



EMPLOYMENT TRIBUNALS

Claimant: Mr J Hislop
Respondent: The Olympus Academy Trust
Heard at: Bristol (via CVP video link) On: 4th March 2021
Before: Employment Judge P Cadney
Representation:
Claimant: Ms S Shaw
Respondent: Ms A Williams

PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

- i) The claimant was at all material times a disabled person within the meaning of s6 Equality Act 2010.
- ii) The respondent's application that the claimant's claim be dismissed as having no reasonable prospect of success and/or that a deposit be ordered as a condition of the claimant being permitted to pursue them is dismissed.

Reasons

At a TPH held on 23rd December 2020 it was directed that the case be listed for a Preliminary Hearing to determine:

- i) Whether the claimant was a disabled person within the meaning of s6 Equality 2010 at the material time;
- ii) Whether any of the claimant's claims are out of time and if so whether time should be extended;
- iii) Whether any of the claimant's claims should be struck out as having no reasonable prospect of success; and/or
- iv) A deposit ordered as a condition of the claimant being permitted to pursue all or any of his claims having little reasonable prospect of success;
- v) To give such further case management orders as are necessary.

Time Limits

1. By a claim form presented on 5th April 2020 the claimant brings claims of unfair dismissal and disability discrimination. The claimant was dismissed on 19th November 2019 and entered ACAS early conciliation on 18th February 2020

(the last day on which he gained the benefit of the automatic extension of time) and it ended on 5th March 2020. He submitted his ET1 on 5th April 2020 (the last day on which he obtained the benefit of the ACAS EC extension of time). It is accepted by the respondent that as a result the claim for unfair dismissal and any disability discrimination claims relating to dismissal itself were submitted in time. Following further particularisation of the claim it has been clarified that the only claims being brought relate to the dismissal and the second issue has fallen away.

Disability

2. The first issue before me today is whether the claimant was or was not at the relevant time a disabled person within the meaning of s6 Equality Act 2010. A disabled person is an individual who has a “physical or mental impairment” which has a “substantial and long term adverse effect on the ability to carry out normal day to day activities”. In this context “substantial” means more than minor or trivial; and long term means lasting or likely to last for twelve months or more. In this case the disability contended for is PTSD and major depressive disorder. The claimant’s Impact Statement dates the onset of depression from the beginning of 2017. He was signed off work from mid-January 2017 and referred by the respondent for an Occupational Health Report in March 2017. By the time of that report he had been prescribed citalopram anti-depressant medication.
3. For the first half of 2017 the claimant suffered the physical symptoms of what was diagnosed by the summer of 2017 as sarcoidosis. This is not relied on as a disability in this case but is the background to the mental conditions that are relied on. Put simply for some six months he suffered serious physical symptoms of an undiagnosed condition for which he had been given a initial and provisional diagnosis of lymphoma or sarcoidosis. The claimant describes believing that he was suffering a terminal illness and the mental consequences of believing that he was not going to see his children grow up.: *“Whilst my diagnosis was a massive relief, I remained anxious and depressed. Even after I made physical improvement, experienced vivid flashbacks of lying on the sofa unable to function and sitting on the children’s beds crying, watching them sleep, feeling I would die. I felt very confused at around this time as, because I was improving physically, I expected to also improve mentally, yet I kept having these flashbacks and regular negative thoughts or feelings of guilt about the whole experience.”*
4. There are a number of sources of medical evidence. In respect of the sarcoidosis there are reports from Professor Robertson; and in December 2018 the claimant saw Dr Castle (a Consultant Neurologist) who referred him to Dr Bradley a Clinical Psychologist in Neuropsychology. However, the primary medical evidence comes from Dr Peter Higson. In an email of 30th March 2020 he expresses the view that the claimant had suffered PTSD since 2017. In his subsequent report of 5th April 2020 he expands on this diagnosis and concludes that the claimant was suffering from PTSD and a major depressive episode.
5. The respondent does not dispute any of Dr Higson’s diagnosis or conclusions. The evidence before me is therefore that the claimant has suffered from PTSD since 2017, and has had a major depressive episode for which he has been prescribed anti-depressant drugs for the same period. Accordingly there is no dispute that the claimant suffers from a mental impairment and that the underlying conditions had been present for over two years prior to the date of

the alleged act of discrimination. The respondent does, however, dispute the claimant's contention that the impairment had a substantial or long term effect on his ability to carry out normal day to day activities. This is based on a number of propositions. Firstly they point to the fact that the claimant had made a sufficient recovery from both physical and mental conditions to return to work in September 2017. There is no suggestion in the medical records that there was any ongoing difficulty between then and December 2018. Accordingly they submit that the initial period of disability lasted for significantly less than one year and that there is then a gap of some fifteen months before any further symptoms are reported. The report of Dr Castle of December 2018 describes the claimant as "psychologically rather fragile". In Dr Bradley's report of March 2019 there is no mention of any ongoing symptoms. Finally they point to the fact that in the latter part of 2019 the claimant was undergoing significant stress in his personal life with the break-up of his marriage. They invite me to conclude that these are two separate time limited episodes of mental illness and that judged as at November 2019 there is insufficient evidence to hold that the second was "likely" to last more than twelve months. In addition Dr Higson's report follows a consultation in February 2020 and there is insufficient evidence in any event that he suffered any symptoms, or that any symptoms were "substantial" as at November 2019.

6. In summary they invite me to conclude that there is insufficient evidence to conclude that the claimant fulfilled the statutory definition of disability in November 2019, or alternatively if he did that there is insufficient evidence to hold that it was likely to last for more than twelve months judged on the evidence available at that time.
7. The claimant's case is that to characterise his conditions in that way is to fundamentally misunderstand them. He has suffered the symptoms of PTSD continuously since 2017, albeit to differing degrees and with differing frequency, and has suffered a continuing major depressive episode which has required him to be prescribed anti-depressant medication continuously over that period. He describes symptoms that have been essentially continuous, albeit that they have fluctuated in severity since his suffering from sarcoidosis. He suffers flashbacks, dreams of dying and severely disturbed sleep resulting in him being exceptionally tired. This in turn has led to problems in concentration and difficulties with his short term memory. In my judgement the evidence being given by the claimant as to the symptoms was transparently honest and I accept it. I note that Dr Higson also took the view that there was no reason to doubt the veracity of the claimant's account which confirms my own view of its truthfulness.
8. In my judgement the picture described by the medical evidence is of the claimant suffering a severe psychiatric reaction to a potentially life threatening illness. This has been diagnosed as PTSD and he has suffered from it since 2017. As the claimant himself accepts the symptoms have fluctuated in severity at times since. In my judgement however it is clear from Dr Higson's report that these are the most severe symptoms of an underlying condition that has been present continuously since 2017. These are not discrete and unrelated episodes of psychological illness but the fluctuating symptoms of an continuous underlying condition.
9. On that basis in my judgement he was a disabled person as at the date of the alleged act of discrimination in November 2019.

Strike Out/Deposit Order

Unfair Dismissal

10. The respondent's essential point is that the claimant does not dispute any of the factual allegations in relation to the conduct for which he was dismissed. In those circumstances the only real question in relation to the unfair dismissal claim is whether the sanction fell within the range reasonably open to the respondent. As the conduct itself was the commission of the criminal offence of harassment and the use of class A drugs including cocaine (which is itself necessarily a criminal offence albeit not one with which he was charged) it is clearly incompatible with his continued employment as a teacher. Looked at as a stand-alone claim the proposition that dismissal for that conduct fell outside the range reasonably open to the respondent is in reality fanciful and has no reasonable prospect of success, or at the very least has little reasonable prospect of success.
11. The claimant's case is essentially that the unfair dismissal claim cannot be disentangled from the disability discrimination claim and that either the respondent failed properly to investigate and understand his medical condition and the link with his conduct and/or that they should, even on the evidence before them, have concluded that there was such a link and that that is sufficiently powerful mitigation to make the decision to dismiss at least arguably outside the range of reasonable responses. Put another way if there is arguable merit in the disability discrimination, in particular the section 15 claim then it necessarily follows that the unfair dismissal claim is at least arguable and that neither a strike out or deposit order is appropriate.

Discrimination Arising from Disability (S15 Equality Act)

12. In respect of the disability discrimination claims the respondent submits the s15 claim is either bound to fail and should be struck out as having no reasonable prospect of success, or again at very least has little reasonable prospect of success and a deposit order should be made. Even if the claimant can causally link the behaviour for which he was dismissed and his disability (something arising from disability) the respondent is bound to succeed in demonstrating, given its overarching responsibility to its students and its interest in maintaining its reputation, that dismissal was a proportionate means of achieving both legitimate aims.
13. The claimant submits that as the behaviour for which he was dismissed is at least consistent with behaviours exhibited by those suffering from PTSD that he has an arguable prospect of establishing the causal link. If this is correct the burden will fall to the respondent to establish the justification defence and it is not inevitable that they will be able to do so. The judgement will involve in essence an assessment of the proportionality of the dismissal in the light of the mitigating circumstances and whilst the respondent may succeed it is not inevitable that they will. If this analysis is correct and they will not inevitably be able to satisfy the burden then it is necessarily not appropriate to order a deposit or strike out the claim.
14. In my judgement the claimant is essentially correct to say that both these are linked and that if the s15 claim is arguable that it would not be appropriate to strike out or order a deposit in respect of either. I confess that I have not found this easy to resolve. Neither claim is strong and if the test for ordering a deposit

were on the balance of probabilities I may well have ordered one. However it is not and there is in my judgement enough arguable merit in the claimant's submissions that I am persuaded that it is not appropriate to make either order I respect of either of these claims.

15. In the light of my conclusions as to the primary dispute in this case it does not appear to me necessary or appropriate to make any separate order in respect of the reasonable adjustments claim relating to the disciplinary process itself.

Directions

16. The parties are directed to supply within 21 days :
- i) A joint time estimate for the final hearing;
 - ii) An agreed List of Issues; and
 - iii) Agreed Draft directions.

Employment Judge P Cadney
Dated: 10 May 2021

Judgment and Reasons sent to the Parties: 18 May 2021

FOR THE TRIBUNAL OFFICE