



EMPLOYMENT TRIBUNALS  
London Central Region

Heard CVP On: 8/3/21

Claimant: Ms D Derby

Respondent: Southwark Council

Before: Mr J S Burns

Representation

Claimant: Mr C Ewan (solicitor)

Respondent: Ms A Ahmad (Counsel)

JUDGMENT

1. The Claimant was not disabled at the relevant time
2. The Claimant's application dated 23/11/20 to amend her claim is dismissed
3. The disability discrimination claim is struck out.

REASONS

1. The hearing was conducted by CVP and joined by telephone in the case of the Claimant at her request. There were no technical problems. The documents were in an agreed bundle of 68 pages which I read. I heard evidence on oath from the Claimant and received oral final submissions.

Findings of fact

Disability

Depression and anxiety

2. It is agreed that the Claimant has suffered from intermittent depression and anxiety since 2010 but it was well-managed and there was no reference to it when she discussed her health with a supervisor on 22/2/2018 and again on 23/5/2018.
3. In a meeting dated 13/7/2018 it was noted that she had "*seemed a bit quiet*" and she stated about herself that "*she felt a bit subdued*". The cause was a complaint that had been made against the Claimant at work in May 2018 and a related ongoing dispute she was having at the time with the complainant third party over a car-parking issue.
4. The Claimant went off on long-term sick-leave primarily because of her mental state from 27/8/2018 to February 2019. She was assessed by occupational health on 1/10/2018 and again on 27/11/2018 by which time her return to work was anticipated in early 2019 and the reporter wrote that the Claimant was not disabled under the Equality Act because "*she has not had her symptoms for over 12 months and she appears to be improving and having less impact upon her day to day activities*".

5. The Claimant having returned to work in early 2019 was able to carry out her job and deal satisfactorily with colleagues and the Respondent's clients until 13/8/2019 when she was dismissed.
6. She was assessed shortly before on 8/8/2019 at which point she stated that "*she had suffered with depression for a long time however, until recently she had managed to manage the symptoms*". She attributed the problem to "*current circumstances as she was going through the final stage of the management investigation*". The only symptoms she referred to were insomnia/anxiety.
7. The Claimant's signed impact statement dated 1/2/2021 is extremely scanty and only 4 short paragraphs (numbered 9 to 12) make any substantive reference to her mental health, but in doing so refer only to her current feelings and symptoms, (and about the impact of current matters such as the pandemic and her post-dismissal unemployment) and provide no evidence about any impact of her mental state on her ability to do day-to-day activities in the relevant period up to dismissal.
8. The Claimant has mainly if not entirely declined to take any antidepressants during the relevant period.

#### Sciatica and lumbago

9. The Claimant was diagnosed with lower back pain in 2017. The only medical evidence about this is a GP note dated 16/11/2017 which confirmed that at the time of the consultation the Claimant's social activities included "*amateur boxer*". The Claimant sought in her oral evidence to suggest that this was an error in her notes but I do not accept this—the Claimant herself must have given the GP this information.
10. The Claimant then said in her oral evidence that all she had ever done was "*boxercise*" but even on her own description of this, it was a vigorous physical activity which does not fit easily with the Claimant's suggestion that her mobility was significantly impaired at the time.
11. She suggested under cross-examination that after 2017 she limited her exercise to "*stretching at home*" but then acknowledged that she had continued going to the gym throughout. It is evident (bundle page 80) that on 8/8/2019, just before her dismissal she stated that she was "*limiting the amount of rigorous exercise she completes*" and walking on a treadmill.
12. In her oral evidence she told me that she has suffered severe back pain all day every day since 2017 but this is again inconsistent with the contemporary documentation. On 8/8/2019 she had stated that she was experiencing "*occasional pain/discomfort...the pain comes and goes*".
13. It became apparent that almost every working day for a long time up to her dismissal the Claimant had been parking her car up to a mile away from work and walking to and from her work place sometime several times a day – including extra excursions during the working day in order to drive to visit clients.
14. The Claimant explained in her evidence that she lives on the third floor of a residential building with no lift. She did not apply to the housing association until 2020 for a move and when she did so her main reason was a need for more room "*so her nephew could live with her*".
15. She also explained that she prefers to walk to the shops (another one mile walk each way) - rather than get groceries delivered to her home- so as to ensure that she get fresh food.

Summary

16. The onus of proof is on the Claimant to prove she was disabled at the relevant time.
17. I find that the Claimant has been exaggerating her symptoms for the benefit of the tribunal and is not a reliable witness about them.
18. In any event the evidence the Claimant has provided falls far short of making out her case on disability and she has not shown that she was substantially adversely affected in her ability to do day to day activities for 12 months or at all.

Amendment application

19. As the Claimant has not shown she was disabled, it is inappropriate to allow her to amend to extend her DDA claims in any event.
20. However, even if I had found that the Claimant had proved she was disabled, then applying the Selkent principles, I would have refused the amendment because if it were allowed it would (i) open up significant new areas of dispute (ii) not be a relabelling exercise, and (iii) require the Respondent to have to try to find witnesses and deal now in 2021 with additional events and matters dating back to 2018 and possibly earlier which are significantly out of time in circumstances in which it would not be appropriate to extend time.
21. The Claimant was dismissed in August 2019 and brought her claim on 3/1/2020. She was requested in writing in February 2020 by the Respondent's solicitor to explain and particularise her disability claim but ignored the request at the time and, despite instructing solicitors, delayed until 2/11/2020 before providing the details including the new matters the subject of the amendment application.
22. There is no reasonable excuse for these new matters having not been referred to at the outset and for the subsequent delay in articulating them.
23. The Claimant's main claim is her unfair dismissal claim and the amendment is an attempt to bring in much earlier matters which appear to have occurred to the Claimant only recently with the benefit of legal advice.

J S Burns Employment Judge  
9 March 2021

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