



EMPLOYMENT TRIBUNALS

Claimant: Mr E Parnaby
Respondent: Leicester City Council
Heard at: Leicester
On: 9 August 2018
Before: Employment Judge Ahmed (sitting alone)

Representation

Claimant: Mr Kohanzad of Counsel
Respondent: Mr Linstead of Counsel

JUDGMENT AT A PRELIMINARY HEARING

The judgment of the Tribunal is that the Claimant was not at the material time a 'disabled person' within the meaning of section 6 and Schedule 1 of the Equality Act 2010.

REASONS

1. Mr Parnaby was employed by the Respondent from 21 July 2010 as a Head Caretaker. He was dismissed on 18 July 2017 because of long term sickness absence. He brings a separate complaint of unfair dismissal which is not the subject of any issue to be determined today.

2. Mr Parnaby describes his disability as 'work related stress' which he says he has suffered from since May 2016. The Claimant's GP records refer to him suffering from 'a depressive disorder'. He has been intermittently prescribed antidepressant medication, Citalopram, since May 2016 and continuously since June 2017.

3. The definition of disability is contained in Section 6 of the Equality Act 2010 ("EA 2010") and is as follows:-

"(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.”

4. ‘Substantial’ in section 6(1)(b) of EA 2010 according to section 212 (1) of the same Act means ‘more than minor or trivial’.

5. ‘Long term’ in section 6(1)(b) of EA 2010 is defined in Schedule 1, paragraph 2 as meaning:

“ 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;

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have 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.”

6. Whether a condition has a substantial adverse effect is to be judged by reference to the information and evidence available at the time of the decision which is said to be discriminatory not later (see **McDougall v Richmond Adult Community College** [2008] ICR 431).

7. The word ‘likely’ means the Tribunal must ask whether itself whether ‘it could well happen’ (see **SCA Packaging Limited v Boyle** [2009] IRLR 746).

8. In coming to my decision I take into consideration the evidence of the Claimant as set out in his impact statement and also in his oral evidence at this hearing. I also take into account the circular “*Guidance on matters to be taken into account in determining questions relating to the definition of disability 2011*”, in particular paragraph B12 and B13 which states that the Tribunal must take into consideration the effects of any medical treatment which may have the effect of masking or ameliorating a disability.

9. Insofar as it is disputed, although I understand the position is that the issue of impairment is now conceded, I accept that the Claimant had an impairment which satisfies the definition of disability. I also accept that the impairment was substantial.

10. The real issue in this case is whether the impairment was long term.

11. There was also an issue at the commencement of the hearing as to whether the Claimant could amend his claim to include a ‘depressive disorder’. In determining that issue I have had regard to the guidance in **Selkent Bus Company v Moore** [1996] IRLR 661. The disability relied on has always been stated as work-related stress. The Claimant has been legally represented throughout. He must have considered carefully the nature of the disability to be relied on and specifically chose work-related stress. To call it depressive disorder is not just another phrase for the same thing because if it was the Claimant would not be seeking an amendment. The application for amendment is made very late, indeed at the hearing itself. There is no valid reason why it could not have been made earlier. The balance of hardship favours the Respondent who would be substantially prejudiced by having to deal with a different impairment to the one identified throughout these proceedings. The application to amend is refused

THE FACTS

12. Mr Parnaby says that he has had intermittent periods of absences due to work related stress since May 2016 with the most recent episode which began on 16 January 2017. He says that the effect of the condition has led to him avoiding everyday situations and scenarios, that his sleeping pattern was disrupted and that he is “a shadow of his former self”. He says he is unable to articulate himself or converse, has lost self-esteem and self-confidence. His appetite has fluctuated from day to day and he has suffered episodes of fatigue, poor concentration, dizziness and feeling light-headed. He says that he is unable to communicate properly and has suffered loss of function. He gave evidence that he has shut himself away at home and avoided going out unless absolutely necessary due to feeling that he is not able to cope. He does not go shopping, do any exercise, ride on his bike as he used to, socialise or carry out tasks at home.

13. Having heard the evidence of the Claimant and upon cross examination, I did not find the Claimant’s evidence as to what he can and cannot do wholly reliable. He has a tendency to exaggerate the effects of what he cannot do. He speaks of his condition both in the statement and oral evidence in the present tense so it is not easy to discern what he was or was not able to do at the relevant time as opposed to what his condition is presently. That is not merely a question of style of writing but the absence of any examples in his witness statements as to what the Claimant could not do at the relevant time is telling.

14. More importantly perhaps, the Claimant’s evidence is inconsistent with his GP medical notes and at times is at sharp variance with them. For example, the Claimant refers to difficulty in sleeping. He did discuss sleeping problems with his GP in January 2018 but it is clear from the medical notes that was because he had a pain in his knee and not the stress. The Claimant says he does not go out shopping or go on his bike or exercise. It is not immediately apparent how the condition of work-related stress would affect his ability to use his cycle or go shopping. The Claimant has multiple conditions. Some of the day to day effects are clearly down to problems the Claimant had with his feet for which he has had medical advice and assistance and that is more likely to be the cause of him not exercising or cycling. The Claimant only complained of a disruption to his sleeping pattern in April 2018. In other words I am not satisfied that the day to day effects he refers to are related to the condition which is the subject of these proceedings.

Long term

15. The relevant dates of the acts complained of are between 15 April 2016 and 17 July 2017. There are two distinct phases of work related stress. The first begins in April 2016 and ends in September 2016 at the latest. The second phase started in January 2017 when the Claimant re-started Citalopram. In relation to the first period, the Claimant was absent from work on 15 April to 31 May 2016. It is clear that the stress suffered by the Claimant during this period was resolved by September as this is confirmed by the September occupational health report. The report also confirms that it was unlikely to recur. In the second phase, there are only 3 substantive entries in the Claimant’s GP records, in January, February and June 2017. Nothing in the records supports substantial adverse effect on the Claimant’s ability to carry out day to day activities. Mr Parnaby did suffer from drowsiness in February 2017 but that appears to have been a reaction to medication rather than the condition.

16. Mr Kohanzad on behalf of the Claimant disputes that there are two separate distinct phases. However, I am satisfied that they need to be treated separately for the following reasons. Firstly, the most reliable contemporaneous documentary evidence is the second of the two occupational health reports of 23 September 2016. That makes it clear that the Claimant took medication for stress for about a week and then stopped it. There is no reason for the author of that report to lie or mislead. That information could only have come from the Claimant. The Claimant did not seek to correct the report or subsequently amend it. I prefer what is said in the report rather than the Claimant's recollection of what he said to occupational health as given in his evidence today. The report confirms that the stress was unlikely to recur. It was not a recurring condition. Clearly it did not last 12 months.

17. Secondly, the Claimant's own GP notes record that the Claimant *restarted Citalopram* (my emphasis) in January 2017 rather than a continuation through repeat prescriptions. Indeed, there are no repeat prescriptions for Citalopram as there are for other items from the first time it was prescribed. I do not accept that the first entry for a prescription of Citalopram covers the entire period. It is tolerably clear from the GP notes that the Claimant was resuming Citalopram after having stopped it. In other words the Claimant was prescribed Citalopram in May 2016 and was told to stay on it for 6 months but he did not do so. He stopped taking it and did not take it again until January 2017 when it was restarted. I am therefore satisfied that we are talking of two different and distinct periods.

18. I am satisfied that the Claimant did not have a disability from April 2016 to January 2017. The difficulties that the Claimant was having between January 2017 and June 2017 were a reaction to specific difficulties in the workplace. They did not manifest themselves when he was not at work. There is no communication between the Claimant and his GP about mental health issues from mid July 2017 until 10 April 2018 except to say that he has been 'struggling on and off'. The improvement of the Claimant's condition in July 2017 coincides with dismissal. There is no medical evidence that the Claimant's stress condition continued after his final sick certificate ran out in August 2017.

19. I am therefore satisfied that the impairment was not long term and that the Claimant does not meet the definition of being a disabled person.

Employment Judge Ahmed

Date: 15 October 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE