



EMPLOYMENT TRIBUNALS

Claimant: Ms C McKay

Respondent: Coloplast Limited

Heard at Cambridge by CVP

On: 26 July 2024

Before: Employment Judge Isabel Manley

Appearances

For the claimant: In person accompanied by partner Mr Orton

For the respondent: Mr C Crow, counsel

PRELIMINARY HEARING JUDGMENT

JUDGMENT having been given orally to the parties on 26 July 2024 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

Introduction and issues

- 1 The question of whether the claimant was a disabled person was listed to be determined at this preliminary hearing at an earlier preliminary hearing on 1 May 2024 with orders being made in preparation for this hearing at that point. The question had previously been determined in June 2021 but the claimant had been successful on appeal and the matter was remitted to be determined afresh with evidence which had been provided before and some new evidence.
- 2 This preliminary issue was whether the claimant was disabled within the definition contained in section 6 Equality Act 2010 (EQA). This includes considering whether there was disability "*at the material time*". Although the hearing had been listed with suggested dates for the material time being 2017 to the end of the claimant's employment of which she was notified on 25 April 2019, it required early consideration of when the alleged acts of disability discrimination had occurred.
- 3 Although this claim has been progressing for some time, there has been no definitive statement on when the material time was. Although initially the respondent's representative believed it was summer of 2018, after clarification of

the claims for the list of issues, it seems now that the first alleged act or omission of discrimination is February 2018.

- 4 The main question is whether, at that point (February 2018) or at later point up to the dismissal of the claimant in April 2019, there were substantial adverse effects resulting from the claimant's impairment which had lasted 12 months or were likely to last 12 months. The respondent accepts that, by March 2019, there were substantial adverse effects but disputes that they were likely to last 12 months.

The hearing

- 5 The hearing was by CVP. The claimant attended and was assisted by her partner, Mr Orton. I had before me a bundle of documents and a skeleton argument from the respondent's representatives. There was also a draft list of issues which was considered for the merits hearing after I had given judgment on the definition of disability issue. There were three disability impact statements in the bundle, all of which had some descriptions of the symptoms of the claimant's ill health. The bundle also contained copies of the claimant's medical records as well as Occupational Health service (OHS) information.
- 6 The claimant gave evidence for approximately one hour and the remainder of the morning was taken up with discussion and submissions. I considered the issue over a slightly extended lunch break and gave oral judgment at 2pm. We then moved onto case management matters.

The facts

- 7 The claimant worked for the respondent from 2011 until she learnt she had been dismissed on 25 April 2019. She was employed for the last few years as a customer care specialist.
- 8 During 2017 the claimant alleges there were problems with a manager which upset her. It seems similar concerns were raised by others and the individual about whom the concerns were raised left the respondent around November 2017. Some of these concerns formed the basis of the claimant's sex discrimination claim but that has been struck out as it was out of time. The claimant also had some family difficulties around her daughter in 2017 of which the respondent was aware. In her impact statements, the claimant mentions these matters but the details are not relevant to my determination.
- 9 In her impact statements, the claimant described how she started experiencing symptoms of depression in mid-2017. She visited her GP in January 2018 where she was diagnosed with depression and anxiety, prescribed Sertraline 50mg and signed off for 2 weeks, later extended to 6 weeks. She continued on the medication but decided, after discussion with her GP, to try a phased return to work in mid-February. This phased return started at 4 hours a day which after 8 weeks was increased to 5 hours a day for 8 weeks and then to 6 hours for 4 weeks until the claimant returned to full time hours in August 2018. During this time her medication was increased to 100mg.

- 10 She described how, in early 2018, she found it very difficult to leave the house, not getting dressed and struggled to manage house work. She had trouble sleeping and spent a vast amount of time in bed. After she was back at work on the phased return, she described finding it difficult to concentrate and was getting irritable. She would go straight to bed after work. She said she tried to reduce the Sertraline to taking it every other day. Between August and November 2018, she asked several times to work from home as she found socialising difficult but this was refused and it was recorded by the respondent as “domestic incident” which was unpaid. In November 2018, she had a problem with her eye and, when she visited the GP on 19 November 2018, they confirmed depression and anxiety, prescribed Sertraline at 50mg and signed her off work for 2 weeks with another 2 weeks following that.
- 11 The symptoms continued with very poor sleep, no concentration and sickness absence and her medication dose increased to 100mg in March 2019. At one point she described feeling suicidal but accepted she did not tell either the GP or the Occupational Health adviser that as she was embarrassed. She described spending many days in bed and social anxieties becoming “*out of control*”.
- 12 When the claimant was answering questions in the hearing, she agreed she had very little absence from work during 2017 when she believed the depression had begun. She said there had been more flexibility then about working from home. She also agreed there may have been a gap in her medication of about 4 months between July and November 2018 but said that she was trying to manage without it and trying to be “*normal*”. She felt she relapsed in November, that she thought she was getting better but found she was not.
- 13 The claimant was facing disciplinary proceedings and was referred to OHS whom she spoke to on 11 March 2019. Their report included much of the information of her symptoms as described above and considered she was still unable to work but well enough to attend a meeting. Their opinion was that she was likely to be disabled under the EQA. She was still on sick leave when she was dismissed at a meeting she did not attend on 18 April, being informed by letter on 25 April 2019.

Law and Submissions

- 14 The primary source for consideration of the definition of disability is in Section 6 EQA which reads:-
 - (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.*
 - (2) *A reference to a disabled person is a reference to a person who has a disability.*

(3)In relation to the protected characteristic of disability—

(a)a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b)a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4)This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a)a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b)a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability

(5)A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6)Schedule 1 (disability: supplementary provision) has effect.

15 Section 212 (1) EQA provides that “substantial” means more than minor or trivial”.

16 The provisions in Schedule 1 EQA with respect to what is “long term” are as follows:

Long-term effects

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.

(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 that effect is likely to recur.

(3)For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

17 The Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) contains much which is useful including sections on the meaning of “substantial adverse effect”; effects of treatment; and importantly for this case, “long term effects” and “likely”. It also references situations where the effects are fluctuating or recurring.

- 18 Paragraph C3 states that the meaning of “likely” is that “*it could well happen*” (see Boyle v SCA Packaging Ltd [2009] ICR 1056) and paragraph C4 states - “*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*”
- 19 The respondent referred me to the case of Richmond Adult Community College v McDougall [2008] ICR 431 which re-iterates that the long term effect must be judged at the date of the alleged acts of discrimination (as in paragraph C4 above). The more recent case of All Answers Ltd v W and anor [2021] IRLR 612 also made it clear (again as in paragraph C4 above) that a tribunal must not take into account anything only known after the alleged act when assessing the likelihood of the effects lasting more than 12 months.
- 20 The respondent provided a written skeleton argument which he added to orally after the evidence had been heard. In summary, it is not disputed that the claimant had substantial adverse effects of a mental impairment at the time of her dismissal. What is not accepted is that those effects were long term. It was suggested that there was a degree of inconsistency in the claimant’s account of her symptoms and there is no medical evidence to support her case that there were effects in 2017. It was submitted that any mention by the claimant of suicidal ideation is not supported by the medical evidence and suggests exaggeration. Importantly, the respondent submits, there was a gap between August and November when the claimant was working full time and not taking medication. It is submitted that the substantial adverse effects had not lasted 12 months nor were they likely to last 12 months as at March or April 2019, reminding me that I cannot take into account effects that postdated the dismissal.
- 21 The claimant submitted that she did feel unwell in 2017 but did not recognise it, at the time, as symptoms of depression. She said that she had managed to return to work but reminded me that the phased return was relatively long. She also said that the period of time when she was not taking medication and working full time, she had a difficult balance and asked to work from home to help, which was not allowed. She submitted that she had substantial effects throughout 2018 and into 2019 (and beyond) and that it had been a mistake to stop taking her medication.

Conclusions

- 22 First, I find that the claimant had the mental impairment of depression and anxiety from early 2017 until her dismissal in April 2019.
- 23 Secondly, I find that the effects of that impairment amounted to substantial adverse effects on normal day-to-day activities throughout that period. I have accepted the claimant’s evidence that she had effects that were more than minor or trivial throughout that period. Although there was a time during August to November 2018 when the claimant did not visit the GP or take medication, I

accept that the effects remained substantial, even if they were not as severe as early 2018 and early 2019. She still had significant sleeping issues and social anxiety which led to some time off and staying at home instead of going to work. This means that the claimant was disabled at the material time, the alleged acts of discrimination having occurred from February 2018 to April 2019.

- 24 Thirdly, if I am wrong about that and the effects were not substantial for a period of time, I find that it was likely that the effects would last for at least 12 months, either when looking at it from February 2018 (when the claimant was only able to return to work on much reduced hours and increased medication) or from the later point of dismissal, given the clear history of substantial adverse effects at that point. I find that it could well happen that the effects could last for at least that length of time.
- 25 The claimant’s claim for disability discrimination continues to be determined with her other claims for unfair dismissal and victimisation in line with the agreed list of issues.

Employment Judge Isabel Manley

1 August 2024

Sent to the parties on:
17 September 2024

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For the Tribunal Office:

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