



EMPLOYMENT TRIBUNALS

Claimant: Mr N Buxton

Respondents: 1. MPV Packaging Limited
2. Robert Seddon

Heard at: Manchester

On: 27 November 2019 &
9 January 2020

Before: Employment Judge Sharkett
(sitting alone)

REPRESENTATION:

Claimant: Ms S Quinn, Solicitor

Respondents: Mr R Newstead, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. By no later than 7 June 2019 the claimant was a disabled person for the purpose of section 6 of the Equality Act 2010
2. Prior to 7 June 2019 the claimant was not a disabled person for the purpose of section 6 of the Equality Act 2010.

REASONS

1. This preliminary hearing was listed in order to determine whether the claimant is disabled for the purpose of section 6 of the Equality Act 2010 (the EqAct). The hearing went part heard on 27 November 2019 as during the course of my reading the documents it came to light that the respondent had previously commissioned a medical report from the claimant's general practitioner (GP), but that this had never been received by the respondent because the claimant, having originally given his consent to the report being prepared, withdrew his consent for it to be disclosed once he had had the opportunity to read it. On 27 November 2019, I was informed by

Ms Quinn, that it had not been possible to contact the GP that day to ask for a copy of the report and consequently, given that the respondent continued to contest that the claimant satisfied the definition of disability under the Act, I adjourned the proceedings to enable the claimant to produce the report. I did this because I considered it relevant evidence which may be of assistance to the parties and the Tribunal in the determination of this matter.

2. The hearing has reconvened today. The claimant is not present and I am informed by Ms Quinn that he is not well enough to attend due to illness. She has not produced medical evidence in support of his absence and advised me that she was only made aware that he would not be attending yesterday evening. It is of course a matter for the claimant whether he wishes to attend or not. He gave oral evidence at the last hearing and there has been no request for an adjournment of today's hearing.

3. A further bundle of documents has been produced today consisting of historic medical records of the claimant, which had not previously been disclosed, and copies of the minutes of a welfare meeting between the claimant and the respondent of 7 June 2019. The report which had been commissioned by the respondent, and the reason why this hearing was adjourned on 27 November 2019, has not been produced. I am advised by Ms Quinn and have been referred to emails from the claimant's GP surgery, that the report and the letter of instruction from the respondent was destroyed by the surgery on the instruction of the claimant at the time of his refusal to disclose it to the respondent. In respect of this report Ms Quinn has advised me that she was unsure of whether a report had ever been produced because the claimant had told her that the reason why he objected to the respondent receiving 'the report' was because the GP intended to just send all his medical notes to the respondent. Whilst I do not doubt that this is what the claimant has told Ms Quinn, I do not accept his account because it is clear from the medical notes before me that there is reference to the claimant wanting to see the report before it is sent to the respondent and that the report was left on reception for him to see. There is then further reference in the notes to him refusing to allow the report to be disclosed. I can see no reason why a medical practice would make such entries on a patient record if a report had not existed. Fortunately, a copy of the letter of instruction to the GP surgery is attached to the claimant's witness statement so I have had the benefit of seeing the basis upon which the respondent made the request on 10 June 2019.

4. Having heard oral evidence from the claimant at the last hearing, considered the new documentation before me and confirmed that Mr Newstead had no further questions arising out of the further disclosure, I was satisfied that the Hearing could proceed without need to hear further from the claimant in person. In addition to the submissions made at the hearing on 27 November 2019 I heard further submissions from Ms Quinn for the claimant and Mr Newstead for the respondent.

5. Ms Quinn submits that the claimant has been suffering from depression from childhood. This she submits is a mental impairment the existence of which and its duration being clearly documented in his medical records. She refers me to the claimant's oral evidence and witness statement in which he explains how his illness substantially affects his ability to carry out normal day to day activities and that this has been ongoing for years, thus satisfying the definition of long term. She also refers me to Schedule 1 of the Act and the Guidance on matters to be taken into

account when determining questions relating to the definition of disability. She submits that the threshold the claimant needs to meet is low, with a need to show as few as two day to day activities adversely affected as a result of his impairment.

6. For the respondent Mr Newstead submits that the burden of showing that the claimant is disabled for the purposes s6 of the EqAct lies with the claimant and that he has failed to do this. He submits that there is insufficient medical evidence on which the Tribunal can rely to enable it to make a positive finding in favour of the claimant. In this respect he refers me to Royal Bank of Scotland v Morris UKEAT/0436/10/MAA, a copy of which he has helpfully provided. Mr Newstead accepts that the medical notes make reference to the prescription of medications used for depression but maintains that the claimant has failed to show that any condition he relies on is either long term or substantially and adversely affects his ability to carry out his normal day to day activities. Mr Newstead submits that it would be unreasonable for the claimant to now expect the respondent to incur the additional expense of commissioning another medical report when it had been he who had instructed that the one previously paid for by the respondent be withheld and subsequently destroyed. Mr Newstead also reminded me of inconsistencies in the claimant's evidence and that recorded in the medical records.

FINDINGS AND APPLICATION OF THE LAW

7. In order to show that he can meet the definition of disability under s6 of the EqAct the claimant has to show that he has a physical or mental impairment that has a substantial long term adverse effect on his ability to carry out normal day to day activities. Section 6 of the EqAct defines disability as:

“(1) 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

(2) A reference to a disabled person is a reference to a person who has a disability.

'Substantial for these purposes means more than minor or trivial (S212(1) EqAct).

8. As for what is 'long term' that is defined in Schedule 1 paragraph 2 of the EqAct as:

“2 Long term effects

(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 the person's ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if the effect is likely to recur.

Where it is necessary to project forward to determine whether an impairment is long term the correct test as to whether it is 'likely' is to ask whether 'it could well happen' and not whether it is more probable than not that it will happen (SCA Packaging Ltd v Boyle [2009] D ICR 1056 HL) and para C3 of The Guidance on matters to be taken into account in Determining Questions Relating to the definition of Disability (2011).

9. It is the claimant's case that he has suffered from anxiety and depression since he was 11 years old and that this has affected his whole life. He also maintains that he has been diagnosed with post-traumatic stress disorder (PTSD) as a result of abuse in his childhood. In oral evidence and in the welfare meeting of 7 June 2019 the claimant told the respondent that he needed to see a psychiatrist. The medical notes before me do not support much of the claimant's evidence in respect of the conditions he states he has and the proposal to refer him for psychiatric consultation. The medical notes are however of some assistance to me. I note that there has been no diagnosis nor suggestion of post-traumatic stress disorder and nor has there been a referral to a psychiatrist at any stage of the claimant's medical history. The claimant was on one occasion referred for counselling but by his own evidence he only attended one of the sessions as he did not find it useful. Within the medical notes there is reference to historic recreational drug use, self-harm and the prescription of anti-depressant medication. In 2015 there is a medical diagnosis of 'Adjustment Disorder'. There are references to the adjustment disorder and the occasions when the claimant has needed treatment by reason of events in his life that have resulted in him experiencing the symptoms described in his notes such as anxiety and depression and interrupted or abnormal sleep patterns, which in turn have affected his ability to work and function during those times. I note however that even at times where the claimant has been well he has experienced problems sleeping because he sleeps during the day and so cannot then sleep at night.

10. In determining whether the claimant is disabled for the purposes of the EqAct I have regard to Mr Newstead's submission that the burden of proving disability lies on the claimant and that in the absence of expert medical evidence the Tribunal is unable to assess the likely duration, effect and risk of recurrence of any condition suffered by the claimant. I accept that may be the case where there is an absence of evidence to assist in determining the circumstances prevailing at the time of the alleged discriminatory acts as to whether it is likely to last for 12 months or more or the question of whether it is likely to recur. However I am satisfied on the basis of the medical evidence before me and in particular the fact that the medical notes specifically identify the claimant as being diagnosed with an adjustment disorder, and that the claimant has required medication from time to time for the manifestations of this disorder, the claimant does have a mental impairment for the purposes of the Act.

11. Identification of an impairment only does not satisfy the definition of s6 of the Act in these circumstances as all aspects of the definition need to be satisfied before the claimant will be afforded protection under the EqAct. Both in the content of his witness statement and oral evidence I find that the claimant tended to exaggerate the way in which his condition affected his ability to carry out his daily life and he

seemed unable to differentiate between how he was now feeling and how he was at the relevant time (i.e. in the period between October 2018 and February 2019 when he commenced a period of sick leave and in June 2019 when he attended a welfare meeting and submitted a grievance). There was inconsistency between his oral evidence and what was recorded in his medical notes. For example in his medical records it is noted that the claimant attends the gym, walks about three miles and had been on a fishing holiday. All of which he denied in oral evidence. However, there are occasions when he is being treated by his GP where it is recorded that the claimant experiences poor sleep patterns and concentration, lack of appetite and lack of motivation and self-care. These are normal day to day activities and I find that during these times the claimant's ability to carry out normal day to day activities was substantially and adversely affected by the symptoms of his adjustment disorder.

12. Having established that the claimant has a mental impairment, and that there is evidence that the effects of that impairment has in the past substantially and adversely affected the claimant's ability to carry out normal day to day activities, such as sleep, appetite, motivation and self-care, it is necessary to identify whether or not the condition is long term.

13. I note that on the claimant's own evidence and the medical evidence before me the claimant had stopped taking medication almost immediately after he commenced work with the respondent in October 2017. He told the Tribunal that at that time he had felt in control of his life and that getting a job had made a big difference to him. He felt that he had got his depression under control and his medical records make no reference to any problems experienced by him in carrying out his normal day to day activities. Up to the point where he commenced a period of sick leave from 19 February 2019, and the preceding week when he was absent on two occasions and left work early on one, the claimant attended work regularly and there are no reported issues about his work. Save for the claimant's ongoing sleep patterns there is nothing else on which I can make a finding that the claimant's ability to carry out normal day to day activities was substantially adversely effected during that period.

14. The claimant did not seek medication until some months after he started to experience problems at work in October 2018 which is when he started a relationship with a work colleague who was younger than him. It was this relationship that is said to have been the cause for the adverse treatment the claimant started to experience at work and about which he states he complained but was ignored. On 19 February 2019 the claimant commenced a period of sick leave and was prescribed anti-depressants. He had no further contact with the respondent until he attended a welfare meeting on 7 June 2019 where he informed the respondent of his wish to submit a formal grievance. He has not returned to work since that date and continues with his medication.

15. Ms Quinn submits that the claimant has suffered from depression since he was a child and therefore the definition of his impairment being long term is satisfied. Alternatively, she submits that his is a recurring condition and should be treated as long term. I do not accept Ms Quinn's submission that the claimant has suffered from depression since childhood as the medical notes, which date back to the claimant's early childhood show no record of this diagnosis or treatment for the same, despite a significant number of attendances with his GP during those years. I further accept Mr Newstead's submission that an adjustment disorder is a reactive disorder whereby

the claimant is only likely to suffer symptoms in circumstances of adverse events in his life (or work) which are generally, not normally, long lived.

16. The relevant time for determining whether or not the claimant was disabled for the purposes of the EqAct date from October 2018 when the claimant alleges that the respondent failed in its duty to make reasonable adjustments. The claimant claims that there were further failures in February 2019 and again in June 2019. As the claimant continued to be employed by the respondent in June 2019, it is necessary to assess whether the claimant satisfied the definition of disability on any or all of these dates.

17. In October 2018, the claimant had not been taking medication for approximately a year, and was attending work on a regular basis. He was in a relationship with a work colleague and he had a purpose in his life. Whilst in oral evidence the claimant maintains that he was still suffering problems sleeping, socialising and motivating himself, I find as mentioned above that the claimant had a tendency to exaggerate his situation and his evidence was inconsistent with the enthusiasm with which he explained his pleasure at getting a job and how well things were during that time. In addition the medical notes do not support the problems the claimant complains of in oral evidence.

18. In October 2018 the claimant had been medication and symptom free for a least a year and his day to day activities were not substantially and adversely affected by the adjustment disorder with which he had been diagnosed in 2015. His was not a recurring condition but a reactionary condition to adverse events the effect and duration of which could only be speculative in the absence of medical opinion. At this time the claimant's condition was not long terms for the purposes of s6EqAct.

19. When the claimant commenced a period of sick leave in February 2019 it was because of the problems he complains of at work. He asked for medication and was certified as being unfit for work because of his low mood which he reported had deteriorated over the previous months. The medical notes support the claimant's evidence that he experienced difficulties with his sleep, could not motivate himself to do simple things such as making sure he submitted his fit note to work, and was eating very little having lost his appetite. I am satisfied that claimant's reaction to what was happening at work did adversely affect his ability to carry out normal day to day activities at this time. The question then is whether this would be likely to last for 12 months or more. It would be incorrect to look back from today to find that his condition had lasted for 12 months. It is necessary, on the basis of the information available at that time, and, in the absence of any medical evidence, to ask 'could' it last for 12 months or more. I find that it would be speculative to make such a finding as there is insufficient evidence before to do so.

20. By June 2019, the medical records show that the claimant was not improving and if anything he had deteriorated further. Having removed the claimant from the source of the treatment he is said to have received at work, some evidence of improvement however slight might have been expected. The medical notes reflect this not to be the case. He had originally been signed off work with 'low mood' but by April 2019 was assessed by his GP as suffering from depression. Whilst his sleep and appetite had improved somewhat he was on increased levels of medication which would have ameliorated his symptoms to some extent .

21. In determining whether in June 2019 the claimant was suffering from an impairment that had a substantial and long-term adverse effect on his ability to carry out his normal day to day activities, I have regard to the guidance in *J v DLA Piper UK LLP* 2010 WL 2131720. In June 2019 the claimant was still being prescribed anti-depressants and the medical notes support his evidence that despite the medication he was not improving and continued to have difficulties with his sleep, appetite and motivation. I am satisfied therefore that at that time he was suffering from symptoms of depression and that this had a substantial adverse effect on his ability to carry out normal day to day activities. He had been experiencing these symptoms from at least February 2019 and if anything his condition had deteriorated since that time. Based on the medical evidence before me I find that by no later than 7 June 2019, the answer to the question of whether the claimant's condition 'could' last for 12 months or more, is yes. There had been no improvement in the previous five months and there had been a need to increase his medication. On the basis of this evidence I find that it reasonable to conclude that his symptoms could last for a further seven months. In June 2019 I am satisfied the claimant satisfied the definition of disability under s6 of the EqAct.

Conclusion

22. By no later than 7 June 2019 the claimant satisfied the definition of disability under s6 of the Equality Act 2010. Prior to that date he did not have a physical or mental impairment that had a substantial long-term adverse effect on his ability to carry out normal day to day activities.

Employment Judge Sharkett
Date: 27 January 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
20 February 2020

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