



EMPLOYMENT TRIBUNALS

Claimant

Mr. Lewis Taylor

Respondents

v

1. Deluxe Mobile Homes Limited

2. Simon Docherty

Heard by CVP

On: 18 November 2020

Before:

Employment Judge Wedderspoon

Representation:

Claimant:

In person

Respondents:

Mr. Serr, Counsel

RESERVED JUDGMENT

1. The claimant was not disabled at the relevant time within the meaning of section 6 of the Equality Act 2010.
2. The claimant's claim is dismissed.

REASONS

Background

1. The claimant was employed by the first respondent from 1 July 2019 until his dismissal on 6 April 2020. The purpose of the Preliminary hearing was to determine whether the claimant met the definition of disability pursuant to section 6 of the Equality Act 2010. If he does not, his claims fail.

The issues

2. The issues to be resolved at this open preliminary hearing were identified by Employment Judge Wade in her order dated 7 August 2020 as follows: -
 - 2.1 On or around 6 April 2020 did the claimant have the impairment of depression and anxiety?
 - 2.2 If so did that impairment have a substantial adverse effect on the claimant's ability to carry out normal day to day activities?
 - 2.3 If so, was that effect long term? In particular when did it start; and
 - 2.3.1 Had it lasted at least 12 months?
 - 2.3.2 Was the effect likely to last at least 12 months?

3. At the hearing the Respondent conceded that the claimant did have a mental impairment of depression and anxiety on 6 April 2020 (the relevant date) and that it had a substantial adverse effect on the claimant's ability to carry out normal day to day activities. Therefore, the limited issue for the Tribunal to determine at the hearing was whether "the effect was likely to last at least 12 months".

The Hearing

4. The claimant relied upon a section 6 disability impact witness statement. I was provided with an agreed bundle of 60 pages.

Facts

5. The claimant started suffering issues with his mental health from 14 August 2018 when he was signed off work (with another employer) for a 4 week period with work related stress. He stated he was struggling with day to day activities and described in his evidence of difficulty getting out of bed, interacting with his family, showering and washing. He said he had no energy and did not want to leave the house. He was given the option for counselling and/or medication. There is no mention of this in the G.P. records but I accept his evidence that these options were given to him but he declined them. By 14 September 2018 he was feeling better. He stated the period off work made him feel much better. He attended his G.P. in December 2018 with an unrelated issue and did not mention any mental health issues. From the evidence given by the claimant about this and the contemporaneous records, it is clear that the claimant fully recovered from this period of work related stress.
6. In September 2018, the claimant was made redundant and he was out of work until July 2019 when he commenced work with the First Respondent. For the period September 2018 to July 2019 the claimant did not suffer any mental health issues.
7. On 2 September 2019 the claimant attended his G.P. and described feeling low. His sleep was described as o.k. He did not need anti-depressants and was continuing to work. It was agreed that he would self-refer if he so required but did not do so. The claimant's evidence at the hearing is that he was in denial that he had a mental health issue. A medical health questionnaire was completed by the claimant on 4 September 2019. The claimant was described as suffering from a generalized anxiety state and felt restless and annoyed. He was not prescribed medication. He says that he did contact Talk Therapy but they were very slow and he had one appointment in October 2019. This is not noted in his G.P. records but I accept his evidence that it was a different service and therefore not recorded by his G.P.
8. There are no recordings in the G.P. records from September 2019 until 27 January 2020 about any mental health issues. The claimant's evidence is that prior to a long period of absence from work (commencing on 27 January 2020) with the First Respondent the claimant took a few days off with work related and personal stress.

9. On 27 January 2020 the claimant's mental condition began to deteriorate and his sleep was affected. He struggled to get out of bed; he felt unable to eat breakfast and he could not face travelling to work by bus. He did not feel able to walk to a local shop; he did not want to drink or talk to anyone or interact with his children and he became short tempered. His work was affected and he was unmotivated and he made some mistakes on paperwork and struggled to cope with queries or requests to deal with production related issues.
10. On 27 January 2020, the claimant was prescribed medication (50 m.g. sertraline, an anti-depressant) by his G.P, to help reduce his levels of anxiety and improve his sleep pattern. He was diagnosed as suffering from depressed mood. He was provided with a fit note on 28 January which stated he was not fit for work. A further entry in his G.P. records on 24 February 2020 indicates that work and personal issues were causal factors in his mental health. A depressive disorder was diagnosed. The medication improved his health and he felt ready to return to work. He stopped taking his medication in March because he felt better but he suffered a relapse and his anxiety and depression returned. His sleep, appetite and motivation again were affected and he suffered a loss of motivation. His G.P. prescribed him medication. He was provided with another sick note on 23 March 2020.
11. The claimant's evidence is that he did not feel able to return to work in April when his sick note ran out. However, he did not receive the new sick note on time so his evidence is that he attended work on 6 April 2020. His intention had been to go to work with the sick note. He suggested working from home as an alternative because he did not have a valid sick note. This evidence was unsatisfactory. On the one hand the claimant says he was unfit to attend work but he did attend work and on the other hand he was asking to work at home. The claimant's motivations at this time are unclear.
12. Mr. Taylor also stated in his evidence that he stopped taking medication in April 2020 but continues with treatment in the form of counselling but due to COVID this has not progressed. He has not found alternative work because of his continuing depression and anxiety and he remains on universal credit.

SUBMISSIONS

13. Mr. Serr provided a skeleton argument and added to it with oral submissions. He submitted that the Claimant suffered three separate periods of illness. The first period commenced on 14 August 2018 where the claimant was displaying symptoms of stress but there was no diagnosis of depression or anxiety. He did not receive any medication or counselling. He fully recovered within four weeks. He submitted that this was a short period of work related stress which resolved itself following a period of absence from the workplace and there was no impairment which has a substantial or adverse effect. He attended his G.P. later that year for an unrelated matter. The second period was in September 2019 where he was not prescribed medication. He submitted that there was no substantial adverse effect. The third period was from January 2020 to April 2020. The evidence was within the period he stopped taking medication and on 6 April 2020 his sick note expired.

14. On this basis Mr. Serr submitted that the respondent conceded the claimant had an impairment on 6 April 2020 (the relevant date) and it did have a substantial adverse effect but disputed that the impairment was long term. At the relevant date, 6 April 2020, it cannot be said that the impairment lasted 12 months; it lasted three months. The claimant suffered a short period of depression and during the period of January to April 2020 his depression had fluctuated. He submitted it cannot be said and there is no medical evidence to support the contention that as of 6 April 2020 that the claimant's impairment would last or was likely to last until January 2021.

15. Mr. Serr referred the Tribunal to the meaning of "likely" in the context of "likely to last at least 12 months" and submitted that it means "it could well happen". Further, he submitted the Tribunal must judge at the date of 6 April 2020, the relevant date, what could well happen. In the case of **Patel v Metropolitan Borough Council (2010) IRLR 280** the EAT clarified that the issue of whether the effect of an impairment is long term where it has lasted at 12 months may be determined retrospectively or determine whether the period for which it lasts is likely to be at least 12 months can be determined prospectively. Mrs. Justice Slade commented in the case *"it will no doubt be necessary in most if not all cases ..that a diagnosis will have to be given in order to obtain a prognosis of the likely duration of the effects of an impairment.."* In the case of **Nissa v Waverly Education Foundation Limited UKEAT/0135/18** a warning was given not to concentrate solely on a diagnosis which will be relevant but not determinative. HHJ Eady stated *"the correct question was to consider what the effects of the impairments were at the material time and to consider whether there was information before the ET which showed that viewed at that time it could well happen that the effects of the impairments would last for more than 12 months."*

16. Mr. Serr submitted that the Tribunal has no medical evidence to establish that the claimant's impairment was likely to last 12 months on 6 April 2020. At this stage the claimant had suffered a fluctuating impairment from January 2020; the claimant has suffered for a period of 3 months. There was no evidence that this impairment would last a 12 month period. Mr. Serr invited the Tribunal to consider the claimant's health history. The claimant suffered one period of work related stress in August 2018. One year later he suffered a further period of work related stress. From January 2020 he suffered a period of depression and anxiety. On the basis of the history of discrete periods of work related stress which resolved it cannot be said that the impairment suffered from January 2020 was likely to last 12 months; it could not be said it may well happen. He submitted that there was no evidence whatsoever the claimant would continue to experience substantial adverse effects for a further 9 months from April 2020. At that point there was no recurrent history of this condition and there is no prognosis from a doctor to indicate such a likely future.

17. Mr. Taylor submitted that he was young with a young family when he was first diagnosed with work related stress in August 2018, he was in denial and did not want to believe that he had mental health issues. From January 2020 he was diagnosed with depression and anxiety. He submitted he was suffering from symptoms before but he struggled to accept that. He said his illness was obvious in January 2020.

18. Mr. Taylor requested the Tribunal to consider his present position. He was still receiving counselling which has been delayed because of COVID. His illness has continued for 10 months. He was not prescribed anti-depressants throughout the period but is intending to speak to therapists. He does not want to take anti-depressants. He says his disability goes beyond 12 months.

The Law

19. For the purposes of section 6 of the Equality Act 2010 (EqA) a person is said 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.”
20. The burden of proof lies with the claimant to prove that he is a disabled person in accordance with that definition.
21. The term “substantial” is defined at section 212 as “*more than minor or trivial*”. Normal day to day activities are things people do on regular basis including shopping, reading and writing, having a conversation, getting washed and dressed preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, socializing (see D2 to D9 of the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011)).
22. Further clarity 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 at 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.”
23. Likely should be interpreted as meaning “it could well happen” rather than it is more probable than not it will happen; see **SCA Packaging Limited v Boyle (2009) ICR 1056**. In the case of **Patel v Metropolitan Borough Council (2010) IRLR 280** the EAT stated that the issue of whether the effect of an impairment is long term may be determined retrospectively or prospectively. A claimant must meet the definition of disability as at the date of the alleged discrimination.
24. 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 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 include in particular medical treatment...
25. 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” The guidance should not be taken too literally and used as a check list (see **Leonard v Southern Derbyshire Chamber of Commerce (2001) IRLR 19**).

26. Some guidance is given in paragraph B1 as to the meaning of “Substantial adverse effects” namely,
“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.”

Conclusions

27. The starting point is that the claimant has the burden of establishing that he met the definition of disability at the relevant time in accordance with section 6 of the Equality Act 2010. There is no medical evidence providing a prognosis which establishes this. Therefore, I consider the claimant’s evidence and other material before me.
28. In my Judgment the claimant suffered a period of work related stress in August 2018. During this period he describes difficulty with everyday tasks such as getting out of bed, interacting with family, showering; he had low energy and did not want to leave the house. He had a 4 week absence from work and fully recovered. He did so without the need for medication or other medical interventions. This is further supported by an attendance at the G.P. in December of that year in respect of an unrelated matter and there was no mention of his mental health.
29. The claimant suffered a further period of low mood in September 2019. He attended his G.P. The health questionnaire completed at the time indicates he was diagnosed with generalized anxiety state. He did not require medication and had a triage session with the Talk service. He recovered and returned to work.
30. From January 2020 the claimant was diagnosed with depression and anxiety. He was prescribed an anti-depressant. He took time off work. His appetite was affected and he could not face getting on a bus to travel to work or leave the house. However, his symptoms improved, he considered returning to work and he stopped taking the medication but suffered a relapse. He attended work on 6 April 2020 because he had not got a new sick note but was suggesting he could work from home.
31. In the light of the concessions of the respondent that at the relevant time the claimant was suffering from a mental impairment of depression and anxiety which had a substantial and adverse effect, I focus on the issue of whether at the relevant time the claimant’s condition was likely to last at least 12 months.
32. I take into account that this means it could well happen. There is no medical report to assist me in the determination of this issue. I take into account the comments of HHJ Eady in the **Nissa** case: *“the correct question was to consider what the effects of the impairments were at the material time and to consider*

whether there was information before the ET which showed that viewed at that time it could well happen that the effects of the impairments would last for more than 12 months.”

33. The claimant described to me the effects depression and anxiety were having on him in 2020. These included loss of appetite, difficulty in travelling to work or leaving the house and interacting with family. These effects were matters he suffered in 2018 where he fully recovered from in a short period without medical intervention. At the relevant date the claimant had been signed off work for about 3 months. On this occasion the claimant did require and take anti-depressants but had felt better by March so much so he stopped the medication. He suffered a relapse. By the relevant date he was suggesting to his employer that he could work from home.
34. On the evidence I have heard and considering the history of discrete periods of illness, in my judgment I do not find that “it might well happen” and last at least 12 months. At this point of time the claimant had been suffering symptoms for only 3 months.
35. I do take into account that in 2020 the diagnosis is depression and anxiety which is a different diagnosis from work related stress in 2018 and generalized anxiety in 2019 and he was in 2020 prescribed medication. However, there is no medical report to support the contention as at 6 April 2020 that the claimant’s depression and anxiety was likely to last at least 12 months. Further, from the medical history, the claimant had recovered from other periods of ill health fully. In fact, in the relevant period of illness, by March 2020 he did feel much improved but stopped his medication and suffered a relapse. However, he was proposing working from home in April 2020. I am not persuaded that there is evidence that viewed at that time it could well happen in that the effects of the impairments would last for more than 12 months.
36. In the circumstances I conclude the claimant was not a disabled person at the relevant time.
37. The claimant’s claim is dismissed.

Employment Judge Wedderspoon

Date: 26 November 2020