



EMPLOYMENT TRIBUNALS

Claimant: Ms J Morris

Respondent: Denholm UK Logistics Limited

HELD AT: Manchester

ON: 7 October 2021

BEFORE: Employment Judge B Hodgson (sitting alone)

REPRESENTATION

Claimant: Ms S Johnson, Counsel

Respondent: Ms K Graydon, Solicitor

RESERVED JUDGMENT ON PRELIMINARY HEARING

The Judgment of the Tribunal is that

- 1 the claimant was not, at the relevant time, a disabled person as defined
- 2 the claims of discrimination arising from disability, failure to make reasonable adjustments and harassment are accordingly dismissed
- 3 the matter will now be listed for a further Preliminary Hearing

REASONS

Background

1. This matter came before the Employment Tribunal by way of Preliminary Hearing on 27 May 2021 ("the first PH")
2. At the first PH, it was identified that the claimant was pursuing the following claims:
 - 2.1. Discrimination arising from disability
 - 2.2. Failure to make reasonable adjustments
 - 2.3. Harassment
 - 2.4. Victimisation
 - 2.5. Unauthorised deduction from wages
3. All claims are denied and it is further denied that the claimant was at all relevant times a disabled person as defined. The claimant was ordered to further particularise her claims which she has done
4. Two hearings were listed at the first PH. A Final Hearing was listed for four days commencing on 4 July 2022 and case management orders in respect of that Final Hearing were made. A further Preliminary Hearing was also listed for today and again case management orders were made in respect of this

Issues

5. What was to be considered and determined at this Preliminary Hearing was discussed at the outset
6. At the first PH, it was indicated that, albeit subject to available time and at the discretion of the Judge assigned to hear it, the following two issues would be considered:
 - 6.1. Whether the claimant's claim was presented in time, and if not, whether the claimant should be granted an extension of time to allow the claimant's claim to proceed ("the time issue"); and
 - 6.2. Whether the claimant was a disabled person within the meaning of the Equality Act 2010 at all or any time relevant to the claims made ("the disability issue")

7. The Notice of Preliminary Hearing, however, subsequently sent to the parties on 29 June 2021, indicated simply that, at this hearing, "an Employment Judge will discuss the disability issue"
8. Both parties had attended prepared to deal with the disability issue but not the time issue. Given this, and the time available for the hearing, it was agreed that this Preliminary Hearing would consider and determine solely the disability issue. The time issue – particularly given that it concerns a question of the possibility of a continuing act – was agreed to be dealt with at the Final Hearing (subject to the Judgment reached at this Preliminary Hearing)

Disability Issue

9. The issue to be determined by the Tribunal is therefore whether or not at the relevant time the claimant was a disabled person as defined
10. The claimant's representative confirmed at the outset that she was not relying on the physical impairment of a shoulder injury or condition but solely on the mental impairments of depression and anxiety
11. In terms of the relevant period, the first in time of the claimant's allegations arose in April 2020 and the last in November 2020 and accordingly this defines the period potentially relevant, that is April 2020 through to November 2020. This was agreed on behalf of both parties by their respective representative

Facts

12. The parties had agreed a bundle of documents and references to numbered pages in this Judgment are to pages as numbered within such bundle
13. The claimant had prepared two statements which together stood as evidence in chief. The content of the first statement ("the Impact Statement") is clearly relevant to the disability issue. The supplementary statement, prepared whilst there was a degree of uncertainty as to what would be determined at this Preliminary Hearing, is concerned primarily with the time issue and the question of the respondent's knowledge. The claimant gave oral evidence on her own behalf. The respondent did not call any witnesses to give oral evidence
14. The Tribunal came to its conclusions on the following facts on the balance of probabilities, having considered all of the evidence before it, both oral and documentary

General background

15. The claimant's date of birth is 16 August 1973 and she is accordingly aged 48 at the time of this hearing

16. She was employed by the respondent – a haulage company - as an HGV Driver from October 2017, her role involving her driving HGV trucks, delivering goods across the country
17. She remained in the employment of the respondent at the time of presenting her ET1 Claim Form, namely on 8 February 2021, but that employment has subsequently (in July 2021) terminated by reason of the claimant's resignation

Medical Records

18. The document bundle included extracts of the claimant's medical records. The records disclosed state that the claimant was spoken to following receipt of her request for release of the records and she confirmed that she only wanted them from May 2020 [see 19 August 2021 entry at page 175]
19. The Tribunal considered the medical records in their entirety but was specifically referred to the following entries in the records as being directly relevant to its considerations
20. 20 May 2020. History: *Spoke to her, got sent home from work last week, could not stop crying. Had a breakdown at work. Truckdriver by profession. Tells me they are stopping the money, understandable duress due to finances. Cough 1/12, no phlegm – is dry, headache 2 weeks ago, no fever, no sore throat. She understandably feels under duress, not able to RTW yet, sx onset last Thursday and has been off work for 1w now. Problem: Cough. Comment: Plan agreed. Shall send eMed3 2w, self isolate 1w, link for testing Accurxed, advised ring 111 due to having CV sx [page 180]*
21. 13 July 2020. History: *Struggling at work, has had new management, 'not being very nice', feels under a lot of pressure, having lots of mini breakdowns, normally would go and speak to sisters but they have a lot on plate, has tried to go back to work past two weeks, struggling to cope, very upset, mum has dementia, sisters looking after mum, has fallen out with daughter, struggling to cope with it all, feeling very low in mood, in past has felt better whilst working and does get down when not working, work has always been her 'safe haven', since changes this is no longer the case, is currently trying to go through meetings to work out issues with new management, no thoughts DSH/suicide, lives alone, doesn't think will be able to make up with daughter. Problem: Depressive disorder. Comment: Discussed options of medication and counselling, not keen on medication as doesn't like taking tablets, discussed this further and will think about this, for now given number for self help and some online resources for further support/someone to talk to as requested, any thoughts of DSH/suicide to ask for emergency TC/phone crisis as discussed, review in 3 weeks, sooner if required as discussed [page 179]*
22. 17 November 2020. History: *works are requesting a mental assessment as she left work early on Friday as she was tired and work are saying she has walked*

out on the job, she feels work are bullying her as she has been crying on a few occasions, work have said that they are not paying her until she gets this mental assessment, she feels they are trying to get rid of her, advised to ask work for an occupational health assessment [page 179]

23. 14 December 2020. Problem: *Depressive disorder*. History: *has a grievance at work, not sleeping or eating, doesn't want to go back to work, trying to get out of her contract [page 178]*
24. The claimant was signed off on the sick and did not return to work after this date. Two sick notes have been disclosed which appear to overlap [pages 168 and 169] but both refer to the condition of "depressive disorder". This same condition is also referred to in the entry of 7 January 2021 [page 178]
25. There are further subsequent entries, starting on 4 June 2021, referring to: Problem - *depressive disorder* [pages 176 - 177]
26. The records indicate under *Significant Past* that "this section is empty" and, under *Minor Past*, reference is only made to "cough" on 20 May 2020 [page 175]
27. Reference to *Medications* indicates that the claimant was first prescribed medication (Sertraline in 50mg tablets) on 16 June 2021 [page 180]
28. The Tribunal was also referred to correspondence from "SelfHelp" a registered charity
29. By letter dated 13 July 2020 addressed to the claimant's GP practice [page 166], SelfHelp advised that: "We have received a referral for [the claimant] requesting an appointment to access our Manchester Psychological Therapies Service in order to obtain support with emotional/mental health difficulties that they are experiencing. If you have any concerns about [the claimant] being offered the opportunity to access our service, please could you comment below and return the form back to us as soon as possible." There is no suggestion that the GP practice raised any concerns
30. By follow up letter dated 14 September 2020 (described as a "Discharge Report") [page 167], SelfHelp, under *Client Discharge*, noted "Planned Completion". Under *General Comments*, it advised: "Client has attended 4 sessions of Counselling with myself and achieved clinical recovery via their outcome measures" – the "outcome measures" refer to the claimant's first and last assessment scores (from 19 to 4 and 14 to 2 respectively). Under *Risks*, it noted "N/A"
31. The Tribunal was also referred to further correspondence from SelfHelp from June 2021 [pages 170 – 172]

Documentary evidence

32. The Tribunal was referred to a number of comments or responses made by the claimant in the course of exchanges with the respondent. Although the Tribunal was not considering the issue of knowledge at this hearing, these exchanges are potentially relevant to the disability issue itself. The respondent does not dispute the fact that such comments were made. Those to which the Tribunal was referred to are as follows:
 - 32.1. Text exchange dated 14 October 2020: "I'm in a bit of a state" [page 79]
 - 32.2. Meeting on 20 October 2020: "Yeah, it's making me very poorly" [page 93] and "I wanted to go home because I was upset - broke me again" [page 105]
 - 32.3. Meeting on 6 November 2020: "I've had two breakdowns" [page 117], "You've seen me – you've seen I've had two breakdowns" [page 124], "Do you think this is helping my mental health?" [page 132] and "I had a full-on breakdown and Anthony said to me I think it's best for you to go home so I did not walk off the job" [page 133]
 - 32.4. Grievance letter (undated): includes reference to "breakdown" and "panic attack" [page 158]

Impact Statement

33. The claimant's evidence was that she had started suffering from anxiety "around one year ago" (the statement being dated September 2021) and had "suffered from depression all of my adult life and was diagnosed when I was around 15 years old" [see paragraphs 4 and 5]
34. At paragraphs 6 and 7, she indicates that symptoms progressed to a level she could no longer manage in or around May 2020 and describes the "typical symptoms" of both conditions as including but not limited to: shortness of breath, crying uncontrollably, shaking, fatigue, emotionally sensitive, strong heart flutters, difficulty with sleeping and being unable to leave my home. No further examples were given by the claimant in her oral evidence. She goes on to say (paragraph 8) that, in respect of depression, this can cause low moods which impact upon her ability to maintain relationships with others, giving further examples of impacts upon her "earlier in her life"
35. At paragraph 23, she states that: "My conditions started to impact my day to day life in around May 2020 when they had got out of control. At this time, I noticed that I was struggling [with] day to day activities such as keeping on top of bills, housework, managing emotions and managing relationships with

family". In cross-examination, the claimant confirmed that debt issues had only arisen from February 2021

36. At paragraph 26 she states: "In around December 2020 I became limited in my ability to leave my house and manage some activities such as general self-care and maintenance". The claimant goes on to refer to not being able to leave her home for activities such as household shopping and seeing friends and family as from "in or around March 2021" [paragraph 27]
37. The Tribunal's assessment of this evidence is incorporated within its conclusions below

Statutory Framework

38. The definition of a disabled person for the purposes of the statute appears at section 6 Equality Act 2010 ("EqA"). This is supplemented by Schedule 1, Part 1 EqA, headed "Determination of Disability"
39. The burden is on the claimant to show, on the balance of probabilities, that she had, at the relevant time, a disability as defined
40. Section 6(1) EqA states:

"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."
41. Within the interpretation section, section 212 EqA states that, in this Act ... 'substantial' means 'more than minor or trivial'
42. Paragraph 2 of Schedule 1 Part1 EqA states that the effect of an impairment is long-term if –
 - (a) it has lasted for at least 12 months, [or]
 - (b) it is likely to last for at least twelve months ,,,

Further at subsection (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"
43. The long-term requirement relates to the effect of the impairment rather than the impairment itself

44. In determining whether a person is disabled, the Tribunal should apply the appropriate test to the claimant's condition at the date of the alleged discriminatory act and not at the date of the hearing (see, for example *Cruikshank v VAW Motorcast Limited* [2002] IRLR 24)
45. In the context of the definition of "long-term", "likely" means "could well happen" (see, for example, *SCA Packaging v Boyle* [2009] IRLR 746)
46. "Guidance on matters to be taken into account in determining questions relating to the definition of disability" was issued in 2011. This Guidance does not impose any legal obligations in itself, nor is it an authoritative statement of the law. Any aspect of this Guidance, however, which appears to the Tribunal to be relevant in determining whether a person is a disabled person must be taken into account and the Tribunal considered the Guidance where relevant to its findings

Submissions

47. The respondent's representative prepared and spoke to written submissions which, being on record, the Tribunal does not propose to repeat in this Judgment but full account was taken of all that was put forward including the reference to case law
48. The claimant's representative made oral submissions summarised as follows:
 - 48.1. The claimant on the evidence has suffered from "depression" throughout her adult life
 - 48.2. The diagnosis in July 2020 by her GP was of a "depressive disorder"
 - 48.3. As previously, she had sought to manage her condition herself with the assistance of counselling
 - 48.4. Confirmation of her earlier problems was given in the SelfHelp records of June 2021 and at that point her level of depression and anxiety was assessed as "moderately severe"
 - 48.5. The various references by the claimant to her condition and its impact, both within the GP records and the internal documentation, illustrate the effect upon the claimant of her condition
 - 48.6. The claimant's Impact Statement clearly sets out the impact of her condition upon her normal day to day activities
 - 48.7. The case of *Herry v Dudley Metropolitan Council*, as relied upon by the respondent, can clearly be distinguished on the facts and has no relevance. (No further case law was referred to or relied upon on behalf of the claimant)

48.8. In all the circumstances, the correct conclusion is that the claimant was at the relevant time a disabled person as defined

Conclusions

49. The claimant's position was that she had been a disabled person by reference to the mental impairment of "depression" throughout her adult life. The further pleaded condition of "anxiety" had arisen more recently and was a condition suffered by the claimant from May 2020
50. The Tribunal does not doubt at all that there were incidents that occurred during the early part of the claimant's life as described by her. These more specifically were incidents of self-harm at about the age of 15 and the taking of an overdose at about the age of 21
51. The claimant has produced no medical evidence relevant to her condition at that time. As indicated, the medical evidence she has produced, by her own choice, runs in fact only from May 2020. Neither the claimant nor her representative had any explanation as to why she had limited the medical evidence to this recent period only
52. There is accordingly nothing before the Tribunal which would indicate any medical diagnosis of an earlier mental impairment and, if so, its nature and extent. The only section in the medical records produced to the Tribunal relevant to the period prior to May 2020 in fact indicates no entry at all under the heading "Significant Past". It would be surprising, if there were a formal diagnosis going back to the claimant's youth and early adulthood, that it would be omitted from her medical records
53. The relevant period for the disability issue, agreed by the parties, is April 2020 to November 2020
54. The claimant's own evidence was that she had never previously been prescribed medication for any mental condition until June 2021, namely some seven months or so after the end of the relevant period. Her evidence also was that she had previously had counselling but not for some 10 – 15 years prior to the relevant period
55. The Tribunal notes that the medical records include in July 2020 reference to a "depressive disorder". This however was at a level that did not require any medication to be prescribed and was proposed by the claimant's GP to be dealt with by the claimant self-referring to a counselling service, SelfHelp
56. The claimant did self-refer which led to a series of four counselling sessions. It was described by the claimant in her evidence that she attended these by telephone whilst working, having been given permission to pull in from her

driving duties for the purposes of the calls. At the end of these four sessions, she was described as having "achieved clinical recovery"

57. Whilst it is clear that, on the face of the evidence, the claimant's condition deteriorated, again, on the claimant's own evidence, it did not start do so until December 2020, namely after the end of the relevant period
58. The Tribunal recognises that there were issues which preyed upon the mind of the claimant at the relevant time. There were undoubtedly stressors both at work and in her personal life. These included her concerns over Covid and the cleanliness of her work environment together with concerns over her Mother's health and her relationship with her daughter. These were stressors that impacted upon the claimant and produced reactions such as her "breaking down in tears". On the evidence, and on balance of probabilities, the Tribunal concludes by way of preliminary finding however that the claimant was not suffering from what could be properly be described as a mental impairment at the relevant time with those issues that indicate possible stress having their own discrete explanation. The Tribunal would however review this in the overall context of the balance of the statutory definition. There was no argument pursued on behalf of the claimant that the claimant had what may be described as a progressive condition nor was any reliance placed upon a past disability
59. In terms of effect on normal day to day activities, the claimant made reference in her Impact Statement to a number of matters as referred to in the Tribunal's above section on facts
60. Paragraph 7 of the Impact Statement sets out "symptoms". The only such symptom that can perhaps properly be described also as an effect upon normal day to day activities is "being unable to leave my home". In paragraphs 26 and 27, however, the claimant describes that such limitation began to take effect in December 2020, then worsening in March 2021. This is accordingly outside the relevant period
61. Paragraph 23 of the Impact Statement sets out activities the claimant alleges she was "struggling with" from May 2020. The Tribunal accepts that these are examples of normal day to day activities. In respect of "keeping on top of bills", the claimant accepted in her evidence that she did not have any financial issues prior to December 2020. The claimant however in her evidence gives no more than generic reference to possible impact and no specific examples or illustrations were given by her in her oral evidence
62. Although the Tribunal is mindful that reference in the statutory framework is specifically to "normal day to day activities", the Tribunal does consider it relevant - particularly given the matters relied upon by the claimant – to note that throughout the relevant period, save only for a relatively short period of absence in or about May 2020 following a diagnosis of "cough", (it is unclear from the evidence the length of time the claimant was absent from work at this

time as no sick note was produced to the Tribunal but it was agreed that it was a relatively short period of time, perhaps two weeks), the claimant continued to perform her work duties. It is further noted that her job was an HGV driver, a job that requires careful and prolonged attention given the potential severe consequences of any lapse in concentration

63. It was put to the claimant in cross-examination that the possible effects upon her day to day activities were not reflected in any way by entries in her medical records. The claimant's response was that she had raised them with her GP in telephone consultations but that these discussions have not been recorded. The Tribunal rejects this evidence. It is crucial that GPs record all relevant information they are given in consultations with their patients and it is not credible that the claimant would have had any consultations with her GP that have not been noted or referenced in any way within her records
64. The Tribunal is further mindful that "substantial" is interpreted as "more than minor or trivial" but the Tribunal concludes, on the evidence and on balance of probabilities, that any mental impairment the claimant may have had did not have any substantial effect upon her ability to carry out normal day to day activities during the relevant period.
65. For the claimant to fall within the definition of a disabled person, any such adverse effect must also be "long-term". As indicated, this is defined (insofar as relevant to this claim) as having lasted or likely to last for a period of at least 12 months
66. The Tribunal notes that this is to be assessed by reference to the knowledge and circumstances at the relevant time rather than in retrospect and with the benefit of hindsight
67. Whilst the claimant was referred to in her GP records in June 2020 as having a "depressive disorder", this resulted in her self-referral for counselling. After four such sessions (conducted, as indicated, by taking a break from her work duties), she was deemed as having "achieved clinical recovery". She was at no point during the relevant period prescribed any medical treatment and she was not further diagnosed and did not have any further consultations with her GP until December 2020, namely after the end of the relevant period
68. On the evidence produced, and on balance of probabilities, the Tribunal concludes that any adverse effect upon the claimant was not "long-term", acknowledging the definition of "likely" as being "could well happen"
69. In all the circumstances, and looking at the position in the round, the Tribunal concludes that, whether or not the claimant had at the relevant time what may

properly described as a mental impairment, the claimant was not, at the relevant time, a disabled person as defined

70. It follows as a consequence that the claims of discrimination arising from disability, failure to make reasonable adjustments and harassment must correspondingly be dismissed
71. The matter will now be listed for a Preliminary Hearing to consider any further case management orders that may be required prior to the Final Hearing which at present remains as listed

Employment Judge B Hodgson

Date: 19 January 2022

JUDGMENT SENT TO THE PARTIES ON

20 January 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.