



Case Number: 2302748/2018 (V)

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## EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

Mr T Burton

and

**Respondent**

Brooknight Security  
Limited

**Held by audio/video on** 23 September 2020

**Representation**

**Claimant:**

Mr N Shah, Solicitor

**Respondent:**

Mrs J Barnett, Lay  
Representative

**Members**

Mr J Turley

Ms C Bonner

**Employment Judge** Kurrein

## RESERVED JUDGMENT

- 1 The unanimous Judgment of the Tribunal is that:-
  - 1.1 The Claimant was not a disabled person within the meaning of the Equality Act 2020 at the relevant date; and
  - 1.2 This claim must be dismissed.

## REASONS

- 1 On 23 July 2018 the claimant presented a claim to the tribunal alleging he had been discriminated against because of his disability. On 27 September 2018 the respondent presented a response in which it contested his claim and, in particular, asserted that he had not been a disabled person at the relevant time. It further asserted that even if he had been a disabled person at the relevant time it did not know that was the case or have any grounds to suspect so.
- 2 On 14 December 2018 directions were given that the claimant should provide the respondent with a disability impact statement and an open preliminary

- hearing was listed at which the issue of whether or not the claimant was a disabled person might be determined. That hearing had to be re listed and has come before us today.
- 3 This hearing is taking place today using the common video platform due to the COVID-19 pandemic.
- 4 We have heard the evidence of the claimant on his own behalf. We have considered the documents in the bundle provided to us of almost 100 pages. We have heard and considered the parties submissions. We make the following findings of fact.
- 5 The claimant was born on 14 September 1954 and started his employment with the respondent on 30 October 2017. That employment was subject to a six month probation. And it is the respondents case that the claimant was dismissed on 3 April 2018 because he had failed his probation. It is the claimant's case that that dismissal arose from his disability.
- 6 It was common ground between the parties that the relevant date on which the claimant bore the onus of establishing that he was a disabled person for the purposes of the Equality Act 2020 was 3 April 2018.
- 7 The claimant, who was born on 14 September 1954, relied on impairments of anxiety/depression and fibromyalgia. The existence of those impairments was not in dispute.
- 8 We thought the claimant to be an unsatisfactory witness.
- 8.1 He asserted his sinusitis was a well-known precursor to and/or symptom of fibromyalgia. We thought he was not qualified to say that, and the assertion was unsupported by the medical evidence.
- 8.2 He alleged that he was "bed bound", but accepted that he got up and went downstairs and was driven to the GP's surgery by his wife, where he then walked as necessary. It was not something he ever mentioned to his GP.
- 8.3 He asserted that he was prescribed Sertraline for his fibromyalgia, when it was clear from the GP's notes it was for his low mood arising from his heart complaints, loss of relatives and loss of a previous job.
- 8.4 His assertions as to the medication he required or was prescribed Sertraline were not borne out by the evidence. For instance, his evidence was that he was prescribed Duloxetine "from the start", but this was only prescribed at the instance of his Consultant in September 2018.
- 8.5 He took every possible opportunity to assert ill-health or adverse effects in response to questions that had not raised such issues.
- 9 The claimant's disability impact statement, which was unsigned and undated, was taken as his evidence in chief. it was brief, extending to only 17 paragraphs, and referred to other ailments, including ischaemic heart disease, asthma, irritable bowel syndrome and diverticulitis. The claimant had a triple heart bypass in 2013. He did not seek to amend his claim to rely on any impairments other than anxiety/depression and fibromyalgia. We have,

however, considered the effects of his impairments against the background of his other ailments.

- 10 We deal with the history of each of these impairments separately, but bear in mind that when looking at the issue before us we have to consider them together, and the effect of each on the other, as well as his other ailments. We had the benefit of the GP's notes from November 2015.

### **Anxiety/Depression**

- 11 It is clear that the Claimant was taking Sertraline 100mg daily from at least November 2015, and probably from about 2013. He had also been taking Aspirin 75mg, Atorvastatin and other blood circulation related medicines from the date of his bypass operation.
- 12 In May 2016 various issues, such as tiredness, lethargy, joint pain following surgery were making him miserable and short-tempered, but he did not see his depression as the primary problem. Blood tests were carried out.
- 13 In August 2016 he was in a low mood and his Sertraline was increased to 100mg, temporarily, and then increased to 150mg in December that year, but reduced to 100mg in February 2017 and reduced again, to 50mg, in April 2017.
- 14 That dose was increased to 100mg on 7 March 2018, when he complained of low mood, shortly after the Claimant had been invited to a probationary review meeting in early March, and had self-certified sickness absence from 3 March 2018.
- 15 On 19 March 2018 he was diagnosed with depression, but no new drug treatment was prescribed.
- 16 On the basis of the above history we accept that the Claimant had anxiety/depression on 3 April 2018.

### **Fibromyalgia**

- 17 It is clear that the Claimant was a regular attendee at his GP's surgery, with a wide variety of ailments. These included sinusitis, asthma, low mood, general lethargy, aches and pains. He was the subject of numerous blood tests, without any diagnosis.
- 18 The first mention in the GP's notes of fibromyalgia is on 12 March 2018 when it is under consideration as a possible diagnosis. When he was reviewed a week later he is diagnosed with depression and there is an entry "?fibromyalgia" which we interpret as a possible diagnosis.
- 19 On 10 April the Claimant was referred to see a Rheumatologist, whose letter dated 21 May 2018 gave a diagnosis of "Chronic Pain Syndrome (fibromyalgia)".
- 20 On 12 April 2018 he reported pain with brief stiffness in the morning.
- 21 On the basis of the above history we accept that the Claimant had fibromyalgia on 3 April 2018.

### **Effects**

Anxiety/Depression

- 22 In the Disability Questionnaire the Claimant completed on an unknown date he attributed his anxiety/depression to his fibromyalgia. However, he did not give any answer to the question about the effects of that impairment on him.
- 23 In his disability impact statement, he stated that this impairment made him anxious and scared and he had difficulty in socialising with new people if he did not take his medication. He also had trouble sleeping, and said he “would be exhausted most of the time”.
- 24 These effects are not defined by any time frame, and the only mention in his GP’s notes of difficulty in sleeping is on 16 August 2016. He was prescribed a higher dose of Sertraline.

Fibromyalgia

- 25 It was his evidence in his impact statement that this gives him constant pain which is controlled by medication. It makes him feel stiff and he is unable to stand or sit in a position for long periods. He suffers from fatigue which can come on suddenly and drain him off all energy. It affects his sleep pattern and he wakes up feeling tired and has trouble remembering and learning new things. He sometimes has slowed or confused speech. He has frequent headaches and would be “bed bound” without his medication.
- 26 That evidence reflects the answers he gave in response to the disability questionnaire, which was in the bundle, but not proved by him.
- 27 Unfortunately, this evidence was in very general terms. By way of example only, there was no evidence that the Claimant could not drive, walk a reasonable distance, go shopping, use public transport, read newspapers or books, watch TV, use a smartphone or engage in conversation.
- 28 He was silent on when his symptoms started, how they progressed and were treated and what, if any, day to day activities were adversely affected.
- 29 Once again, those symptoms and effects were not defined by any time frame.

**Medication**

Anxiety/Depression

- 30 Our findings on the medication the claimant took for this condition are set out above. He was treated with Sertraline, which for all but a short time was a low dose of 50mg.

Fibromyalgia

- 31 The Claimant was wholly unspecific as to what medications he took for what conditions and when.
- 32 There was no evidence from the GP’s notes that up to the relevant date the Claimant was ever prescribed strong painkillers, or any painkillers at all (other than Aspirin as a blood thinner) after a single prescription for 100 co-codamol 500mg on 18 April 2017, a relatively mild over-the-counter analgesic.

- 33 In paragraph 3 of his impact statement the Claimant lists a great many medications. Only one is a prescription painkiller, Co-Dydramol, at the lowest prescribed dose of 10mg/500mg (7.5mg/500mg being available without prescription). That does not appear to have been prescribed before 28 May 2018, the last entry we have from the GP's records.
- 34 In cross examination the Claimant accepted that he was not prescribed any specific medication for his fibromyalgia before it was diagnosed in April 2018. He also accepted that he had been carrying out his work for the Respondent for almost six months before that, working long hours, driving many miles and being on-call frequently. He was hoping for promotion to a more demanding role at the time of these events.
- 35 We did not accept the Claimant's evidence that he would be "bed bound" by this impairment without his medication, or that he was so in April 2018. There was no evidence of any medication being prescribed for his pain at that time. He was clearly able to visit his GP. He was carrying out his work duties until early March, when his performance was called into question and he self-certificated sick.

**Substantial**

- 36 We accept that this should be interpreted as meaning more than minor or trivial.

Anxiety/Depression

- 37 The adverse effects the Claimant mentioned were anxiety, feeling scared, difficulty in meeting new people and troubled sleep.
- 38 He gave no examples of when, where or how any of these matters had arisen in the past, or how he had been affected by them. It could only be assumed that these effects existed at the relevant date. There was no specificity to the alleged effects against which some assessment could be made.
- 39 Against that background we were quite unable to find that the effects on the Claimant of his anxiety/depression, even without medication, were substantial at the relevant date.

Fibromyalgia

- 40 The Claimant's responses to the undated disability questionnaire listed widespread pain, stiffness, fatigue, poor sleep quality, cognitive problems (fibro-fog), headaches, irritable bowel syndrome and depression and anxiety. He then expanded on these in sections headed Mobility, Manual dexterity, Physical Coordination, Continence, Ability to lift, carry etc, Speech Hearing etc, Memory and Perception of risk.
- 41 We should immediately state that we did not accept the Claimant's assertion in that questionnaire that his IBS was a symptom of his fibromyalgia. There was no evidence to that effect, and his GP's notes make clear that he has had gastro-intestinal problems for many years before his fibromyalgia was even suspected, let alone diagnosed.

- 42 His disability impact statement was far less particularised than the questionnaire. It only referred to pain, difficulty in sitting or standing in one position for a long time, overwhelming fatigue, poor sleep and headaches.
- 43 As in the case with his anxiety/depression, however, the Claimant has again failed to give any examples of how this has actually affected his ability to perform normal day to day activities.
- 44 Not only that, he has not given a time frame for when these difficulties have occurred. This is of particular concerns to us where, as here, we are seeking to assess the effects of his impairments years since they were diagnosed. We simply do not know if the effects that the Claimant does detail are contemporaneous with the diagnosis in April 2018, or are more recent recollections.
- 45 We noted that on 3 April 2018, the relevant date, the Claimant had returned to work in the belief he was fit to do so.
- 46 We have reached a similar conclusion in respect of this impairment to that we made concerning his anxiety/depression. The Claimant has simply failed to show on the balance of probabilities that at the relevant date his impairments had a substantial adverse effect on his ability to perform normal day to day activities.

### **Long Term**

- 47 We thought the Claimant's assertion that the impairments were long term to be unhelpful: it is their effects on his ability to carry out normal day to day activities that is in issue.
- 48 We did not receive any evidence, whether from the Claimant or a medical specialist, as to whether the effects the Claimant did complain of had been, were or were likely to be long term.
- 49 There was no basis on which we could find that any effects were "likely" to recur.

### **The Law**

- 50 Whether there is an impairment which has a substantial effect on normal day to day activities has to be addressed at the date of the alleged discriminatory act: Cruickshanks v VAW Motorcrest Limited [2002] ICR 729, EAT. In this case that date is the 3rd April 2018.
- 51 In accordance with the decision in Goodwin v Patent Office [1999] IRLR 4 (EAT) we have considered each of the relevant elements separately and sequentially.
- 52 In doing so we have, as we indicated we would, had regard to each impairment and ailment and considered them both individually and cumulatively.
- 53 In light of the failure of the Claimant to give his evidence in the context of the strict time periods we are required to have regard to, see Richmond Adult Community College v McDougall [2008] ICR 431, CA, we were unable to give it the weight we might otherwise have been able to. It is against that background, and in light of all our above findings, we are quite unable to find

that at the relevant date the Claimant had an impairment that had a substantial long term adverse effect on his ability to perform normal day to day activities: Swift v Chief Constable of Wiltshire Constabulary [2004] IRLR 540

- 54 The Claimant has failed to establish, on the balance of probabilities, that he was a disabled person within Equality Act 2010 on 3 April 2018.

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Employment Judge Kurrein

5 October 2020

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