



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs Cynthia Arthur **v** **Hertfordshire Partnership University NHS
Foundation Trust**

Heard at: Watford

On: 13 March 2019

Before: Employment Judge McNeill QC

Appearances

For the Claimant: Mr N Bignell-Edwards, Counsel

For the Respondent: Miss N Motraghi, Counsel

JUDGMENT having been sent to the parties on 18 April 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant was employed by the respondent from 28 July 2015 to 23 June 2017. She brings a claim for disability discrimination against the respondent. The issue at the preliminary hearing was whether the claimant was a disabled person within the meaning of Section 6 of the Equality Act 2010 (EqA) at the material time.
2. There was a case management hearing before Employment Judge Palmer on 16 April 2018. At that hearing, the agreed issues relevant to disability were set out as follows:
 - 2.1 Does the claimant have a physical or mental impairment? The claimant says she has PTSD, depression and anxiety. This is not admitted by the respondent.
 - 2.2 If so, does the impairment have a substantial adverse effect on the claimant's ability to carry out normal day to day activities?
 - 2.3 If so, is that effect long term? In particular, when did it start and:
 - 2.3.1 has the impairment lasted for at least 12 months?
 - 2.3.2 Is or was the impairment likely to last at least 12 months or the rest of the claimant's life if less than 12 months?

It was noted that in assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurred after that time would not be relevant in assessing this likelihood. There was reference to the 2011 Guidance on the definition of disability at paragraph C4.

- 2.4 Are any measures being taken to treat or correct the impairment? But for those measures, would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day to day activities?
- 2.5 It was noted that the relevant time for assessing whether the claimant had/has a disability was May 2017.

- 3. Before me, the parties agreed that the material date was 31 May or 1 June 2017. The claimant at one stage appeared to be seeking to rely on a later date in early July 2017. That was based on some further particulars that were provided which refer to a Provision Criterion Practice (PCP) under section 20 of the EqA, being the Trust's general time limit policy not to hear an appeal if it was submitted later than 10 working days from dismissal. That was not part of the claimant's pleaded claim and it was not referred to in the list of issues. In practice it may be of no real significance whether the material date was 1 June or a few weeks later. For the purposes of this decision, I treated the material date as 31 May or 1 June as this was agreed.
- 4. The disability relied on by the claimant is a mental health impairment. In an impact statement dated 16 May 2018, the claimant described her mental health problems, and the effects that those problems had had on her. She said that her mental health problems started in October 2016. At that time, she was informed that disciplinary proceedings were being commenced against her. On 27 October 2016, she was told about the nature of the allegations, which were made by members of staff. She was informed during the meeting that concerns had been raised by staff in relation to the claimant's management and leadership style and the way that staff were spoken to and treated by the claimant. One member of the team advised that they were frightened to come to work, and some had said that they were actively looking for other jobs.
- 5. The claimant was very distressed to hear about these allegations and, soon after, her problems commenced. She was told on 27 October 2016 that she was going to be suspended. She said she felt claustrophobic and trapped, her pulse was elevated, everything felt surreal as though she was having an out of body experience. She felt humiliated and disempowered. She was frog-marched off the premises. She felt sick to her stomach, was confused, anxious, started getting headaches and felt wobbly. She timed her symptoms and the impact of those symptoms from that particular date.
- 6. The claimant went home devastated and confused after the meeting and her mood did not recover in the following days. She found herself experiencing negative feelings and what she described as depressive symptoms. These included problems with mobilising, not being able to get out of bed, losing the motivation to get up and start the day and taking an extra 30 minutes more than she had done previously to leave her bedroom. She was exhausted and lethargic. She took a long time to gather her things

to go out of the house. She was reluctant to leave the house and avoided doing so where possible. She found she had lost her appetite after 27 October. She was unable to look after her young son. In March 2017, he moved in with her mother-in-law, who assisted the claimant with child care. She described difficulties with sleeping and suffering from insomnia, managing only about 2 hours a night with regular flashbacks at night which disturbed her sleep. She was taking much longer to take care of her personal appearance. She went shopping as little as possible. In terms of time management, she found it difficult to manage her time or stick to any form of routine. She woke up late and did not have the basic structure of meal times and spent much of the day worrying. She described problems with communicating and socialising with others, feeling unable to go out and socialise as she had done previously. When she did go out, she felt nauseous, with symptoms of paranoia. She felt she could not talk to anyone. She would cry and become hysterical. She found it difficult to interact with her family and go to social functions. She said she found it difficult to deal with and answer correspondence. She did correspond at length with the respondent but she did so with the assistance of her husband and with somebody who was supporting her at work. She found it took her twice as long as normal to read basic bills and ordinary post. She described her symptoms as continuing to the present day. The claimant went on to describe further incidents occurring and the impact they had on her from November 2016.

7. The claimant's mental impairment, starting in November 2016, had a substantial adverse effect on her ability to carry out day to day activities as described by her. She got by with the assistance of therapy and medication, which she was still taking at the time of the hearing.
8. The claimant gave evidence before me and I accepted her evidence as to the sort of experiences she was having on a day to day basis and the sort of restrictions that she was experiencing.
9. GP notes adduced in evidence showed that the claimant first went to the doctor on 18 November 2016, complaining of stress at work. Amongst other matters, she complained that she had headaches, was not sleeping, had general anxiety and felt tearful at times. She was prescribed amitriptyline but said she did not want anti-depressants. Her headaches were bad.
10. In January 2017, the claimant attended her GP complaining of stress at work. She said that the amitriptyline had helped and she would like to continue it. There was random twitching of her muscles. She did not describe any formal thought disorder. On 14 February 2017, she again went to the GP, who on this occasion diagnosed anxiety with depression. She was continued on amitriptyline and prescribed Sertraline, and was referred to the mental health team on an urgent basis. I was shown a copy of the referral form dated 14 February. The referral priority status on that form was stated to be urgent.
11. On 31 May 2017, a report was produced by an occupational health doctor, which set out the claimant's symptoms. The doctor referred to the claimant having been extremely distressed to find she was at the centre of a formal

procedure and then stated that she was volunteering symptoms of anxiety and depression. This was borne out using a recognised and validated questionnaire tool that suggested she had very high levels of anxiety and depression. The claimant had been consulting her GP, who had prescribed an anti-depressant and she had been referred for CBT psychological therapy, the first face-to-face appointment having taken place on 12 May 2017.

12. The claimant had had a miscarriage which caused her further distress. She considered that the miscarriage was directly linked to what she described as the stress, victimisation and isolation she had been put through.
13. The doctor concluded that the claimant was not fit to return to work. She was not fit to participate in a disciplinary hearing. He described her levels of anxiety and depression as situational in nature, secondary to distress about the formal proceedings and her inability to retrieve supportive data. He also referred to reactive depression, worsened as a result of a miscarriage. He concluded that given the current clinical picture, he would suggest that some time was allowed to elapse to allow the anti-depressant treatment and further sessions of CBT to take effect. It was difficult to be prescriptive about a time frame but he suggested six weeks in the first instance.
14. For the purpose of these proceedings, the claimant obtained a report from a consultant psychiatrist, Dr Norman Stanley Lockhart. The report is dated 1 April 2018. That was the only report before me from an independent expert. Dr Lockhart examined the claimant. He was very clear that he did not find anything to suggest malingering or exaggeration. He thought there was good evidence of an anxiety order. He thought the current disorder was stress-related and therefore probably not a generalised anxiety order. He also thought there was a range of post traumatic symptoms. His conclusion was that the claimant had a mental health disorder which had, since mid to late 2016 caused substantial impairment to her ability to work and to continue with activities of daily living. For the most part, the claimant was able to function in a number of areas except when emotionally upset. However, the degree of distress and anxiety prevented consistent functioning in some areas without support.
15. Dr Lockhart went on to say that the claimant's disorder had been continuously active since mid to late 2016 and that, in his opinion, its effect should be "considered under the provisions of the Equality Act 2010". It was, of course, not for the doctor to determine whether the claimant had a condition that fell within section 6 of the EqA. Nevertheless, it is clear that he had the EqA definition of disability in mind when he giving his opinion on the claimant's condition.
16. I was also referred to three medical certificates the first of which was dated 17 February 2017. At that point, the GP considered that the claimant was not fit for work because of anxiety and panic attacks and a certificate was given for one month. Following that, there was a further note dated 10 March 2017 recording anxiety with depression, giving an assessment that the claimant would not be fit for work for six weeks from 10 March 2017 – 31st May 2017. Following that on 30th May 2017 a further one month certificate was given for anxiety with depression.

17. On the basis of the medical evidence, I was satisfied that the claimant had a mental impairment since around the end of October 2016. The precise diagnosis of her condition does not particularly matter but I find it consisted of anxiety, depression and possibly post-traumatic stress disorder. What really matters is the effect of that mental impairment on her day to day activities and whether the impairment was a long-term impairment.
18. The claimant bears the burden of proving disability. Section 6 of the EqA provides that a person has a disability if they have an impairment, physical or mental, and the impairment has a substantial and long-term effect on the individual's ability to carry out normal day to day activities. I was referred to section 212(1) of the Equality Act which defines substantial as meaning more than minor or trivial. I was also referred to Schedule 1 of the EqA and the provisions in relation to the determination of disability, in particular the effect of an impairment as long term if it is likely to last for at least 12 months.
19. I was further referred to paragraph C4 of the 2011 Guidance in relation to the definition of disability. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after this time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual and any relevant factors specific to this individual.
20. The effects of her condition on the claimant were very much more than just trivial, taking into account what she could not do and what she found it difficult to do. While her symptoms have fluctuated in severity, I accepted that they have been present since about the end of October 2016, probably from 26 or 27 October 2016 when she was first suspended. Having seen the claimant give evidence, it was clear that she still becomes easily distressed. I was satisfied that the claimant's mental health impairment and its symptoms have had a substantial adverse effect on her day to day activities since about the end of October 2016.
21. The respondent placed some emphasis on the fact that the claimant regularly corresponded with the respondent and indeed put in three detailed grievances, in particular towards the end of 2017. I saw the correspondence and the grievances, although I was not asked to consider the latter in any detail. I did not consider that the existence of those documents detracted from the matters that the claimant said she could not do or had difficulty doing. I accepted that she had quite significant support in producing those documents from her husband, from support at work, and then later from her solicitor.
22. The key issue between the parties was whether the effect on the claimant's ability to carry out normal day to day activities was long term within the meaning of Schedule 1, Part 1 paragraph 2 of the EqA. It was agreed that the impairment had not lasted for 12 months as at 31 May 2017/1 June 2017. By that point, it had lasted for only about 7 months. The issue was whether at that date, the claimant's impairment was one which was likely to last at least 12 months. Many conditions do fluctuate and depression is one

such condition. I should take into account the medical treatment and the correction measures, for example therapies, and I should disregard those in assessing disability. I should look at how the claimant would be without the measures in question. The claimant relied in particular on the case of Nissa -v Waverly Education Foundation Limited and another UK EAT0135/18/DA, a judgment of Her Honour Judge Eady QC.

23. The correct approach in deciding whether an impairment was likely to last for at least 12 months was to project forward from the relevant date (31 May/1 June 2017 in the current case) being careful to avoid hindsight. In paragraph 14 of her judgment in Nissa, Her Honour Judge Eady QC referred to the decision of the House of Lords in SCA Packaging Limited -v Boyle [2009] UKHL 37 in which Baroness Hale clarified that in considering whether something was likely, it must be asked whether it could well happen. In the guidance on matters to be taken into account in determining questions relating to the definition of disability, Her Honour Judge Eady QC stated, “likely” should be interpreted as meaning that it could well happen, rather than it is more probable than not. 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 disability as they appear at the material time.
24. I applied that approach to the current case and looked at the claimant’s symptoms and the consequences of her condition and the effects upon her, as they appeared at the material time, being careful to avoid hindsight. Was it likely as at 31 May/1 June 2017, in the sense that it could well happen, that the effect of the claimant’s mental impairment would last for at least 12 months?
25. The respondent relied on the case of Royal Bank of Scotland plc -v Morris. UK EAT/0436/10MAA. Reference was made in particular to paragraphs 61 and 62 of the judgment of the then President, Mr Justice Underhill. Ms Motraghi referred to the passage in paragraph 61 where the President was looking at whether there was medical evidence showing how long, either before or after the relevant date, the claimant had an impairment with a substantial adverse impact on his day to day activities. He said this was just the kind of question on which a tribunal was very unlikely to be able to make safe findings without the benefit of medical evidence. In that particular case there were reports from Capita relied on by the claimant but there was no independent expert evidence before the tribunal. There was also a note from a psychiatric registrar at an NHS out-patient clinic. The relevant extracts from the medical evidence were set out in the judgment of Mr Justice Underhill, and they indicated quite different opinions at different times. For example, in July 2006, it had been found that the outlook for the claimants’ health was very good and a full recovery was anticipated. Later he was described in October as having “possibly” a severe depressive episode. The doctor noted that the claimant presented as very distressed but found it nearly impossible to get him off the subject of speaking about his work.
26. In paragraph 62 of the judgment, it was held that the evidence before the tribunal in that case could not establish that the claimant at any time in the relevant period suffered from a serious impairment which had lasted for at least 12 months. It was found that the evidence did not justify a conclusion

that the impairment was likely to last for at least 12 months. There was reference to a lack of prognosis from the doctor, Dr Donovan, and it was said that the Tribunal could not, without expert evidence, form any view on the likelihood of that impairment at the necessary level of seriousness continuing for at least a year.

27. At paragraph 63, the President said it may well be that the claimant could have filled the evidential gap by agreeing to a suggestion that expert evidence be sought but he made a deliberate and perfectly rationale choice not to do so. He went on to say that “while in the case of other kinds of impairment, the contemporary medical notes or reports, may even if they are not explicitly addressed to the issues arising under the Act, give the Tribunal sufficient evidential basis to make common sense findings in cases where the disability alleged takes the form of depression or a cognate [presumably meaning cognitive] mental impairment, the issues will often be too subtle to allow it to make proper findings without expert evidence.”
28. The respondent relies on the importance of a “sufficient evidential basis”. Ms Motraghi submits that there is a stark gap in the evidence as regards the likely duration of the claimant’s impairment as at May 2017.
29. I consider that Morris is a very different case from the current case. These cases are fact dependent. In Morris there was no independent expert evidence at all before the tribunal and there was inconsistency in the opinions being given by various doctors and occupational health professionals. I do not consider that the then President was suggesting that there was any rule that cases involving mental impairment should be treated differently from cases involving physical impairment. He was simply saying that in cases involving mental health impairment the issues may sometimes be subtle and specific medical evidence as to the likely duration of an impairment at the material time may be required.
30. In contrast to Morris, in the current case, there is a consistent picture of a mental health condition, which over a period of 7 months, had substantial adverse effects on the claimant’s day to day activities, with some fluctuation but nevertheless serious in their impact and a continuing pattern of medical certificates, the latest of which showed a period of unfitness for a further month from 30 May 2017. While Dr Lockhart was not specifically addressing in his report the question of whether the claimant’s impairment was likely to be last for at least 12 months from the stand point of 31 May 2017/1June 2017, by looking forward and looking back, he did state that the claimant’s condition had caused substantial impairment since mid-late 2016.
31. Further, the GP notes which I have already referred to and the referral for mental health review in February 2017 are indicative of a long-term mental health condition. From time to time the claimant’s symptoms improved a little, but overall the picture up until February 2017 is of a deteriorating condition, with treatment that was then put in place to assist the claimant, partly before that date but also substantially after that date.
32. I took into account the claimant’s own evidence and the fact that by March 2017, the effect of her impairment was such that she could not cope with

looking after her young son who went to stay with her mother-in-law when she was finding it very difficult to look after him, or indeed express any affection for him. The fit notes indicate some deterioration and fluctuation in the claimant's condition, the second of the fit notes being for 6 weeks rather than 4 weeks and then the third being for 4 weeks.

33. Taking all the evidence into account, I consider that it demonstrates a significant mental health condition and impairment which, as at 31 May or 1 June, was likely to last for at least 12 months in the sense that that could well happen. I consider that the strength and consistency of the evidence is such that such a conclusion can and should be drawn. If the claimant had not been receiving the medical treatment including medication and therapies which she did receive, her condition was likely to have been even more serious.
34. I therefore find that the claimant was a disabled person within the meaning of section 6 of the EqA.

Employment Judge McNeill QC

Date: 13 May 2019

Judgment sent to the parties on

.....22 May 2019.....

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For the Tribunal office