



EMPLOYMENT TRIBUNALS

Claimant Miss M Martic

Respondent EE Limited

Heard at: Bristol **On:** 28 January 2019

Chairman: Employment Judge M Ford QC

Representation

For the Claimant: In person
For the Respondents: Miss J Danvers, Counsel

REASONS FOR JUDGMENT ON DISABILITY

*Reasons provided at request of Respondent
by an e-mail dated 6 February 2019*

Background

1. The background to this matter is set out in a separate document recording the case management orders made at the Preliminary Hearing ('PH'). These are reasons for the judgment on disability, sent to the parties on 6 February 2019.
2. In a claim form received on 29 April 2018 the Claimant, who was employed by the Respondent as a Customer Adviser between 27 October 2014 and 22 March 2018, complained of unfair dismissal, discrimination because of disability, sex and race under the Equality Act 2010, said that other payments were due and referred to breach of contract, harassment, victimisation, unfair treatment and constructive dismissal.
3. In its response served on 7 June 2018 the Respondent denied the claims. It said the Claimant was dismissed for gross misconduct on 22 March 2018 because she removed a phone from the Respondent's premises, and lied during the investigation into it. Among other matters, it did not admit that the Claimant was a disabled person.

4. Some attempt to clarify the issues was made at a PH on 31 July 2018, and they were further clarified at the PH before me. The dispute on disability narrowed in course of hearing because (i) the Claimant withdrew any contention that she was disabled owing to PTSD and (ii) Respondent conceded that, in light of evidence, Claimant was disabled at material time by dyspraxia. So the only issue to be determined was whether she disabled because of "severe anxiety".
5. I heard evidence from the Claimant about her alleged disabilities and she was questioned by Ms Danvers. There was a bundle of documents at the hearing.
6. One issue relevant to disability, however, was left to be determined at the full hearing, if necessary. This is whether the Claimant did not have an impairment because her condition(s) amounted to a tendency to steal within the meaning of regulation 4 of the Equality Act (Disability) Regulations 2010. This question shall be determined at the full hearing: see the EAT decision in **Wood v Durham County Council**, UKEAT/0099/18/OO and the orders made at the PH.

Facts

7. I find the following facts on the balance of probabilities. Prior to the tribunal hearing, the Claimant presented evidence principally focused on how she was affected by dyspraxia, not anxiety (see e.g. her e-mail of 8 November 2018). Nevertheless further evidence emerged at the hearing when she was questioned. The facts were not greatly in dispute, though the legal conclusion to be drawn from them was.
8. The Claimant was born on 12 December 1991. She accepted she had no real anxiety before 19 January 2018, when she contends there was an incident with her then manager, Matt Hale, at the Bath store where she worked, which led to her leaving the shop in distress and crying. She set out details of how this incident affected her in her statement for the PH and, unsurprisingly, was not challenged on her account of how the incident caused her to be upset.
9. Following the incident, the Claimant was off work on sick leave for two weeks from 22 January. During that time she had diarrhea, vomiting and migraines, which she attributed to the stress caused by the incident. In addition, she began to suffer from feelings of anxiety. In the week after 21 January 2018 the Claimant saw her GP who told her that that it sounded as though she had severe anxiety, though her doctor did not want to put a medical label on the condition. In February 2018 she was referred to the Bristol Well-being Centre in connection with her anxiety (she also received some Cognitive Behavioural Therapy in April). At around the same time she was prescribed Sertraline by her GP for anxiety and Cyclizine for nausea. She only took Sertraline for several weeks (she thought in April and May 2018, though she may be mistaken about the date) but it made her worse and she discontinued the drug (she later became pregnant and stopped taking any drugs).
10. The Claimant returned to work on about 4 February, working at another store in Bradley Stoke, and submitted a grievance about her treatment. She

was still suffering from symptoms of stress at the time. After an incident which took place on 23 February concerning a customer's old phone, which is the subject of the full hearing in this matter, the Claimant was suspended and invited to a disciplinary hearing which took place on 22 March 2018, and which led to her dismissal. She later appealed and her appeal was dismissed on 16 June 2018.

11. Based on the evidence at the PH, I consider that from shortly after the time of the incident and until around May 2018 the Claimant was affected by anxiety in various ways. She often would not leave her bedroom or the house, did not feel like and had difficulty eating, and felt sick. On one occasion she did not shower for a week. She did not want to go to the shops or walk her dog; she could not face confrontation with others, found speaking to people difficult, and she became easily upset. She had low concentration levels and was more confused and forgetful than normal.
12. I was referred to two relevant medical reports. On 15 March an Occupational Health Advisor prepared a report for the Claimant's line manager in connection her forthcoming disciplinary hearing. The report referred to her being under the care of her GP, and taking medication to help with nausea (presumably Cyclizine); remaining "very emotional and anxious"; and her reporting irregular sleep, and effects on her appetite, concentration levels and memory, noting "she rarely goes out". The report said there was no prospect of a return to work "at this juncture", saying further sickness was anticipated and she was unfit for work because of "anxiety".
13. A second report, prepared in connection with her appeal, was dated 22 May 2018. It recorded that at that time the Claimant was still suffering symptoms of anxiety and stress. It said that at the time of the incident which led to her suspension she had been suffering from anxiety and stress and had been taking Cyclizine. It noted she was currently undergoing psychotherapy and said that 'if she is reinstated she would be medically fit to return to work in a suitable post'. Similar statements about her being fit to work if she were reinstated were made at the end of the report.
14. In about May 2018, after her dismissal by the Respondent but before her appeal, the Claimant started work in new job, in an Apple store in Cribbs Causeway. That job helped with her symptoms but she still had some days off due to anxiety, and she continued to suffer severe symptoms till about September, such as low concentration levels and difficulty attending to conversations with friends. Not long before the previous PH she had time off sick with anxiety, headaches and migraines. She was off again in November with two weeks with anxiety. Though her condition had improved at the date of the PH, she still found it difficult to engage in conversations, especially with those in authority, and certain incidents made her anxious, such as meetings at work.

Legal principles

15. The Equality Act 2010 ("EqA") defines a disabled person as a person who has a disability: s.6(2). This means a "physical or mental impairment" which has "a substantial and long-term adverse effect on [the individual's] ability to

carry out normal day-to-day activities”: s.6(1). The burden of proof is on the claimant to show he or she was disabled.

16. The material time for assessing whether a person is disabled is the date of the alleged discriminatory act(s).
17. Schedule 1 to Part 1 of the EqA contains further provisions relevant to whether a person is disabled. For the purpose of determining whether an impairment has a substantial effect on a person’s ability to carry out normal day-to-day activities, the effect of medical treatment on the impairment are ignored: see para. 5(1), Schedule 1. A tribunal should examine the actual effects on a claimant’s abilities at the material time and then assess what they would be without the medication.
18. In addition, there is Government guidance on matters to be taken into account on disability, which tribunals should take into account where it is relevant: see **Goodwin v Patent Office** [1999] ICR 302.
19. In **Goodwin** the EAT explained that a tribunal should assess four issues: (i) whether the Claimant had an impairment: (ii) whether the impairment affected his ability to carry out normal day-to-day activities: (iii) whether the adverse effect was substantial; and (iv) whether it was long-term.
20. The EqA does not contain a list of what are normal day to day activities (contrast the predecessor legislation). According to the Government Guidance, these are things people do on a regular and daily basis. It gives various examples of such activities. Other guidance is given in Appendix 1 to the Code of Practice on Employment published by the Equality and Human Rights Commission.
21. “Substantial” for this purpose means more than minor or trivial: see s.212 EqA. The focus is on what a person cannot do, or can only do with difficulty.
22. By para. 2(1) of Schedule 1, the effect of an impairment is long term if it has lasted for at least 12 months, it is likely to last for at least 12 months or it is likely to last for the rest of a person’s life. An impairment is treated as continuing if its substantial adverse effect on normal day-to-day activities is likely to recur (para. 2(3)). For this purpose “likely” means that it “could well happen”: see **Boyle v SCA Packaging** [2009] ICR 1056. This question must be determined at the date of the relevant discriminatory act, and not with hindsight at the Tribunal hearing (Guidance, para. C4).

Conclusions

23. In light of the law, my conclusions are as follows. I focus on each of the questions relevant to whether the Claimant was disabled by reason of “severe anxiety”. Neither party sought to argue that medical treatment improved the Claimant’s condition or had effects which should be ignored – unsurprising given that the Sertraline made her worse and she stopped taking it.
24. In light of how the claim for disability discrimination was clarified at the PH, it seems it seems the material time was the time the Claimant was dismissed on 27 March 2018 and the upholding of that decision on appeal in June

2018. But, as I was asked to clarify the matter at the PH and in case it is relevant, my findings are that the Claimant was disabled from shortly after the incident on 19 January until June 2018.

25. **Impairment.** The Claimant had no specific medical diagnosis of “severe anxiety” because her GP declined to give a specific label to her condition. But this is not necessary to establish an impairment. In accordance with the EHRC Code (para. 7), it is preferable to focus on the effects of impairment rather than the cause. In light of the matters to which I refer below, I consider that the Claimant did have an impairment – a disorder compared with a person in normal condition.
26. **Substantial adverse effect on day-to-day activities.** I consider, second, that the Claimant met this element of the definition at the material time. Though there was limited evidence before me, in light of the OHS reports set out above and, especially, the Claimant’s evidence about the effects on her in the period from shortly after 16 January to May (see para. 11 above), there was a substantial adverse effect on her ability to carry out normal day-to-day activities. I accept that this affected her soon after the incident of 16 January. Her impairment affected her in relation to things people frequently do on a daily basis, such as getting up, leaving the home, eating, showering, interacting with others, and so on (see Government Guidance, para. D3). These effects were more than trivial.
27. Although the Claimant started a job in May 2018, I accept her evidence set out in para. 14 above was that her anxiety continued to affect her normal day-to-day activities, such as concentrating and interaction with friends, until September 2018. I consider the substantial adverse effect on her ability to carry out normal daily activities continued, therefore, until the end of the material time, in June 2018.
28. **Long-term effect.** The more difficult question is whether, at the material time, the severe anxiety “could well” last for at least 12 months. That question must be judged at the material time and not with hindsight. The Claimant’s own evidence was that until May she had severe effects and this continued, albeit with some improvement, until September. In addition to her evidence, I pay particular regard to the two OHS reports, summarised at paras 12-13 above, as roughly contemporaneous records of what was expected at the material time.
29. The first report, in March, indicated there was no prospect of a return to work at that time, and anticipated further sickness. Though it said she was “temporarily unfit for work”, it suggests a condition which could well last for a significant period. The second report, too, indicated that she was suffering from the symptoms of stress and anxiety. As to how long those symptoms would last, its premise was that *if* the Claimant were reinstated then she might well be fit to return to work: see e.g. the last page of the report, stating “If she is reinstated then she should be able to return to work in a few weeks time”, subject to counselling and medication. Given that at that time the Claimant had already been dismissed, and her reinstatement on appeal was only a possibility, it seems the premise necessary for her improvement was questionable. In those circumstances, with some hesitation, I consider that the evidence suggests her condition could well last at least twelve months.

30. My conclusion is, therefore, that at the material time the Claimant was disabled by reason of severe anxiety.

Employment Judge M Ford QC

Dated 20 February 2019

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