



EMPLOYMENT TRIBUNALS

Claimant: Gerard Donnelly

Respondent: Wirral Borough Council

Heard at: Manchester by CVP

On: 14 October 2024

Before: Employment Judge Lloyd

Representation

Claimant: In person

Respondent: Miss Gumbs, Counsel

JUDGMENT ON PRELIMINARY ISSUE OF DISABILITY STATUS

1. The claimant was not disabled within the meaning of section 6 of the Equality Act 2010 at the relevant time.
2. The claimant's claims of disability discrimination are dismissed.

REASONS

Introduction

3. The purpose of the preliminary hearing is to determine whether the claimant had at the relevant time a disability within the meaning of section 6 of the Equality Act 2010.
4. By claim form dated 5 December 2023 the claimant brought complaints against his former employer, Wirral Borough Council, one of which was of disability discrimination. The claimant was employed by the respondent as a Museum Assistant from 1 November 2018 until his dismissal on 26 July 2023.

5. The hearing was held as a remote CVP video hearing. The Tribunal was provided with an agreed bundle of documents 256 pages. The claimant gave evidence and provided redacted medical material (page 82-128).

Facts – GP notes

6. The GP entry dated 15 August 2019 on page 106 says the claimant has recurrent depression and he was not getting much sleep.
7. The GP notes on 4 January 2020 on page 94 state the claimant visited GP who prescribed 15mg mirtazapine for depression. The GP notes confirm that he had previously been prescribed sertraline and fluoxetine which did not help. The claimant was not taking his medication as he did not think it helped. The claimant said he felt isolated in the workplace. He has been given information about the employee assistance programme. The claimant said he had no thoughts of self harm or suicidal ideations.
8. The GP entry for 6 February 2020 (page 93) says the claimant felt no better and he did not obtain the medication for financial reasons. He has had a session of counselling and this helped. The GP recorded “depressive disorder”.
9. The GP entry for 16 December 2020 (page 93) says the appellant has recurrent depression. He has low mood, poor concentration, poor motivation, sleep disturbance which have been aggravated by lockdown. The GP prescribed 50mg sertraline.
10. The GP entry for 31 March 2021 on page 92 says the claimant has recurrent depression. He felt low.
11. On 19 May 2021, the GP records that the claimant does not wish to take medication for his mental health condition. He was having counselling at work.
12. On page 92 the 25 May 2021, the GP entry says the claimant has ongoing depression with sleep disturbance, poor appetite and low mood. He is having counselling once a week. The claimant has occasional suicidal thoughts but would not act on them. He did not want to take anti depressants.
13. On 8 June 2021 on page 91, the GP records that the claimant appeared “in a relatively good mood and was jovial”. The counsellor was helping “a lot” and understood the claimant. The claimant enjoys reading, exercise and music. He felt isolated. The claimant told his GP that he worked 19.5 hours and “wishes to do more hours”.

14. On 1 July 2021 on page 91 that the claimant has workplace stress which is getting worse.
15. On 2 July 2021 on page 90 the GP records depressive disorder. The claimant is putting on weight. The claimant felt unsupported at work. He agreed to try taking an anti depressant - 50mg sertraline.
16. On 18 November 2021 on page 87 the claimant tells his GP that he is feeling better and does not need GP input now.
17. On 1 February 2022, the GP entry on page 85 records that the claimant's mood is poor as is his sleep. He is not taking an anti depressant but takes propranolol when particularly stressed. The claimant would like to restart the anti depressant medication. He has had two CBT sessions which have helped. The claimant has no thoughts of self harm or suicide.
18. On page 84 in an entry dated 22 March 2022, the GP says the claimant is physically active.
19. On 25 July 2022, the GP made an entry on page 82 which says the claimant has low mood. It relates to his employment. The claimant does not want to take anti depressant medication. He is paying to see a private counsellor.
20. An online GP consultation request on page 101 dated 15 December 2020 says the claimant has had low mood for 1 – 4 weeks. His sleep, appetite, energy and concentration levels were affected. The claimant has had anxiety for 1-3 days. He doesn't socialise (page 102).
21. There is an online GP consultation request beginning on page 83 dated 17 May 2021. The claimant lists his symptoms of depression and anxiety. He said these problems started when he was 21 years. The claimant is having problems with socialising, sleeping, socialising, eating and concentrating.
22. An online GP consultation request dated 26 March 2021 begins on page 99. He said he is not socialising and his appetite, sleep, concentration and energy levels are affected.
23. A Psychologist Wellbeing Practitioner recommends counselling for the claimant on page 108 on 4 November 2022.
24. On 27 January 2022, the claimant completes an online consultation request which begins on page 109. He says he is tired and has low mood and panic symptoms.
25. A GP printout on page 115 says the claimant was first diagnosed with depression in July 1997.

26. A GP entry on page 126 dated 20 March 2023 says the claimant has low mood and is anxious. Counselling is not helping.
27. A GP entry dated 6 December 2023 on page 116 records a mental health review with the claimant. The GP says the claimant is well kempt and dressed appropriately for the weather. The claimant had good eye contact and established a good rapport easily.

Facts – Occupational Health Reports

28. There is an Occupational Health Report (OHR) dated 11 June 2021 beginning at page 129. The claimant's stress is affecting his mood and sleep. The report says *"Based on my assessment today, I consider Mr Donnelly fit for work. He told me he enjoys his role and has no issues carrying out his duties in work"*.
29. An OHR dated 26 July 2021 notes the claimant is off work sick and counselling is recommended.
30. An OHR dated 7 February 2022 on page 140 notes the claimant *"is accessing the EAP (Employee Assistance Programme) provided by Wirral council. He stated the therapy is supporting him and has taught him some coping mechanisms. He currently takes medication to assist in the management of his symptoms. He is currently maintaining his day-to-day activities independently. However, he is experiencing difficulties with sleeping and concentration due to worries within the workplace. He described his mood as being low but stated if he took time absent from work he believes his mental health would deteriorate". "I would consider Gerrard fit to continue to work at present with the suggested adjustments I have made below. Gerrard has made it clear that he enjoys providing a service to the public at the museum, and although he is experiencing work related issues, he informed me that he would feel worse if absent from work. Gerrard has reported some issues with his concentration but states it does not impact on him performing his duties at work". "Gerrard has reported work related issues which are causing him to experience some difficulties in sleeping and affecting his concentration. He is able to continue his day-to-day activities independently and is receiving support by his GP and the EAP (Employee Assistance Programme). I have advised him to continue this at present as he stated it is having a positive impact on his symptoms. I believe that Gerrard is fit to continue work with the above suggested adjustments. I have not arranged to review Gerrard but would be happy to do so if required"*.
31. The claimant off work sick 3 July 2021 to 31 August 2021 with anxiety and depression.
32. An OH report dated 4 April 2022 has difficulty sleeping and is lacking structure.

33. An OHR report dated 24 May 2022 on page 163 says “*Current Position Gerard has been experiencing symptoms of anxiety and low mood. These manifest as poor sleep, altered appetite and difficulty with concentration. Gerard denies any personal factors affecting his mental health. Gerard reports that a number of work related factors have affected his mental health. Gerard is currently prescribed medication by his GP to manage his symptoms and is also undertaking counselling via the Wirral Council Employee Assistance Programme. Gerard reports he enjoys his job role and is keen to remain in work*”. The report says the claimant is fit for work. The report says “*He is able to continue his usual day to day activities independently and is receiving support via his GP and the Employee Assistance Programme*”.

Oral evidence at the hearing from the claimant

34. At the hearing, the claimant said his condition fluctuated depending on behaviours in the workplace.
35. The claimant agreed from the report on page 101 that as at 15 December 2020, he had symptoms of depression for 1 – 4 weeks and anxiety symptoms for between 1-3 days. The claimant said he was eating but not at regular times. He was undertaking his hobbies less frequently.
36. The claimant told the Tribunal he walked to work or sometimes cycled.
37. The claimant agreed that he could carry out normal day to day activities when assessed by the OH in 2021 and 2022.
38. The claimant agreed that he would have liked more hours in his job in June 2021 – page 91
39. The claimant told the Tribunal that he did not take his medication on an ongoing basis as he did not think they helped his condition.
40. The claimant agreed with the entry at page 87 of the GP reports which confirm he is feeling better in November 2021, and he did not need GP input

The Law

Disability defined

41. For the purposes of section 6 of the Equality Act 2010 (EqA) a person is said to have a disability if they meet the following definition: “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.”
42. The burden of proof lies with the claimant to prove that he is a disabled person in accordance with that definition.

43. Case No: 2412216/2023

44. The term “substantial” is defined at section 212 as “more than minor or trivial”. Normal day to day activities are things people do on regular basis including shopping, reading and writing, having a conversation, getting washed and dressed preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, socializing (see D2 to D9 of the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011).
45. Further clarity is provided at Schedule 1 which explains at paragraph 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.”
46. Likely should be interpreted as meaning “it could well happen” rather than it is more probable than not it will happen; see SCA Packaging Limited v Boyle (2009) ICR 1056. In the case of Patel v Metropolitan Borough Council (2010) IRLR 280 the EAT stated that the issue of whether the effect of an impairment is long term may be determined retrospectively or prospectively.
47. A claimant must meet the definition of disability as at the date of the alleged discrimination.
48. As to the effect of medical treatment, paragraph 5 provides: - (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if- (a) measures are being taken to treat or correct it and (b) but for that it would be likely to have that effect. (2) Measures include in particular medical treatment...
49. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government’s office for disability issues entitled “Guidance on matters to be taken into Account in Determining Questions Relating to the Definition of Case Number: 1300655/2021 3 Disability” The guidance should not be taken too literally and used as a check list (see Leonard v Southern Derbyshire Chamber of Commerce (2001) IRLR 19).
50. Some guidance is given in paragraph B1 as to the meaning of “Substantial adverse effects” namely, “The requirement that an adverse effect on normal day to day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences

and ability which may exist amongst people. A substantial effect is one that is more than a minor or trivial effect.”

Submissions

51. The respondent invited the Tribunal to find that the claimant was not disabled within the meaning of the Act. At the hearing, the respondent said it was accepted that the claimant had a mental impairment which had a long term effect. The issue was whether the impact had a substantial and long term adverse effect on the claimant’s ability to carry out normal day to day activities.
52. The claimant said he was subject to ill treatment at work which made him unwell and affected his mental health.

Relevant period

53. The Tribunal at the preliminary hearing on 23 July 2024 decided that the relevant time where it is contended that the claimant was subject to discriminatory treatment is from 2019 to July 2023.

Mental Impairment

54. As noted above, counsel for the respondent accepted at the hearing that the claimant has a mental impairment which has a long term effect. Counsel did not accept that the mental health impairment had a substantial adverse effect on the claimant’s ability to carry out day to day activities.

Substantial adverse effect on ability to carry out day to day activities

55. The Tribunal should not only focus on a diagnosis but consider the effects on normal day to day activities.
56. From the medical evidence in the bundle, the main impact of the claimant’s anxiety and depression are on his sleep, appetite and concentration.
57. The impact of the claimant’s mental health impairment on his sleep is intermittent. There are gaps in the times this was a problem as stated in the medical evidence. Sleep is not mentioned as a problem when the claimant speaks to his GP on 14 January 2020 on page 94. The first mention is on page 93 on 16 December 2020, a gap of 11 months. The next entry regarding sleep problems in the GP notes is on 25 May 2021, a gap of five months. By 8 June 2021, the claimant tells his GP he wanted to do more hours at work. The claimant does not mention sleep as a problem to his GP at the consultation on 2 July 2021 (page 90). On 18 November 2021 he tells his GP he is feeling better and does not need GP input. The claimant says he has poor sleep in his GP consultation on 1 February 2022 (page 85). This is a gap of nine

months from when he last raised it with his GP. The claimant does not mention sleep problems in his GP consultation on 25 July 2022 (page 82).

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58. The claimant reports sleep problems in the OH report on page 129 on 11 June 2021 but tells the health care professional that he can carry out his normal day to day activities. He was in work at that time.
59. The OH report on page 140 in February 2022 says the claimant is having sleep problems but is able to carry out his normal day to day activities. The report confirms the claimant is fit for work.
60. I find that the claimant's mental health impairment did not have a substantial adverse effect on his ability to sleep during the relevant period. Sleep problems were intermittent and not always mentioned to the GP in his mental health reviews. The claimant was able to work throughout the relevant period other than in July and August 2021. The GP notes that the claimant wanted to work more hours in June 2021. I find the claimant's sleep problems were minor. He did not say that they stopped him from carrying out day to day activities at the relevant time as confirmed by the OH. The impact of the sleep symptoms on the claimant was not sufficient to meet the threshold for substantial adverse effect on his ability to carry out day to day activities.
61. There is some effect on the claimant's appetite but again this is intermittent. It is first mentioned in the GP entry on page 92 on 25 May 2021. The claimant was putting on weight on 2 July 2021 (page 90). He did not mention appetite problems at the OH assessment on 14 June 2021 or on 3 February 2022. I find that the claimant's mental health impairment did not have a substantial effect on his appetite. Any adverse effect on his appetite was insubstantial and relatively minor. It did not stop him from doing any day to day activities.
62. The claimant says his concentration was affected by his mental health condition. The claimant was however able to work throughout 2019 to July 2023 save for sickness absence in July and August 2021. The claimant wanted more hours at work in June 2021. The OH report from June 2021 confirm that the claimant is managing his normal day to day activities. The OH report from 3 February 2022 on page 140 says that there are some problems with concentration, but it does not impact on the claimant performing his duties at work. The claimant was found fit for work. In May 2022 at page 163 the OH report notes problems with sleep, altered appetite and concentration. The OH report concludes the claimant is fit for work and notes that he is able to continue his usual day to day activities independently. He was not stopped from doing any as a result of concentration problems.
63. The claimant's mental health impairment did not have a substantial effect on his ability to carry out his normal day to day activities. Any adverse effect on concentration was insubstantial and relatively minor. I recognise that disability is not a particularly high bar. I have carefully considered my findings based on the evidence before me.

64. The claimant was prescribed medication for his mental health condition on a number of occasions. Any effect of this medication must be discounted for the purposes of assessing whether the claimant was disabled at the relevant time. From the GP notes, it is clear that the claimant did not take medication for his mental health impairment for any prolonged period. This is confirmed by the GP in a number of entries. The longest period the claimant appears to have taken medication for is six weeks. The claimant said this was because medication did not help him. It did not alleviate his symptoms.
65. Accordingly and for these reasons, I find that the claimant's mental health condition did not have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities, and that the claimant did not have a disability falling within s.6 of the Equality Act 2010. The claimant has not shown he was disabled and therefore his claims of disability discrimination can not be pursued. His claims are dismissed.

Employment Judge Lloyd
11 November 2024

JUDGMENT SENT TO THE PARTIES ON
14 November 2024

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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