



EMPLOYMENT TRIBUNALS

Claimant: Mr A Reynolds

Respondent: My CSP

Heard at: Manchester

On: 5 March 2021

Before: Employment Judge Grundy

REPRESENTATION:

Claimant: Ms M Stanley, Counsel

Respondents: Mr T Rigby, Counsel

JUDGMENT

The judgment of the Tribunal is that:

The claimant was a disabled person as defined in section 6 of the Equality Act 2020 at the material time between July 2019 and December 2019.

REASONS

1. This case concerns the dismissal of the claimant who was a pensions administrator.

The Issue at the preliminary hearing

2. The Tribunal identified at a hearing before Employment Judge Feeney on 28 July 2020 that there should be a preliminary hearing on the issue of "disabled person" as this was not conceded by the respondent.

3. The issues for the Tribunal today were:

- i. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about July 2019 until December 2019.

- ii. Did he have a physical and/ or mental impairment? The claimant relies upon the disabilities of osteoarthritis in his big toe and anxiety and depression.
- iii. Did it/they have a substantial adverse effect on his ability to carry out day-to-day activities?
- iv. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment/s.
- v. If so, would the impairment/s have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?
- vi. Were the effects of the impairment/s long-term? Did they last at least 12 months, or were they likely to last at least 12 month? If not, were they likely to recur?

The Hearing

4. The hearing itself has been conducted as a CVP "code V" video hearing with which all parties were content, as the country remains in lockdown due to covid 19.

5. The claimant gave oral evidence on oath and was cross-examined and the parties each made oral submissions and Mr Rigby provided submissions in writing, previously drafted by Miss Wedderspoon.

6. The Tribunal has also been referred to an electronic bundle of document evidence containing over 100 pages including the claimant's relevant GP records at 73- 94 though not chronological, the hospital records at 95-112, BMI healthcare records at 113-119 and OH reports at 120-126. A page 72a with an email from the claimant was added to the bundle before the hearing.

7. The Tribunal gave an ex tempore judgment and reasons as provided here.

Findings of Fact

8. The Tribunal has made findings of fact in respect of the matter but has not found it necessary to determine all allegations just on those matters about which it considers it necessary to determine the disabled person question.

9. The Tribunal has the "relevant" medical records of the claimant, rather than the totality. These were difficult to follow as they were not chronological. Considering the relevant records in relation to the toe. At page 87 there is reference regarding a "painful toe" as at 22 August 2017. On 21 August 2017 page 84 there is reference to "toe pain" - "broke right toe aged 8 now very painful, keeps awake at night, toe not swollen or red just painful". It said "likely osteoarthritis and get X-ray to confirm extent of problem." 26 September 2017 records show at 85 failed telephone conference and on 20 September 17 there is reference again toe being due to osteoarthritis in the toe. "Significant osteoarthritis not sure if it can be injected or refer to ortho."

10. On 8 November 2017 at page 86 there is reference to "consent to an injection" and on 27 November 2018 it describes "good results with injection before pain flared", "walking okay would like another injection". There is also reference page 87 to the radiographer's reports where the x-ray is detailed. "Advanced osteoarthritis

of the first metatarsal phalangeal joint. Reduced joint space periarticular sclerosis and marginal osteophytes noted" It is plain from the radiological evidence that the condition is present. The GP record also has references on 10 January 2019 and the claimant as I understand it and find has another injection in his toe, (on page 83). On 25 October 2019 there is a further GP consultation page 80 "severe pain in right toe- known severe osteoarthritis talked about taking analgesia but still very painful" and talks about referral to an ortho to explore possible surgical options."

11. There is also evidence from a foot and ankle surgery Dr Amer Shoaib at page 93 dated 25 November 2019, which is consistent detailing some osteoarthritis.

12. From the claimant's oral evidence and page 130 paragraph 17 the Tribunal finds he found the pain of the toe, "being debilitating and exhausting". He talks about the sharp pain in his toe three times a week so painful that he wishes to chop his toe off.' He also talked about fatigue and rest being required as a result and it is the pain in his toe, which impacts his sleep. The Tribunal accepts that he stopped playing sport, in particular football and cricket, and that the pain in his toe affected his ability to socialise.

13. Although it was raised on the papers, it wasn't put to the claimant how his toe affected his ability to work as a baggage handler at the airport in early 2020, in my judgment it wasn't particularly regular mobility that was affected, it was the impact of the pain in the toe which was the debilitating factor on the claimant on occasions. The claimant's treatments did take place per paragraphs 14 and 15 of his statement regarding the toe.

14. In relation to the impairment of "depression and anxiety" the impact statement details some extremely difficult life experiences for the claimant including that his marriage broke down in 2012. The medical records refer on page 73 to anxiousness at this time and although Ms Stanley invited me to read backwards from page 74 75-76, other than 2012 the Tribunal has considered from 2nd July 2018 other than a reference in June 2018 that period regarding "low mood" recording that the medical records made available begins on page 78-; 25 June 2018 talking about low mood the claimant being very anxious about a data breach at work and he was not fit for work and zopiclone was being prescribed.

15. 2 July page 76 refers to claimant being "depressed" and referred to Healthy Minds. 9 July 2018 refers to the claimant being "depressed" and not fit to work. 24 July 2018 page 75 refers to the claimant "doing fine until called for a meeting to decide if they can getting back into work". Symptoms then described are "appetite reduced and sleeping difficulty". On 31st July 2018 the GP records describes him as being depressed and talks about the prescription of mirtazapine and talks about the side-effects which the claimant described to me in evidence fatigue and dry mouth and explains he was awaiting CBT.

16. The reference on 16 August 2018 gave details of depression, - talks about his mood being better with citalopram and talks about a phased return but the anxiety returned." There is reference to "going into work early September 2018 "went well", but then by 4 October 2018 "depressed" Healthy Minds CBT "difficulty getting to sleep". There is reference on 22 October 2018 to "the claimant had a panic attack"." he wasn't getting any solutions", and "the main issue was extreme tiredness". In the reference that is on 13 November 2018 it records " been degraded

in post is shocked. He was not sleeping is fearful, went to work and felt sick." He is prescribed citalopram. He is not sure he was ready for return on 20 November by the 27th it records he feels he could go for a phased return.

17. In the references in 2019 on 3 May 2019 page 78 there is reference to low mood, "with difficult times last year", "symptoms had started quite acutely", "shortness of breath (sob) hyperventilating chest can feel tight." On 23 August 2019 on page 77 reference is made to "an error at work". The claimant was "tearful" denied deliberate self harm (dsh) "made limited eye contact". On 28 August 2019 "low mood" is recorded. By 10th of September 2019 "really struggling". Per GP notes the reference on page 81 on 20 September 2019, is that "a work email had sent him into a spiral" and that he was "tearful". On 27 September there was "dizziness, wasn't sleeping well and he was nauseous". October references referred to "poor sleep" being "low and anxious and tearful and not doing well". On 29 November 2019 he is described as "depressed, tearful and low" He's prescribed sertraline and he is encouraged to set small goals and it was that that the claimant describes me as having been helpful in the accessing of CBT.

18. On 5 November (in a report date stamped 18 December 2019), he saw Dr Roy who is a consultant psychiatrist and he saw Dr Roy again on 10 January 2020. Dr Roy's reports are at pages 89 and 91 and whether or not Dr Roy saw all of the claimants records, I find the first report does not give a happy picture of the claimant's mood. It is plain his mental state was not good at that time by the reporting "at rock bottom". In January his mood has improved in the score given is 4 out of 10, as opposed to the zero in the earlier consultation.

19. I have to look at the totality of those records to consider whether the claimant was a disabled person at the material time between July 19 and December 2019. The best reading of that going through it in my judgment is that this was not cynical attempts by the claimant to exaggerate, manipulate or to "put up a con job" for the doctors, (to use the vernacular). Sometimes in medical records one sees reference to whether a patient is genuine,(??) There is no such reference to any query over the truthfulness or appropriateness of the claimant's presentation to the GP or to the specialists who provide medical evidence here. I find that the claimant has told the truth to his doctors about symptoms and that the records report his symptoms correctly on their diagnoses.

20. I find that the claimant was historically (forgive me for the phraseology) "a sociable animal" who was impacted by depression and anxiety such that he didn't want to meet his friends and associates and at times didn't feel able to share his distress and low mood. I also find that at times he struggled with the prescriptions that were given to him to attempt to assist in resolving or assisting the anxiety and depression. I find that his lack of sleep fed into his emotional state and unfortunately work difficulties triggered periods of depression and anxiety. I accept that CBT (cognitive behavioural therapy) prescribed to the claimant accessed through Healthy Minds has helped the claimant as described earlier as taking small steps /one day to time. I also accept that the claimant was overanalysing the issues as he describes in his impact statement.

21. The claimant gave vivid descriptions of panic attacks in his evidence and on one occasion having taken advice to take a walk he had the manifestation of the trees that he was walking by closing in on him that in my judgment appears to be a

manifestation of his mental ill-health at that time, and he did mention vertigo. I accept it is a genuine report. I accept that on occasion the claimant has suffered nausea and chest pains as reported and I accept that the claimant's interests particularly in relation to playing football and cricket have been affected by his physical impairment and his enjoyment of watching affected by his depression.

The Law

22) As no objection was taken to the law as set out in the respondent's written skeleton and as it appeared to consider all relevant factors to be considered the Tribunal repeats that exposition of the law herein.

23) For the purposes of section 6 of the Equality Act 2010 (EqA) a person is said to have a disability if they meet the following definition :

“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.”

24. The burden of proof lies with the claimant to prove that he is a disabled person in accordance with that definition.

25. The term “substantial” is defined at section 212 as “*more than minor or trivial*”.

26. Normal day to day activities are things people do on a regular basis including shopping, reading and writing, having a conversation, getting washed and dressed preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, socialising (see D2 to D9 of the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011)).

27. Further clarity is provided at Schedule 1 which explains at paragraph 2 :

“(1) The effect of 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, or

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

(2) If an impairment ceases to have a 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.”

28. Likely should be interpreted as meaning “it could well happen” rather than it is more probable than not it will happen; see **SCA Packaging Limited v Boyle (2009) ICR 1056**. In the case of **Patel v Metropolitan Borough Council (2010) IRLR 280** the EAT stated that the issue of whether the effect of an impairment is long term may be determined retrospectively or prospectively. A claimant must meet the definition of disability as at the date of the alleged discrimination.

29. Further, in the case of **Nissa v Waverly Education Foundation Limited (UKEAT/0135/18)** a warning was given not to concentrate solely on a diagnosis which will be relevant but not determinative. HHJ Eady QC stated *“the correct question was to consider what the effects of the impairments were at the material time and to consider whether there was information before the ET which showed that viewed at that time it could well happen that the effects of the impairments would last for more than 12 months.”*

30. As to the effect of medical treatment, paragraph 5 provides :-

- (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if- (a) measures are being taken to treat or correct it and (b) but for that it would be likely to have that effect.*
- (2) Measures include in particular medical treatment..”*

31. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government’s office for disability issues entitled “Guidance on matters to be taken into Account in Determining Questions Relating to the Definition of Disability” The guidance should not be taken too literally and used as a check list (see **Leonard v Southern Derbyshire Chamber of Commerce (2001) IRLR 19**).

32. Some guidance is given in paragraph B1 as to the meaning of “Substantial adverse effects” namely

- “The requirement that an adverse effect on normal day to day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences and ability which may exist amongst people. A substantial effect is one that is more than a minor or trivial effect.”*

Submissions

33. This is a summary of the submissions on from both sides.

Claimant’s Submissions

34. Ms Stanley on behalf of the claimant in brief invited the Tribunal to consider that the more than trivial test was not a significant hurdle, as regards substantial adverse effect. That "long term" to paraphrase covered both the dates around July 2019 and December 2019, ie the before and after in consideration of that period. It may have been that the disciplinary action exacerbated the conditions of the claimant. She drew particular attention to the effects on the claimant and particularly the pain suffered by the claimant in the medical records.

Respondent's Submissions

35. So far as the respondent's submissions are concerned Mr Rigby for the respondent invited the Tribunal to read the written submission, which I have done and relied on the issues raised in the respondent's correspondence at page 71 dated

6 October 2020. He made reference to Dr Roy not seeing historic records and drew the Tribunal's attention to effect rather than cause. He submitted the Tribunal could consider the claimant had exaggerated his symptoms and relied on the fact many in their fifties suffer aches and pains. He invited the Tribunal to find that the definition in section 6 was not met.

Conclusion

36. Having made findings of fact and having considered the legal provisions, which apply in this case, the Tribunal reached the following conclusions. The claimant suffered from a physical impairment relating to his toe and in my judgment the claimant suffered from a mental impairment in relation to anxiety and depression. I find that each in their own way at the relevant time have had a substantial adverse effect on the claimant's ability to carry out day-to-day activities, that is taking into account the medical records of the claimant's attendance that his GP and psychiatric evidence and that of Dr Roy in particular and the claimant's own oral evidence.

37. I accept that the claimant has at times had medical treatments in order to try to resolve issues but in any event the substantial adverse effect was present and having made findings previously stated both of the impairments had a substantial adverse effect on his ability to carry out day-to-day activities the timeframe from July 2019 to December 2019, reading both prospectively and retrospectively in relation to be effect on the claimant and reading his medical records indicates to me that he was a disabled person within the meaning of the Act. In respect of both conditions and impairments they did last in excess of 12 months and in any event in particular in respect of the depression this may recur. In the circumstances the claimant's disability claims can proceed to be heard at the final hearing listed by Employment Judge Feeney on 9 - 12 August 2021.

38. At the conclusion of the hearing the Tribunal made the following case management orders to allow the final hearing in August 2021 to proceed effectively.

ORDERS

1. The date in the order of Employment Judge Feeney regarding draft index shall be varied to require the index to be provided by 13 March 2021.
2. The date in the order of Employment Judge Feeney regarding the copy bundle shall be varied to require the same to be provided by 9 April 2021.
3. The date in the order of Employment Judge Feeney regarding exchange of witness statements shall be varied to require the exchange to be by 6 June 2021.
4. The parties shall write to the Tribunal by 19 March 2021 to confirm their preference for the platform / attendance or hybrid hearing of the final hearing and shall confirm in writing by 30 June should there be any change to their preference. The hearing is currently listed as an in person attended hearing.

Employment Judge Grundy

Date 5 March 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

15 March 2021

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