



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr David Seccombe

AND

Respondent

Reed in Partnership Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin

ON

27 March 2019

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Mr J Gidney of Counsel

For the Respondent: Miss S Hornblower of Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that the claimant was not a disabled person at the relevant times and his claims for disability discrimination are therefore dismissed.

REASONS

1. This is the judgment following a preliminary hearing to determine whether the claimant was a disabled person at the material times, and whether (and if so when) the respondent knew of the claimant's disability.
2. I have heard from the claimant. For the respondent I have heard from Mr Edward Atter and Mrs Kelly Holder.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

4. A succinct history this matter is as follows. The claimant commenced employment with the respondent as a Supply Chain Manager on 28 November 2016. The claimant's employment was subject to a nine-month probationary period which was due to end on 28 August 2017. There were then review meetings on 13 September 2017, 27 September 2017, 11 October 2017, 24 October 2017 and 3 November 2017. On each occasion the claimant's probationary period was extended. Over the period of Christmas 2017 an appalling incident occurred when the claimant's partner was raped. Unsurprisingly this had a serious impact on the claimant and he was absent on certified sickness absence from 5 January 2018 until 16 March 2018. Following the claimant's return to work there was a further performance review on 28 March 2018, at which time the claimant was summarily dismissed for poor performance with pay in lieu of notice.
5. The medical evidence relied upon by the claimant to establish his disability effectively consists of four elements: his own disability impact statement; his GP notes; a medical report from his GP Dr Moore; and his sickness certificates. I deal with each of these in turn.
6. The claimant asserts in his disability impact statement that he has suffered from "recurrent anxiety and depression" for over 10 years. In 2007 he sustained a back injury which required surgery. His back injury led to a drastic reduction in the exercise which he had previously enjoyed and as a result he became gradually depressed with constant low mood, anxiety, inability to sleep, and feelings of low self-esteem. This led to the breakdown of his marriage in May 2008 and further spinal surgery at about the same time. He was initially diagnosed with depression in October 2008, and made redundant in December 2008. This added to the anxiety and depression and he was prescribed fluoxetine, an antidepressant. These antidepressants were not successful and the claimant declined to continue to take them. In August 2015 and September 2015 his anxiety reached levels which caused symptoms resembling a heart attack and he had to attend hospital by ambulance. The claimant asserts that in September 2015 he had a recurrent diagnosis of anxiety and depression. This was repeated in January 2018 following the incident with his partner. His dismissal had a further adverse effect on his mental health, and he still experiences lack of concentration, low mood, irritability, and lack of self-respect and self-worth. He now takes fluoxetine again despite the unpleasant side effects.
7. These assertions are not generally supported by the contemporaneous GP notes. The relevant extracts to which I have been referred are as follows. 18 September 2006 records "not feeling depressed". 27 October 2008 refers to back problems and "seems depressed, start fluoxetine". 12 November 2008 records "feels mood has levelled okay". Two weeks counselling was arranged at that stage which was discharged in December 2008. There are no further entries relating to mental health issues for the next seven years, until September 2015 which records "lots of stress at work". Entries on 4 September, 24 September, 25 September and 13 October 2015 all recorded diagnosis of "stress" with the entry on 24 September 2015 recording "still having problems with grievances and anxiety". There is then no reference to any mental health issues for another three years until the entries on 15 and 16 January 2018 following the sexual assault of his partner. The entries on 16 January, 1 February and 5 March 2018 refer respectively to "stress at home" and "stress". Following the claimant's dismissal, the entries on 4 May 2018 refer to "continuing stress and depression" and on 20 June 2018 "difficulty coping with daily life since lost job ... Counselling through CRASAC was helpful initially". There are no other entries in the GP notes relevant to the claimant's mental health other than these.
8. The claimant asked his GP Dr Moore to prepare a report for the purposes of this hearing and this was completed on 18 January 2019. Dr Moore advises that "David has been diagnosed with both anxiety and depression. His initial diagnosis of depression was on 27 October 2018. This was following a long episode of back pain ... I confirm that Mr Seccombe has had to have several sick notes explaining that he is unable to attend work due to stress, anxiety and depression. The sick notes were arranged on 4 September 2015 until 19 October 2015 and from 16 January 2018 to 16 March 2018. Mr Seccombe

- continues to suffer from both anxiety and depression with his anxiety affecting him on a daily basis variably ... As discussed, the anxiety and depression was first diagnosed in 2008 with a recurrent diagnosis on 1 September 2015 followed by a repeat diagnosis on 16 January 2018 and so I can confirm that this impairment has lasted for over 12 months and is continuing to affect him ... With regard to the effect of the impairment, this is variable on a day-to-day basis. David describes anxiety which can affect his concentration. This can last from a few minutes up to a couple of hours.” Dr Moore then goes on seemingly to qualify his report by adding: “Given that this diagnosis is made solely on discussions with Mr Seccombe and my understanding of depression and anxiety, I am relying solely on what Mr Seccombe has told me over the past two years. I note that Mr Seccombe has not been reviewed by us since 20 June 2018. With regard to day-to-day activity, I believe that he is fully independent of all activities of daily living. His impairment is specifically with regard to concentration. He is able to learn and understand that this is limited relating to his periods of loss of concentration.”
9. Finally, the sickness certificates or statements of fitness for work submitted by the claimant during his employment with the respondent were from 16 January 2018 to 23 January 2018 for “stress at home”, from 24 January 2018 until 13 February 2018 for “stress” and from 14 February 2018 to 16 March 2018 for “stress”.
 10. Against this background, the events and discussions which took place between the parties were as follows.
 11. Mr Atter, from whom I have heard, was the claimant’s line manager when they both worked for another organisation namely Working Links between June 2011 and June 2015 when Mr Atter left that company. It was normal for Mr Atter to talk with the claimant daily, and to meet with him at least weekly. Mr Atter knew of the claimant’s back condition, but I accept his evidence that the claimant never mentioned to him, and he did not know about, any alleged mental health impairment. This is consistent with there being no medical history of any mental impairment in the GP notes during this four year period. Mr Atter subsequently joined the respondent, and he was already in position when the claimant also joined the respondent in November 2016. Again, I accept Mr Atter’s evidence that the claimant did not raise with him, and he did not know about, any alleged mental health difficulties until the events of January 2018.
 12. When the claimant commenced employment with the respondent in November 2016 he completed an equal opportunities questionnaire and he was asked to confirm whether he had any health-related issue or impairment for which the respondent might make reasonable adjustments. Examples were given as physical or mental disability, hearing impairment, recurrent illness etc. The claimant answered “No” to that question.
 13. Mrs Kelly Holder (from whom I have heard) became the claimant’s line manager for the respondent. The claimant’s employment was subject to his satisfactory completion of a nine month probationary period. Clearly Mrs Holder was not fully satisfied with the claimant’s performance because they held detailed performance review meetings on 13 September, 27 September 2017, 11 October 2017, 24 October 2017, and 2 November 2017. In each case the claimant was not deemed to have passed his probationary period, but the probationary period was extended to give him further opportunity to do so. These meetings involved detailed discussions between the claimant and Mrs Holder during which the claimant discussed his back injury and difficulties relating to that, and was also forthright enough on 24 October 2017 to complain of his “disgust” at being subjected to this performance process. Despite being robust enough to make these points to his managers, the claimant never raised at any stage that he had any alleged mental health impairment or difficulties. The claimant’s sickness record was good, and he had not been signed off work at any stage. The claimant did send a text to Mr Atter on 28 September 2017 saying that he was “just kinda fed up”, but that is very far from indicating that he suffered from, or perceived that he suffered from any mental health impairment.
 14. For all these reasons I accept the evidence of Mrs Holder and Mr Atter that as at the end of December 2017 neither of them had been told by the claimant, or were aware by any other means, that the claimant suffered from any actual or perceived mental health

- impairment, let alone “severe anxiety and depression” upon which the claimant now relies.
15. Over Christmas 2017 the incident concerning the claimant’s partner took place. She was attacked and raped, and in his anger and distress the claimant was involved in a car accident as a result of which his car was written off. He was due to return to work on 5 January 2018 and arranged a meeting with Mr Atter that day. He was obvious extremely upset. There has been some debate at this hearing as to whether he suffered a “breakdown”. Mr Atter accepted that the claimant had broken down and cried, but felt unqualified to comment as to whether the claimant has suffered a breakdown in the medical sense. Mr Atter was supportive during the meeting, and he also sent the claimant a supportive text that evening. This was well received by the claimant who sent a text the following day to the effect that he and his partner were due to attend at the Rape Crisis Centre and that he would remain in contact.
 16. Meanwhile the claimant had sent an email to Mrs Holder on 5 January 2018 to explain that he had a dreadful Christmas but there was another issue which he did not want to discuss in an email. He told Mrs Holder that he was meeting Mr Atter later that day because: “If I don’t explain what it is to someone close to me within the workplace I will have a breakdown.” Mrs Holder responded in a supportive fashion to the effect that she hoped everything was okay but that if the claimant wished to discuss matters directly with her she was happy to do so on a confidential basis.
 17. Mr Atter also contacted Mrs Holder at that time to inform her of the claimant’s distressed condition, following which Mrs Holder telephoned the claimant to offer him support and she directed him to the respondent’s Co-Member Assistance Programme. Mrs Holder also spoke to the claimant again on 9 January 2018 and offered to cover for him on some conference calls if the claimant did not feel well enough to do so.
 18. The claimant attended a meeting with colleagues on 10 January 2018 and Mrs Holder granted the claimant two days compassionate leave. The claimant then commenced a period of certified sickness absence on 15 January 2018, the certificates for which are explained in more detail above. As also noted above, this sickness absence continued until 16 March 2018.
 19. The claimant sent an email to Mrs Holder on 22 January 2018 by way of an update on his condition. He stated: I’m starting to get to a point of “coping” and being able to control/suppress the outward emotional stuff. It’s really really hard and I will heal but I’m not fully there yet. My biggest concern is obviously not me, but [my partner] and the children ... We have three sets of counselling arranged/ongoing, both individual and together. I’m going back to my GP in the morning and I will hopefully be back at my desk from late morning ... Again, thanks for your support Kelly, we’re both very appreciative.”
 20. The claimant sent Mr Atter a further text on 30 January 2018 to the effect that his partner was distraught and “threatening the unthinkable”, and later that day confirmed that he had supported his partner by taking her to her GP and the mental health crisis centre. He asked Mr Atter to let Mrs Holder know what he was doing, and concluded by saying: “I’m bordering a fucking breakdown myself and I’m worried about work”. Mr Atter confirmed later that day that he had “Spoken with Kelly and brought her up to speed. Can you call her at some point today please - Try not to worry it doesn’t do any good. Let me know if you need anything.” The claimant also confirmed to Mr Atter on 12 February 2018 that: “We are getting there. Both on counselling ... Intending on being back on Monday next with my head fully back in place.”
 21. The claimant returned to work on 16 March 2018. There was no formal return to work meeting because the respondent’s internal system only triggered such a meeting where the returning employee requests the same under the relevant procedure. The claimant has not done so.
 22. Mrs Holder and the claimant then had a Quarterly Performance Review on 28 March 2018. It was at this meeting that Mrs Holder decided not to extend the claimant’s probationary period, and to terminate his employment because of his poor performance. He was dismissed summarily, but Mrs Holder decided to pay three months’ pay in lieu of notice, rather than the claimant’s contractual notice period of eight weeks.

23. The claimant was required to complete a pro forma review of the previous quarter in advance of this meeting. The claimant included the comment: "Whilst back at work since February 19, the issues that forced my absence in January and February are ongoing and unlikely to be resolved fully for the foreseeable future (police investigation and psychological/emotional recovery). Apart from this comment, the claimant made no reference to any mental health issues, and did not assert at any stage that he was suffering from any mental impairment which gave rise to a disability, and did not mention "severe anxiety and depression" upon which he now relies.
24. It is also clear from the contemporaneous minutes of that meeting that the claimant was very upset at his dismissal following Mrs Holder's explanation of his perceived performance deficiencies. The minutes record that at one stage the claimant: "started waving his arms around shouting "Bollocks" - this is Bollocks - you are getting rid of me because my girlfriend was raped." Another entry records that the claimant: "was pacing around at this point and very aggressive shouting about not following process and this being about the rape of his girlfriend ...". The claimant did not mention at any stage during this meeting that he was suffering from any mental impairment which gave rise to a disability, and did not mention "severe anxiety and depression" upon which he now relies.
25. The claimant served a questionnaire relating to alleged disability discrimination on the respondent in early July 2018. This came as a surprise to Mr Atter and Mrs Holder because this was the first occasion upon which they had received any communication from the claimant to the effect that he was disabled by reason of a mental impairment.
26. The claimant issued these proceedings on 25 July 2018. It was confirmed at a case management preliminary hearing on 27 November 2018 that the claimant has insufficient service to complain of unfair dismissal, but that he brings claims of disability discrimination limited to direct discrimination; discrimination arising from disability; and in respect of an alleged failure to make reasonable adjustments. The disability relied upon was explained to be "severe anxiety and depression" in paragraph 3 of the claimant's particulars of claim. The matter was listed today to determine whether the claimant was a disabled person at the material time, and whether the respondent knew, or reasonably to have known, that the claimant was so disabled.
27. Having established the above facts, I now apply the law.
28. The claimant alleges discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct disability discrimination, discrimination arising from a disability, and failure by the respondent to comply with its duty to make adjustments.
29. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
30. As for the claim for direct disability discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
31. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2) this does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
32. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps

- as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
33. Under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) ... that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.
 34. I have been referred to and I have considered the following authorities: Goodwin v The Patent Office [1999] IRLR 4 EAT; Gallop v Newport City Council [2014] IRLR 211 CA; Mahon v Accuread Ltd [2008] UKEAT/0081/08/0107; McDougall v Richmond Adult Community College [2008] IRLR 227; Boyle v SCA Packaging Ltd [2009] ICR 1056 HL; J v DLA Piper UK LLP [2010] IRLR 936; Jennings v Barts and the London NHS Trust [2012] UKEAT/0056/12; and Donelien v Liberata UK Ltd [2018] IRLR 535. I have also been referred to and I have considered the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011).
 35. I deal first with the matter of whether the claimant was a disabled person at the material times, that it is a during his employment with the respondent. As confirmed in Goodwin, the four questions to be asked are: (i) whether or not a mental physical impairment exists at all; (ii) if so, whether that impairment has an adverse effect on the ability of an individual to carry out normal day-to-day activities; (iii) whether any such adverse effects were substantial; and (iv) whether or not any adverse effect was long-term.
 36. The burden is on the claimant to show, on the balance of probabilities, something in the nature of an impairment whether it is a mental or physical condition. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. Substantial means “more than minor or trivial”. An impairment is long-term if it has lasted 12 months, is likely to last 12 months, or for the rest of the person’s life. If it is likely to recur then it is treated as long-term. The word “likely” should be interpreted as meaning “could well happen”.
 37. The claimant relies on “severe anxiety and depression” as his mental impairment for the purposes of these proceedings. The respondent points out (accurately in my judgment) that there has never been any such diagnosis despite the disclosure of 10 years of the GP’s medical notes. Nonetheless I have considered the matter on the basis of a possible mental impairment, regardless of the absence of any specific diagnosis of severe anxiety and depression.
 38. In my judgment the claimant was not a disabled person at the relevant times. My reasons for this conclusion are as follows. The only contemporaneous evidence to which I have been referred is that of the GP’s medical notes. It is clear that there are only two previous episodes of any form of mental impairment which were depression 10 years previously in October 2008 (following back surgery and marital difficulties), and three years previously in 2015 recording stress at work/grievances and anxiety. The claimant’s impact statement prepared subsequently for the purposes of these proceedings, is simply not supported by the contemporaneous GP notes, nor by the claimant’s interactions with the respondent’s witnesses. Mr Atter worked with and knew the claimant well for the four years between June 2011 and June 2015 and I accept his evidence that the claimant did not raise with him any concerns or issues relating to a possible mental health impairment. Similarly, throughout his employment with the respondent, the claimant did not raise with Mr Atter or Mrs Holder the fact that he might have been disabled by reason of any mental impairment. Indeed, he confirmed the contrary.
 39. It was clear that the claimant was extremely upset and distressed by the events of Christmas 2017 into January 2018, and understandably so. He communicated this to the respondent who supported him during that time. Mr Atter and Mrs Holder knew that the claimant was distressed and upset, and was off work for stress, as confirmed in his sickness certificates. The claimant did not suggest to them at any stage that he had any

- underlying mental illness or impairment (long-standing or otherwise). The claimant was certified as fit to return to work by his GP, and he did return to work. At his dismissal hearing at the end of March 2018, the claimant did not complain at any stage that he had a mental impairment or that the respondent's actions in dismissing him related to the same. Indeed, he argued robustly that the respondent had taken that decision for other reasons.
40. Dr Moore's report was also prepared subsequently for the purposes of these proceedings. This refers to a diagnosis of anxiety or depression in 2008, a recurrent diagnosis in 2015, and again in January 2018. It suggests that this condition affects the claimant's concentration. It is not consistent with the claimant's disability impact statement which claims that the impairment had a continual substantial impact on a number of day-to-day activities over a number of years. Dr Moore's report fails to address what in my judgment is a key question, namely whether (at the times relevant to this claim) there was an underlying mental impairment which met the constituent elements of a disability, and even if it did not manifest itself continually, was always likely to recur. There is no cogent evidence of any such condition.
41. I accept that there may well have been varying degrees of anxiety and depression which temporarily may have had a substantial adverse effect on the claimant's ability to carry out day-to-day activities, such as concentration, on the three occasions which coincided with times a significant difficulty in his life. These were his back injury, operation and marital breakdown in 2008; stress at work in late 2015; and the shocking events of Christmas 2017. In each case the claimant recovered and returned to work. There is no medical evidence of any difficulties arising from mental impairment for the seven-year period between 2008 and 2015; nor for the subsequent two year period until Christmas 2017. There is no underlying medical condition or impairment which can be said to be "likely to recur" during this period. I accept the evidence of Mr Atter and Mrs Holder which I find to be important on this point, namely that (despite their close relationship in their respective employments) the claimant did not display, nor tell them of, any alleged underlying mental impairment or related difficulties between 2011 and 2015, nor throughout his employment. I accept their evidence that the first time they knew of any alleged mental impairment amounting to a disability was when they received the disability questionnaire some months after the termination of the claimant's employment in advance of these proceedings.
42. For these reasons I do not find that there is any mental impairment which can be said to be either substantial or long-term during the period of the claimant's employment, which is the period of time relevant to this claim. I find that the claimant was not a disabled person for the purposes of the relevant legislation as alleged.
43. In any event, even if I were mistaken on the existence of the disability as alleged, I would have found that the respondent did not know, and could not reasonably have been expected to know, that the claimant was so disabled, for the following reasons. The claimant had a good working relationship with Mr Atter for the four-year period from 2011 to 2015, and subsequently with Mr Atter and Mrs Holder during his employment with the respondent. They had a number of frank and personal discussions during this time. They were aware of the claimant's back injury and consequent difficulties, which is not a disability relied upon for the purposes of these proceedings. However, at no stage during these periods did the claimant ever suggest to them that he had a mental impairment which amounted to a disability. Indeed, he declared to the respondent that this was not the case. It is clear that the respondent had no actual knowledge of the alleged disability.
44. The next question is the extent to which the respondent ought reasonably to have known of the claimant's alleged disability. This point has been very ably argued on behalf of the claimant to the effect that (following the claimant's obvious distress and sickness absence in early 2018) the respondent had enough information to make further enquiries and that effectively the burden is on the respondent to show that it was unreasonable for it not to have had the required knowledge. It is argued that a reasonable employer, knowing what it did about the claimant's mental state in early 2018, at the very least

- should have made its own enquiries at which point the disability would reasonably have been known.
45. However, the question whether an employer could reasonably be expected to know a person's disability is a question of fact for the tribunal, and is fact sensitive. The difficulty for the claimant with this case is that the respondent knew of the circumstances of the claimant's distress, understood why the claimant was so affected, had received sickness certificates confirming absence because of stress, and then received a fitness certificate from the claimant's GP confirming that he was fit to return to work. The claimant did then return to work as authorised by his GP. The respondent saw this in the context of the shocking and one-off circumstances of Christmas 2018. This was against the background of the claimant's employment record, at the start of which he confirmed that there were no disability issues, and during which he had had no other absences, and had not raised the possibility of any longer term mental impairment at any stage. In my judgment the respondent was entitled to conclude that the claimant's severe distress was as a result of an appalling but one-off incident, and that his GP had subsequently certified he was fit to return to work. The claimant never argued the contrary position, nor argued the possibility of any mental impairment or disability during his employment. Against this background in my judgment it is entirely reasonable for the respondent to have assumed that the matter was the result of one extraordinary and distressing event which had effectively been resolved.
 46. For these reasons I would have held that the respondent did not know, and could not reasonably be expected to have known, of any alleged disability.
 47. In circumstances where I have found that the claimant was not a disabled person, and in any event the respondent did not know and could not reasonably be expected to have known of any disability, the claimant's claims of disability discrimination must fail. I therefore dismiss the claimant's claims.
 48. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 26; a concise identification of the relevant law is at paragraphs 28 to 34; and how that law has been applied to those findings in order to decide the issues is at paragraphs 35 to 47.

Employment Judge N J Roper

Dated 27 March 2019