



EMPLOYMENT TRIBUNALS

Claimant

NN

v

Respondent

Mitie Limited

Heard at: Bury St Edmunds

On: 29 September 2020

Before: Employment Judge M Warren

Appearances

For the Claimant: Ms J May, Solicitor.

For the Respondent: Mr C Kelly, Counsel.

RESERVED JUDGMENT

1. The claimant was a disabled person as defined in the Equality Act 2010 between 1 March and 12 September 2019.

REASONS

Background

1. The claimant was employed by the respondent as a security guard. She brings claims of disability and sex discrimination. Today's Open Preliminary Hearing has been listed so as to consider whether the claimant was a disabled person at the material time.

The Evidence

2. The evidence before me today was contained within a pdf file provided by the respondent's solicitors. Only the claimant gave oral evidence. She relied upon a witness statement in the form of an Impact Statement, the last document in the pdf file.

The Issues

3. The parties agreed that the material time is between 1 March and 12 September 2019.
4. There was an agreed amended list of issues for the final main hearing within the bundle at page 42. The claimant relies upon separate co-existing disabilities:
 - 4.1 Post-Traumatic Stress Disorder;
 - 4.2 Depression;
 - 4.3 Anxiety; and
 - 4.4 Delayed emotional development.
5. Mr Kelly outlined at the start of the hearing three reasons why the respondent does not accept that the claimant is disabled:
 - 5.1 There are gaps in the documentary records provided and he wishes to put this to the claimant so as to identify whether there is any significance in those gaps;
 - 5.2 The respondent questions whether the impact of the impairments was sufficiently substantial at the material time; and
 - 5.3 Of the four conditions relied upon, delayed emotional development is the most important and the respondent does not accept that the claimant's emotional development disorder amounts to a disability.
6. In closing submissions, Mr Kelly clarified that if I find that during the claimant's period of employment, she suffered from the impairments contended for and the effects on her day to day activities were substantial, the respondent would not seek to argue that they had not lasted for, or were not likely to last for, more than 12 months.

The Law

7. For the purposes of the Equality Act 2010 (EqA) a person is said, at section 6, 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.*
8. The burden of proof lies with the Claimant to prove that he is a disabled person in accordance with that definition.

9. The expression 'substantial' is defined at Section 212 as, '*more than minor or trivial*'.
10. Further assistance 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 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".*
11. 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' includes, in particular medical treatment ..."*
12. 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'. Although I acknowledge that the guidance is not to be taken too literally and used as a check list, (Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19) much of what is there is reflected in the authorities, (or vice versa).
13. As Sections A3 through to A6 of that guide make clear, in assessing whether a particular condition is an "impairment" one does not have to establish that the impairment is as a result of an illness, one must look at the effect that impairment has on a person's ability to carry out normal day-to-day activities. A disability can arise from impairments which include mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, unshared perceptions, eating disorders, bipolar affective disorders, obsessive compulsive disorders, personality disorders, post traumatic stress disorder, (see A5) and can also include mental illnesses such as depression. It is not necessary and will often not be possible to categorise a condition as a particular physical or mental impairment.

14. As to the meaning of 'substantial adverse effects', paragraph B1 assists as follows:

"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".

15. The Guidance at B4 and B5 points out that one should have regard to the cumulative effect of an impairment. There may not be a substantial adverse effect in respect of one particular activity in isolation, but when taken together with the effect on other activities, (which might also not be, "substantial") they may together amount to an overall substantial adverse effect.
16. Paragraph B12 explains that where the impairment is subject to treatment, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or the correction, the impairment is likely to have this effect. The word 'likely' should be interpreted as meaning, 'could well happen', (see SCA Packaging below). In other words, one looks at the effect of the impairment if there was no treatment. A tribunal needs reliable evidence as to what the effect of an impairment would be but for the treatment, see Woodrup v London Borough of Soutwark [2003] IRLR 111 CA.
17. As for what amounts to normal day-to-day activities, the guidance explains that these are the sort of things that people do on a regular or daily basis including, for example, things like shopping, reading, writing, holding conversations, using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, taking part in social activities, (paragraph D3). The expression should be given its ordinary and natural meaning, (paragraph D4).
18. As to what amounts to a 'substantial effect', the guidance is careful not to give prescriptive examples, but sets out in the Appendix a list of examples that might be regarded as a substantial effect on day-to-day activities as compared to what might not be regarded as such. For example, *'difficulty going out of doors unaccompanied...'* or *"difficulty waiting or queuing, for example, because of a lack of understanding of the concept..."* or *"difficulty entering or staying in environments that the person perceives as strange or frightening, because the person has a phobia.."* which would be regarded as substantial effects, as compared to, *'inability to speak in front of an audience simply as a result of nervousness;'* or *"some shyness and timidity..."* which would not be so regarded.

19. In Goodwin v Patent Office [1999] ICR 302 the EAT identified that there were four questions to ask in determining whether a person was disabled:
1. Did the Claimant have a mental and/or physical impairment?
 2. Did the impairment effect the Claimant's ability to carry out normal day-to-day activities?
 3. Was the adverse condition substantial? and
 4. Was the adverse condition long term?

Findings of Fact

20. I shall begin with a review of the medical evidence, insofar as I consider it relevant to the issues before me.
21. On 24 July 2017, the claimant was referred by Ipswich Hospital A&E for a Mental Health Assessment, reported as having suicidal thoughts. She was assessed by a mental health practitioner, Ms Dorneanu-Peek, who wrote a letter to the claimant's GP on 18 August 2017. At that time the claimant was aged 20 and was described as being vulnerable and immature, making irrational comments such as "I am worthless", "I have to die", "All I get is abuse and hate", "I cannot eat as I don't help anybody at the moment" and "I cannot sleep as I could get hurt". Thoughts of suicide are described and recorded. The claimant described a history of abuse at the hands of her family and others.
22. Ms Dorneanu-Peek described the claimant as being vulnerable due to the fact that she exposed herself to risky situations and sexual exploitation. She described her as vulnerable and immature. She said that the claimant was very depressed and would need a lot of help to achieve her goals due to her traumatic past and recent events.
23. The claimant was referred to the Costal Integrated Delivery Team, who provide community mental health services. She attended an appointment with a clinical phycologist, (a Dr Imren Sterno) on 10 January 2018. He or she described the claimant as emotionally immature, desperate to please others for fear of criticism or possible punishment and being very vulnerable to being abused. She was said to be constantly seeking acceptance and had a need to be loved and accepted. Her ability to make healthy relationships/friendships was very limited and her boundary setting was also very limited. It was recommended that she was referred to an organisation called Survivors in Transition.
24. In the meantime, on 22 September 2017 British Transport Police had to intervene when the claimant was reported to be regularly spending time on Ipswich railway station platforms watching trains coming in, having been reported by a mental health nurse and having expressed suicidal thoughts. British Transport Police wrote to the claimant's GP regarding these concerns.

25. After the incident which had occurred in the claimant's workplace which has ultimately given rise to these proceedings, the claimant was referred to the Norfolk and Suffolk NHS Foundation Trust Emotional Wellbeing Hub by her GP. A report was provided, I cannot see from the documents in the bundle who the author of that document was. The report refers to a telephone triage and the following is relevant:
- 25.1 She was not currently having suicidal thoughts but had them in the past.
- 25.2 She has some difficulties sleeping, frequently waking with nightmares and flashbacks.
- 25.3 She was described as a vulnerable adult who presented with uneven development. The report writer wrote, "Her emotional development appears delayed as she has beliefs that would not be expected for her chronological age".
26. On 25 July 2019, the claimant's GP wrote to the respondent in reply to a letter seeking information about her mental health issues. The content of that letter included the following:
- "NN has symptoms of PTSD ...
- She was referred to the Young Persons Emotional Wellbeing Hub in April following concerns about her mental health.
- She has low mood and has in the past had thoughts of self harm, but at that time had no thoughts of self harm or harm to others. She did however complain of difficulties sleeping and waking frequently with nightmares and flashbacks ... in keeping with the diagnosis of PTSD.
- It was felt at this assessment that NN was a vulnerable adult who presents with uneven development, as despite achieving well at school academically, her emotional development appears delayed and she holds beliefs that would not be expected for her chronological age ...
- NN's naivety and willingness to believe what she is told makes her vulnerable ...
- NN has been referred to Survivors in Transition for counselling ... she had not been prescribed any medication."
27. On 6 August 2019 a social worker, Ms Winkless, working for the NHS Norfolk and Suffolk NHS Foundation Trust Coastal Youth Team, wrote a letter, "To whom it may concern" which included the remarks, "... at times of stress she has been observed to regress into a child-like state ...".
28. I record here that I have chosen not to refer to the Personal Independent Payment reports in the bundle dated 30 September and 31 December 2019, because the descriptions of the claimant therein, whilst clearly demonstrating that at that point her mental health impairment was having a substantial impact on her ability to undertake day to day

activities, the observations upon which those reports are based were made after the relevant period, (the claimant's appeal against dismissal, the final alleged act of discrimination, was on 12 September 2019). Those reports may reflect that the claimant's condition was worse at that time because of her dismissal and unsuccessful appeal.

29. In her Impact Statement at paragraph 1, the claimant describes her symptoms of Post-Traumatic Stress Disorder, anxiety, depression and delayed emotional development as:

29.1 Hypervigilance.

29.2 Tense physical reactions to reminders of events, such as pounding heart, nausea, muscle tension and sweating.

29.3 Irrational and intense fear.

29.4 Difficulty concentrating.

29.5 Being easily moved to tears.

29.6 Panic attacks/anxiety/depression/mood swings.

29.7 Feeling jumpy and easily startled.

29.8 Difficulty falling or staying asleep.

29.9 Inability to remember important aspect of trauma.

29.10 Loss of interest in activities and life in general.

29.11 Sense of a limited future.

29.12 Feeling numb and empty.

29.13 Avoidance of people and places.

29.14 Feeling isolated.

29.15 Frequent periods of withdrawal into oneself.

29.16 Flashbacks.

29.17 Nightmares.

29.18 Guilt, shame, embarrassment or self-blame.

29.19 Seeking out high-risk/dangerous pursuits.

29.20 Fear of being in crowds.

30. The claimant places these symptoms at early 2018 when she was diagnosed. Having regard to the corroborative evidence seen in the medical evidence referred to above and having had the benefit of observing the claimant give live evidence in cross examination, I have no hesitation in finding as a fact that these were symptoms the claimant experienced at least as far back as 2017.
31. At paragraph 9 of her Impact Statement the claimant refers to holding child-like beliefs in things such as fairies, mythical creatures such as unicorns and Father Christmas. She refers to herself as a naïve and vulnerable person. Having regard to the medical evidence that I have referred to above and having had the benefit of seeing the claimant give evidence, I accept that this is true.
32. I accept the explanation of the claimant and her solicitor for gaps in her medical records, apparent upon examination of documents in the bundle. The explanation is that NN's GP refused to disclose them because the information contained therein is too sensitive, too confidential. The documents provided are sufficient for my purposes and I accept that there is nothing sinister in terms of determining whether or not the claimant was a disabled person at the material time, in sections of the medical records having been withheld by the GP.

Conclusions

33. Mr Kelly accepts that there is no requirement to put a particular label on an impairment. However, he argues the claimant's pleaded case is that her vulnerability led to her interactions with an individual which ultimately led to her dismissal. He identifies this as a separate alleged disability: delayed emotional development. He says that I have to treat that as a separate disability and that the claimant's description at paragraph 9 does not get her over the threshold of showing it has a significant impact on her day to day activities.
34. Mr Kelly refers to the letter from the GP to the respondent of 25 July 2019 quoted above. He argues that there are two separate paragraphs, one dealing with Post-Traumatic Stress Disorder and the other with the claimant's emotional development.
35. With regard to depression and anxiety, Mr Kelly argues that the impact on the claimant at the relevant time was not sufficient to amount to a disability.
36. With regard to Post-Traumatic Stress Disorder, Mr Kelly submits that the symptoms referred to in the early medical evidence related to an earlier experience of the claimant before her employment and that during her employment, those symptoms were not sufficient to amount to a substantial adverse impact on her day to day activities.

37. For my part, I do not accept the GP's letter of 25 July 2019 is drawing a distinction between symptoms of Post-Traumatic Stress Disorder and of delayed emotional development. There is no analysis anywhere in the documentation that seeks to separate out which symptoms or impairments are the result of which label. In my judgment, it does not matter. The claimant has since at least 2017, (probably earlier than that) experienced the impairments she describes in her Impact Statement and those impairments have had a significant impact on her ability to undertake day to day activities as described in her Impact Statement.
38. There can be no doubt that listed at paragraph 1 of the impact statement, are impairments that effect day to day activities and which are substantial.
39. The claimant was described in August 2017 as vulnerable and immature. In January 2018 she was described as emotionally immature, desperate to please and vulnerable to abuse. These are impairments. Her ability to form health relationships and friendships was said to be severely limited; those are day to day activities and the effect on them is substantial.
40. I therefore find that the claimant was a disabled person at the material time by reason of Post-Traumatic Stress Disorder, anxiety, depression and delayed emotional development.

Employment Judge M Warren

Date: 7 October 2020

Sent to the parties on: 13 October 20

For the Tribunal Office