



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Mr P Burnip

AND

Department for Work
& Pensions

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: North Shields

On: 19 December 2017

Before: Employment Judge Pitt (sitting alone)

Appearances

For the Claimant: Mr J Cole

For the Respondent: Mr A Webster of Counsel

JUDGMENT ON PUBLIC PRELIMINARY HEARING

The claimant was not a disabled person for the purposes of the Equality Act 2010.

REASONS

- 1 I have converted this final hearing in relation to all of Mr Burnip's claim to a public preliminary hearing. This is due to the non-availability of members to deal with the full case today. It was clear on the paperwork I had that I would be able to deal with the issue of whether or not Mr Burnip was a disabled person for the purposes of the Equality Act 2010 and then if necessary make orders as to the ongoing management of this case.
- 2 I heard evidence from Mr Burnip in person. I read an occupational report from December 2016. I read his GP notes for the period of 2016 to 2017, a letter from

the Counselling Service, I also reviewed a stress assessment and a one to one carried out in January 2017 by the respondent.

- 3 In terms of the law I have to consider section 6 of the Equality Act 2010. First does the claimant have a physical or mental impairment, does that have a substantial long term adverse effect on his ability to carry out his normal day to day activities. In determining this I have considered the guidance on the definition of disability issued by the Secretary of State in 2011.

Facts

- 4 The claimant has been employed by the respondent for a number of years. He was dismissed in January 2017 for conduct. He alleges that at that time he was a disabled person for the purposes of the Equality Act 2010.
- 5 In July 2016 his wife gave birth to a baby daughter. On the evidence I have heard it seems that she has had substantial difficulties following that birth which has led to her having to access substantial medical treatment. I am satisfied that this did have an impact on the claimant's health.
- 6 Sometime after that in August, probably around 8 August, the claimant's brother was reported missing. On 11 or 12 August he was found. He was charged with serious criminal matters and incarcerated in prison. As a result of those events Mr Burnip's evidence is that the impact on the extended family was huge, his mother and father were particularly hit hard by this to the extent that his mother was having regular attempts at suicide.
- 7 All these will have undoubtedly had an impact on him.
- 8 During this period the claimant was still attending at work which involved him carrying out or delivering training on behalf of the respondent to new inductees.
- 9 Sometime prior to 16 December 2016 he took advice from his GP as to his mental health.
- 10 Dealing with his medical history he saw his GP on 12 December. It records 'everything getting on top of him, always been like this but worse recently, points out what issues are. He has had thoughts of suicide in the past but has three young children, protective factor. Stressed at work, works alone training a lot of the time'. The doctor describes him as well, chatty, normal dress, speech and eye contact. He was at that time prescribed an antidepressant at 50mcg, one tablet a day. He was reviewed on 21 December. There was no improvement at that time. His mind was still racing, he had lost weight. It was not possible to amend his duties, did not want to take time off as he felt he would sit at home. His dose was then increased to 100mcg.
- 11 On 23 February it is reported that the claimant felt things were stable, counselling is helping, no dark thoughts and more optimistic and relaxed about the future. Discussed duration of treatment but advice it would last six months at least and

to review for considering stopping. The medical notes would tend to suggest that a repeat template was issued on 23 February 2017 for the same dosage.

- 12 As a result of issues raised by him with his line manager he was referred to the occupational health service. They carried out a telephone interview with him on 23 December. This records that he was suffering symptoms of stress, anxiety and depression. The cause of his symptoms mainly related to personal matters. 'He is now accessing appropriate treatment and has been reported for counselling support. He has got medication, is completing self help strategies and passive exercise to help manage his symptoms.' Finally 'his symptoms remain significant at present as he continues to experience symptoms of low mood, poor concentration, disturbed sleep, increased fatigue, raised anxiety and lack of self-confidence and motivation'. The occupational health adviser, Ms Shufflebottom, was of the opinion that he remained fit for work on full hours and duties although advice was given as to how the management could deal with that. The outlook for long term clinical prognosis is unclear. 'His symptoms remain significant and I am unable to predict a timescale for recovery as further treatment options may need to be explored. However I remain optimistic his symptoms will continue to improve with ongoing medical treatment and they will be managed more effectively within the foreseeable future which is the next four to six weeks.'
- 13 The opinion of Ms Shufflebottom was that his condition is likely to be considered a disability at this time, remembering that that was December 2016. I also looked at the stress reduction plan and the one to one strategy and it is clear at this time that the employer was aware of the ongoing personal issues which Mr Burnip faced.
- 14 I asked myself first of all then did the claimant have a mental impairment. I am satisfied and it is conceded by the respondent that he did have a mental impairment for the purposes of the Equality Act 2010 namely depression.
- 15 In terms of whether or not it had a substantial adverse effect on his ability to carry out normal day to day activities the evidence of the claimant was that since August was not sleeping as well as he should. In relation to getting up he would wait for his daughter to wake up and then got up because of her. His personal hygiene he said suffered. He sometimes went without having a shower. Work helped because it kept his mind off his problems at home. At weekends he did not do much with the children, take them for a walk, and perhaps go to soft play. He says that the thoughts that he has comes and goes, sometimes now he still wants to run away but not every day. Since leaving the respondent employment he has not applied for ESA as He wanted to find a job and accepted that to continue claiming JSA he had to produce evidence of applying for a job every week.
- 16 I asked about his ability to deliver his role as a trainer. He said that he was normally OK although he would sometimes leave the room and have a time out. I asked him specifically what that was for and he said to sit and gather his thoughts. I asked him how he felt when he appeared in front of an audience of new inductees and he said "I was good at putting on a front".

- 17 In order to be a substantial adverse effect it must be one that is more than minor or trivial. I am satisfied that the impact that this was having on the claimant was substantial. It seems that from August he was attempting to look after not only his wife's own mental health but those of other members of the family. This clearly had an impact on him. In relation to getting out of bed, he did that because he had to and he had no choice in that to look after his own children. His hygiene would suffer and that although he was going to work that there were periods when his concentration was such that he had to take a break. I am satisfied that for those reasons that it does have a more than minor or trivial impact on his ability to carry out normal day to day activities.
- 18 That is not the end of the story though because I then have to consider whether or not it is a long term effect. Clearly he does not fall within the first definition that it has lasted for 12 months. The most likely is that it is likely to last for at least 12 months. With mental health issues it is frequently difficult to determine exactly at what point feeling low turns into a depressive illness. The best that I can do is assess it as sometime around September or October 2016. The claimant was obviously feeling low as a result of the birth of his daughter and the struggles with his wife. This was impacted upon by his brother's actions and thereafter his family reaction to that. So some time between September and October I assess that he was probably suffering from depression. However I cannot be certain of that. What I do know is that he was so unwell that come December his wife herself had approached him. They spoke about his behaviour which she described as he was withdrawn, sniping at the children and he had no enjoyment going through the motions and he recognised those symptoms himself and that led him to going to see his GP. It seems to me therefore that it is likely that the claimant was suffering from clinical depression from sometime in November of 2016.
- 19 I then jump forward to January and to try and assess whether or not that the depressive illness he was suffering at that time was one that was likely to carry on for at least 12 months.
- 20 On the evidence that I have heard from the claimant I am not so satisfied. He received counselling, the maximum number of 6 until to 12 April 2017. His last GP appointment specifically to his illness was 23 February. The duration of treatment at that time is '6 months at least but to come for review if considering stopping [the medication]'. However, the evidence of the claimant is that he took his medication on an ad hoc basis as and when he remembered. Specifically when asked about when his last repeat prescription was he thought it was a few months ago. Whilst I can accept that somebody with the amount of pressure upon him may occasionally forget to take some vital medication I cannot accept that somebody who has such pressures would fail to take his medication for such a long period of time. His last noted prescription was February and that was for two months which would take him to the end of May. Other than the evidence that I have had from him, it was a few months ago, I assess he probably has not had any medication since August. During that period I am told that he has maintained himself by claiming JSA and seeking new employment which required him to produce evidence of him applying for a job and indeed he has

now found himself since June as a crew member of McDonalds and whilst this is not such a position as he was in previously it still is a job where he has to be able to concentrate and produce goods to a good standard. He tells me he still feels like he wants to run away but it is not every day now.

- 21 For those reasons therefore I have come to the conclusion that the mental impairment is not likely to be ongoing for 12 months. I considered whether it was recurring or fluctuating but there is no evidence before me to say that he is likely to have a downturn and I specifically note in this regard at the lack of medication over the past few months.
- 22 The claimant is not disabled for the purpose of the Equality Act 2010.

EMPLOYMENT JUDGE PITT

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON
8th January 2018**