



EMPLOYMENT TRIBUNALS

Claimant: Mr C Page
Respondent: Ceva Logistics Ltd

RECORD OF A PRELIMINARY HEARING BY CVP

Heard at: Nottingham On: 28 October 2021

Before: Employment Judge M Butler (sitting alone)

Representation

Claimant: Mr S Thakerar, Counsel
Respondent: Mr O Lawrence, Counsel

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

1. At all material times the Claimant's condition of anxiety and depression did not amount to a disability within the meaning of section 6 of the Equality Act 2010.

RESERVED REASONS

Background

1. The Claimant worked for the Respondent in Transport Operations from 1 March 2008 until 15 January 2021 when he resigned from his position. He submitted a claim form to the Tribunal on 21 May 2021 after a period of early conciliation and claimed disability discrimination and constructive unfair dismissal. His claimed disability is anxiety and depression from which he says he suffered

from February 2020 onwards and, in particular, throughout his remaining employment with the Respondent.

The Issues

2. The issue before me is simply whether the evidence shows that the Claimant's conditions of anxiety and depression give rise to a disability within the legal definition.

Evidence

3. For the Claimant, I received a written disability impact statement. He was questioned on Oath. I received a substantial bundle of documents, the bulk of which was taken up with the Claimant's medical records which included his GP records and Occupational Health Reports.
4. Both parties made brief oral closing submissions.

The Law

5. The law is set down principally in section 6 and schedule 1 Equality Act 2020 ("EqA") including the 2011 Guidance made under section 6(5) EqA (The Guidance). Section 6 EqA states, so far as relevant:

"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."

6. It remains good practice to state conclusions separately on questions of impairments, adverse effect, substantiality and long term nature (*Goodwin v The Patent Office* [1999] ICR 302). However, in reaching those conclusions the Tribunal should not proceed by rigid consecutive stages. A purposive approach should be taken without losing sight of the overall condition.
7. Impairment is to be given its ordinary meaning without more. Where there are more than one impairments, the totality of their effects may need to be considered when assessing the linked concepts of substantial and long term (see guidance paragraph B6, ***Ginn v Tesco Stores Ltd* [2005] AER(D)259(OCT)** and ***Patel v Oldham Metropolitan Borough* [2010] ICR 603**. Where the presence of a disputed impairment is not clear, it may be left until after the analysis of long term substantial effects. As Underhill P said at paragraph 42 of ***J v DLA Piper UK LLP* [2010] ICR1052**: specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, to start by making findings about whether the Claimant's ability to carry out normal day to day activities is adversely affected (on a long term basis), and to consider the question of impairment in the light of those findings.
8. Adopting that approach, in ***Herry v Dudley Metropolitan Borough Council***

UKEAT/0100/16/LA, HHJ Richardson observed how: “an Employment Tribunal might start with the question whether the Claimant’s ability to carry out normal day to day activities had been impaired. This would assist it to resolve, in difficult cases, whether an impairment existed”.

9. By section 212(1) EqA and paragraph B1 of the Guidance: “Substantial” means more than minor or trivial.
10. This is a relatively low threshold for a Claimant to establish. Substantial may be considered in respect of different times, different activities, the way an activity is done and having regard to modifications which are reasonable for the Claimant to make but based on the deduced effect excluding the effect of medical treatment. There must be clear evidence on what the deduced effect would be (**Woodrup v London Borough of Southwark [2003] IRLR111**). Although a low threshold, the Claimant carries the burden of showing it. Substantial is likely to be made out by the degree of limitation established in the adverse effect if it goes beyond the normal differences in ability which may exist among people without a disability in the general population.
11. The focus in an assessment of disability should be on what an employee cannot do or can only do with difficulty, and not on what they can do. I am required to look at the whole picture and it is not simply a question of balancing what an employee can do against what they cannot. If the employee is substantially impaired in carrying out normal day to day activity, then they are disabled notwithstanding their ability in a range of other activities.
12. Long term and substantial go hand in hand; they each qualify the other and the adverse effect within the statutory test (**Cruickshank v VAW Motorcast Limited [2002] ICR729 EAT**). The effects need not be the same over the period.
13. By schedule 1 EqA, further provision is made for the determination of the question whether a person is disabled. Specifically, paragraph 2 provides:

“(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 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.*
 - (3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.*
 - (4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.”*
14. Where it is necessary to project forward to determine whether an impairment is

long term, the Tribunal must consider the evidence as it stood at that point in time and address the question whether it was likely to last the necessary period. In that regard whether “something is likely” under the EqA is to be interpreted as “could well happen” (*SCA Packaging Limited v Boyle [2009] ICR1056HL* and paragraph (c)(3) of the Guidance).

15. As for what is relevant to the determination of this question, a broad view is to be taken of the symptoms and consequences of the Claimant’s condition as they appeared during the material time (Cruickshank).

The Facts

16. So far as it is necessary to determine the outstanding issues, I make the following findings of fact on the balance of probabilities.
17. I found the Claimant’s evidence to be inconsistent and often unsupported by the medical evidence before me. For example, he says his symptoms started in late 2019 but there is no medical evidence of this. He also makes reference to discussing the prescription of antidepressants with his GP, but this is not recorded in his GP records. Similarly, he attributes a statement to his GP in February 2020 when he first consulted her that there was a possibility of depression. He then said that his GP diagnosed stress and anxiety but not depression but in the next sentence of his evidence said his GP told him he had mild symptoms of depression.
18. In relation to his problems sleeping, the Claimant said this affected him both in early and late 2020 and this got worse from early 2020. It was pointed out to him that on 1 April 2020 his GP says he had got better, not worse. The Claimant then said he did get better, so he went back to work. In relation to his normal day to day activities, he said he had no energy to go to the gym which he used to do regularly two to three times each week. He said he had cancelled his gym membership but could not remember when or how he did this. He also said he found it difficult to engage with his family. He said he did not try to deter them from visiting but if they called beforehand to say they were coming he tried to put them off by thinking of an excuse. He did not say what excuses he used.
19. Again, in relation to the Occupational Health Report of 12 October 2020, which cites family issues as the cause of his recently diagnosed moderate depression, he said this was incorrect and his symptoms were not caused by his father’s illness but by work. When I asked him why he did not query this if the report was wrong, he said he telephoned the Occupational Health Therapist to tell her it was wrong but she did not change it. He made no mention of this in his impact statement. He also said he had never had a conversation with his GP about whether he was fit to return to work, and he was just given a note saying he could return to work and they did not need to see him again. I found this evidence to be unlikely.
20. Due to these inconsistencies and the vagueness in his evidence, I did not find the Claimant’s evidence to be credible.

21. The Claimant was employed in Traffic Operations for the Respondent from 1 March 2008 to 15 January 2021.
22. On 20 February 2020, the Claimant consulted his GP and was signed off work with anxiety and stress. No medication was prescribed but he said he would like to have Let's Talk Therapy. His GP notes recorded that he had stress at home and at work, was not sleeping well and had a poor appetite. The diagnosis was anxiety and stress. When he visited his GP on 1 April 2020, he is recorded as "feeling a little better", was "sleeping better" and "eating normally". He was awaiting an appointment with Let's Talk Therapy.
23. The Claimant consulted his GP again on 13 May 2020 when there was a discussion about his return to work wherein the Claimant said he was not ready to return to work at this point. In the event, he did return to work on 20 May 2020 and it appears he worked normally until 23 September 2020 when he again consulted his GP complaining that he was "feeling down, depressed". He also said that he was "lacking motivation, poor concentration, poor appetite and difficulty sleeping". He was diagnosed with moderate depression and prescribed Sertraline. On 14 October 2020 he again visited his GP and it is recorded that he only began taking Sertraline on or around 5 October 2020. It was recorded that there had been no deterioration in his condition. On 29 October 2020 he again visited his GP who recorded that the Claimant was "doing okay no worse slight benefit from meds".
24. In his evidence before me, the Claimant said he could not remember when he started taking Sertraline.
25. After a referral by the Respondent, the Claimant was assessed by Medigold Health, the Respondent's Occupational Health provider. The report says "He reports that currently he is off work due to depression, which was triggered by family issues.... regarding activities of daily living, he said at the present moment he is slowly managing as his low mood and motivation is improving". Further the report states, "regarding his depressive symptoms, in my clinical opinion once the trigger is managed and with therapeutic and medical intervention, his symptoms are not likely to last more than 12 months. Therefore, he is unlikely to be covered by the Equality Act 2010".
26. The Claimant did not return to work and on 15 December 2020 indicated to the Respondent that he intended to resign. He confirmed his resignation on 5 January 2021 and left the Respondent's employment on 15 January 2021.

Discussion and Conclusion

27. By reference to the actual allegations of discrimination, the point in time at which the question disability status has to be assessed is generally between February 2020 and January 2021.

28. The Claimant argues that the material time in this case started in February 2020 when he first visited his GP in relation to the stress he was experiencing. He argues that he was suffering from anxiety and depression at this date and that it was long term. I have already commented that I did not find his evidence to be credible and one reason for this is the fact that the medical records do not support that evidence. From February 2020 until May 2020 he was diagnosed with anxiety and stress. There is no evidence before me that he suffered from depression from February 2020 until September 2020. There is no corroborating evidence from, for example, members of his family to confirm the symptoms he says he suffered from during that period. Indeed, he returned to work in May 2020 and there is no evidence before me that he suffered from anxiety, stress or depression during that time. Whilst he seeks to convince me that his normal day to day activities were adversely affected, I do not accept that argument. It is not supported by the medical or any other evidence other than the Claimant's which I have already said I find to be inconsistent. Accordingly, I do not find that between February and September 2020 the Claimant was suffering from a mental impairment which was long term and adversely affected his ability to carry out normal day to day activities.
29. I justified this conclusion by considering stress in itself as a disability. The difficulty in this case is that stress is not in itself an impairment but a normal reaction to adverse circumstances. The mere absence from work due to family or work related stress does not give rise to the conclusion that the Claimant was suffering from a mental impairment. I bear in mind that the EqA does not require a medical diagnosis, but it does require an impairment. What is important is not the label attached to the Claimant's condition, but any substantial adverse consequences it has on his ability to carry out normal day to day activities. The decisions in *J v DLA Piper* and *Herry v Dudley* show that the presence of the substantial adverse effect can be of great assistance in the identification of the presence of an impairment. Unfortunately for the Claimant, I do not find there is sufficient evidence, either in that given by the Claimant himself or the medical records, for me to conclude he was suffering adverse effects on his ability to carry out day to day activities during this period. In any event, I cannot on the facts find that the condition the Claimant suffered from between February and May 2020 was long term. There is no evidence that he had suffered from stress, anxiety or depression prior to February 2020 and he recovered sufficiently to return to work between May and September 2020. I cannot, therefore, conclude that the Claimant's reaction to the stress and anxiety he suffered goes beyond the normal reaction to these conditions. Whilst it is for me to give a legal interpretation to the evidence and documents before me, I also note the view of the Occupational Health Advisor that the Claimant's moderate depression which was diagnosed in September 2020 did not fall within the meaning of disability in section 6 EqA.
30. Nor on the evidence before me, do I consider that the moderate depression diagnosed in September 2020 satisfies the requirement of being long term. Certainly, the only clear medical evidence before me is that in the Occupational Health Report which suggests the Claimant would recover from this moderate

episode of depression in relatively short order. Indeed, the Claimant's evidence as to the effect of his condition on his ability to carry out normal day to day activities does not assist him. He is silent apart from in very general terms and not supported by the medical evidence, on how his normal day to day activities were affected during the period May to September 2020. He says he could not relax or engage with others yet habitually fell asleep on the sofa whilst watching television. I find it difficult to accept that he could fall asleep if he was not relaxed.

31. Accordingly, I find that the Claimant was not disabled during the period February 2020 to January 2021 when employed by the Respondent.
32. The matter will now proceed to hearing in relation to the constructive unfair dismissal claim.

Employment Judge M Butler

Date: 22 November 2021

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