



EMPLOYMENT TRIBUNALS

Claimant: Mr Trevor Hackett

Respondent: Ministry of Defence

Heard at: Bristol

On: 28 July 2021

Before: Employment Judge Oliver

Representation

Claimant: In person

Respondent: Mr Edwards, counsel

RESERVED JUDGMENT ON A PRELIMINARY HEARING

1. The claimant was not disabled by reason of depression, anxiety and stress and his claims for disability discrimination based on these impairments are struck out.
2. The respondent has conceded that the claimant's diabetes is a disability and his claims for disability discrimination based on this impairment can proceed to a full hearing along with his other remaining claims.

REASONS

1. This was a preliminary hearing to determine whether the claimant was disabled within the meaning of the Equality Act 2010 ("EA") at the times relevant to the claim. The claimant relies on the conditions of diabetes, depression, anxiety and stress. The hearing of this matter took all day and judgment was reserved.

2. The hearing was conducted by the parties attending in by video conference (CVP). It was held in public with the Judge sitting in open court in accordance with the Employment Tribunal Rules. It was conducted in that manner because the parties had consented to such a hearing and because a face to face hearing was not desirable in light of the restrictions imposed by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020 and the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, as amended and because it was in accordance with rule 46, the *Presidential Guidance on remote hearings and open justice* and the overriding objective to do so.

3. At the start of the hearing the respondent conceded that the claimant's condition of diabetes was a disability within the meaning of the EA. The respondent disputes that the conditions of depression, anxiety and stress were a disability.

Applicable law

4. Under the EA section 6(1), a person has a disability if they have a physical or mental impairment, which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. The claimant in a case has the burden of showing that they meet the definition of disability.

5. In relation to whether an impairment has a substantial adverse effect on a person's ability to carry out normal day-to-day activities, the Equality Act guidance on matters to be taken into account in determining questions relating to the definition of disability (paragraph D3) refers to things that people do on a regular or daily basis. Examples given in the guidance include reading and writing, having a conversation or using the telephone, taking part in social activities, and interacting with colleagues. An adverse effect is "substantial" if it is more than minor or trivial (section 212).

6. Paragraph 2, Schedule 1 EA defines the effect of an impairment as being long term if, "(a) it has lasted for 12 months, (b) it is likely to last for 12 months, or (c) it is likely to last for the rest of the life of the person affected." This is to be judged at the date of the acts complained of by the claimant. In **Tesco Stores Limited v Tennant** [2020] IRLR 363, the Employment Appeal Tribunal confirmed that it is necessary to ask whether there have been 12 months of a substantial adverse effect on day-to-day activities as of the date of the alleged discrimination or harassment. The fact that a disability in fact goes on to last for more than 12 months is not the correct question. What matters is the position at the time of the alleged discrimination. An impairment must either have lasted for 12 months at that point in time, or have been likely to last for 12 months at that point in time.

7. "Likely" for the purposes of disability discrimination under the EA means "could well happen" (**SCA Packaging Ltd v Boyle** [2009] UKHL 37, and paragraph C3 of the Equality Act guidance on matters to be taken into account in determining questions relating to the definition of disability). This is a broader test than deciding whether something is more probable than not, but requires more than supposition or a small chance. The Court of Appeal confirmed in **McDougall v Richmond Adult Community College** [2008] IRLR 227 that

likelihood is to be assessed at the time of the act or acts alleged to constitute disability discrimination.

Facts

8. The claimant's ET1 complains of events between January 2018 and 3 December 2019, when he was dismissed by the respondent.

9. The claimant has diabetes, which the respondent now accepts is a disability. The claimant's disability impact statement also covers depression, anxiety and stress. He says that both depression and anxiety started in January 2019, the effects of this started in February 2019, and it progressively got worse. For depression, he says the effect on day-to-day activities is, "*adversely affecting my mood, my speech, my mannerism. Cannot sleep at nights. Headaches*". For anxiety, he says the effect on day-to-day activities is, "*Inability to trust others easily. Constantly worrying about everything and about lack of future I have studied to attain my qualification yet seen it pulled away from 'under my feet'.*" Elsewhere in the document he refers to being, "*very emotional, in tears on the streets and other public places. Not wanting to get out of bed, get ready to go to work or anywhere else. Not wanting to speak with anyone and wishing I could make it all go away.*"

10. The claimant also refers to stress in his disability impact statement. He says this is from July 2018 and progressively got worse in March 2019 onwards. He says the effect on day-to-day activities is, "*Due to the unrelenting pressure of the Sentinel CCL role: Frequently missed taking my lunch break as there were many, several tasks, deadlines to meet. Headaches.*"

11. I asked the claimant to describe how he felt and the effect of these conditions on him. He said he was feeling very low and could not function properly, including not being able to concentrate. He described having issues with holding conversations with others, when he would start crying if he tried to chat. He had problems sleeping and saw darkness when he woke up. He said this was ongoing for more than 12 months until now. The claimant said he got worse from March 2019, but was not able to give a date or period of time when he believed his condition became so serious that it became a disability.

12. The claimant said he first sought medical advice for stress in May 2019. I have seen copies of his relevant GP records. These show that he first consulted his GP about stress on 16 May 2019 after an incident at work. He had a GP consultation on 20 August 2019 about a stress related problem. The GP notes record, "*Unclear on today's consultation if there is a serious affective disorder or whether some of this is reactive to current situation*". On 29 August 2019 a further GP consultation on stress at work records "*Mood is low, concentration poor*". There are further GP consultations about stress at work in September, October and November 2019.

13. The claimant said that he was trying to work through his problems himself before May 2019, when he first consulted his GP about his stress. He was signed off work for a period of time at the end of August, and returned to work in September until he was suspended on 25 October 2019. He had an initial assessment with a counsellor on 23 September 2019, and weekly sessions from

January to March 2020. He did not take any medication until January 2020, when he was prescribed some medicine to help him to sleep.

14. I have also seen some workplace correspondence and records. There was an occupational health report in April 2019 which deals only with the claimant's diabetes. There is a record of an emergency mental health first aid callout and an ambulance being called on 17 May 2019, and a number of emails in May expressing concern about his welfare. On 20 May the mental health first aider sent an email to the claimant offering to see him again, which says, "*If there are underlying mental health issues, then I can refer you to professional Organisations and Charities that might be able to help you further*". The claimant replied "*...my underlying issue isn't at all mental health related instead, the causal reason for my situation is simply that I am having to enduring treatment by individuals that are unfair and this is wrong.*" There is an email referring to an incident in July 2019 when the claimant had an "*emotional breakdown*" at work and an ambulance was called due to concerns about his diabetes.

15. An occupational health report dated 26 July 2019 refers to symptoms of stress and low mood which the claimant attributes to work related issues. This report states that he is fit for work, and "*If the issues can be addressed promptly he is likely to see a good improvement in his symptoms.*" The report also says that his stress related symptoms "*have not lasted longer than 12 months nor are they likely to.*" Further emails in late July and August 2019 express concern about the claimant's wellbeing. An occupational health report dated 18 November 2019 states that the claimant was diagnosed with anxiety, depression and stress during a period of sickness absence, and assessment for anxiety and depression, "*revealed severe symptoms level for both conditions. A person with these symptom level is usually not fit for work in any capacity.*" The report also states that this is unlikely to be a disability because it has not lasted longer than 12 months and "*is not having a significant impact on his ability to undertake normal daily activities.*"

Conclusions

16. I have considered the constituent parts of the test for disability in turn.

17. ***Did the claimant have a physical or mental impairment?*** I find that the claimant did have a mental impairment from January 2019 until the end of his employment. I accept the claimant's evidence that he began to have symptoms of depression and anxiety from January 2019, which began to get worse from February/March 2019. I do not find that "stress" was a separate mental impairment. Stress is a description of pressure, not a medical condition. The effects of stress can create a mental impairment, as in this case by causing depression and anxiety.

18. ***Did this have an adverse effect on the claimant's ability to carry out normal day-to-day activities?*** I had limited evidence of the effect of the depression and anxiety on the claimant's activities. His written impact statement does not describe any effect on his activities, apart from references to his speech. At the hearing he described problems with having conversations with others, and also difficulty with functioning properly and concentrating. His GP record from 29 August 2019 also refers to concentration being poor.

Communication with others and concentration are both normal day-to-day activities. I therefore find that these were adversely affected by the claimant's depression and anxiety.

19. **Was this adverse effect substantial?** I have limited evidence on this point. I note the claimant's email of 20 May 2019 which states that his underlying issue is not mental health related. He sought to explain this on the basis that he had been asked whether he had a history of mental health problems – but this is not what he had actually been asked at the time. This comment indicates that the claimant did not at that point attribute serious symptoms to the mental health conditions of depression or anxiety. I note that the occupational health report from November 2019 says there was no significant impact on day-to-day activities. But, there is a clear reference in the GP record from 29 August 2019 to concentration being poor. The claimant is signed off from work at this point. Although he returns to work for a period of time, it is clear from the GP notes and occupational health report that he has become more unwell by November 2019, with the occupational health adviser finding that he had a severe level of symptoms at this point. The test is whether any effect was more than minor or trivial. The claimant was not able to describe to me when he believed his symptoms became serious enough to amount to a disability. However, on the basis of the evidence that I have, I find that the adverse effect on the claimant's ability to communicate and concentrate became substantial by late August 2019.

20. **Was this adverse effect long term?** The adverse effects of depression and anxiety had not lasted for more than 12 months at the time of the alleged discrimination, based on my finding that this became substantial in late August 2019. The question is therefore whether, at any time between late August and 3 December 2019, it was likely that the adverse effects of depression and anxiety would last for more than 12 months.

21. The claimant submits that this is shown because he has in fact been unwell with depression and anxiety for more than 12 months, and says he is still unwell now. However, this is not the correct test. I must decide whether this was likely at the time of the alleged discrimination, applying the test of "could well happen". The claimant has the burden of showing that this test has been met.

22. The respondent submits that the claimant has failed to show that the effects were likely to last for 12 months when judged at any time during his employment. I had very limited evidence from the time of the likely duration of the claimant's illness. The evidence that I do have indicates that this was not expected to last for 12 months. The occupational health report of 26 July 2019 says there is likely to be a good improvement in symptoms if the issues are addressed promptly, and the symptoms are not likely to last for more than 12 months. It appears that the claimant's condition did then get worse from late August. However, the GP record of 20 August 2019 says, "*Unclear on today's consultation if there is a serious affective disorder or whether some of this is reactive to current situation*". As with the occupational health report, this indicates that the claimant's illness may well be a reaction to current events rather than a long-term problem. There is no other evidence of the claimant's prognosis at the time.

23. The test of "could well happen" does not require the balance of probabilities, but does require some likelihood. Having considered the evidence available to

me, the claimant has failed to show this. I do not have any evidence on which to base a finding that the impairments were likely to be long term. as opposed to a short term reaction to events. I therefore find that the adverse effects of the claimant's anxiety and depression were not likely to last for more than 12 months at the time of the alleged discrimination.

24. This means that the claims for disability discrimination based on depression, anxiety and stress cannot proceed because the claimant was not disabled at the relevant time on the basis of these conditions. The claim for disability discrimination based on diabetes can proceed to a full hearing along with the claimant's other claims.

Employment Judge Oliver
Date: 02 August 2021

Reserved Judgment & Reasons sent to the parties: 11 August 2021

FOR THE TRIBUNAL OFFICE