposite. I have drawn an adverse inference from the failure to disclose evidence.
37. I do not consider that the conditions were likely to have had a long-term substantial adverse effect on the claimant.

Overall conclusion and consequences on disability

38. The claimant has not satisfied me that she fulfilled the definition of disability at the time to which her claim relates. It follows that I do not find that she was disabled at that time, and so her disability claims fall to be dismissed.

Employment Judge Fredericks-Bowyer
Date: 31 May 2024