The well-trodden s6 test and knowledge in disability discrimination cases

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Seecombe v Reed In Partnership UKEAT/0213/20/OO

Introduction

1. The Claimant was employed as a Supply Chain Manager from November 2016 to March 2018. He was dismissed summarily, and he contended his dismissal amounted to disability discrimination, and/or a failure to make reasonable adjustments.

2. The Claimant asserted that he was disabled by virtue of his anxiety and depression.

The Law

3. Under s6 EqA 2010, a person has a disability if they have a physical or mental impairment, and the impairment had a substantial and long-term adverse effect on their ability to carry out normal day to day activities. Under s6(4) EqA 2010 a person who has been disabled in the past essentially retains the protected characteristic. Long term is defined with reference to Schedule 1, paragraph 2 as having lasted for at least 12 months, likely to last for 12 months or likely to last for the rest of the life of the person affected.

4. The EAT stressed that the long-term requirement relates to the effect of the impairment, rather than merely the impairment itself (see para 29 of the EAT judgment). HHJ Taylor held that "*it is not sufficient that a person has an impairment that is long term, the impairment must have a substantial adverse effect on day-to-day activities that is long term*" (para 29, EAT judgment).

Employment Tribunal

5. In March 2019 a hearing took place to determine whether the Claimant was disabled within the meaning of s6 EqA 2010 and, if he was found to be disabled, whether the Respondent had knowledge that the Claimant was disabled.

6. The Tribunal's conclusions on disability (and knowledge) were restated at paragraph 21 and 22 of the EAT's judgment but were essentially as follows:

    - There had never been a diagnosis of severe anxiety and depression despite the disclosure of 10 years of GP's medical notes
    - The EJ considered if, absent a diagnosis, the mental impairment could amount to a disability
    - Having considered the (only) contemporaneous evidence in the form of the GP notes, there were two previous episodes of mental impairment, specifically depression in October 2008 (following back surgery and marriage difficulties) and in 2015 relating to work related stress/anxiety
    - The disability impact statement was not supported by the contemporaneous GP notes or interactions with the Respondent's witnesses (e.g., Mr A and the Claimant not having discussed it any mental impairment in the 4 years they worked together prior to them both starting at the Respondent)
    - Following a distressing event in Christmas 2017, the Claimant was extremely upset and distressed and communicated this to the Respondent at the time; the Claimant did not suggest that he had any underlying mental impairments
    - He was subsequently certified as fit to work, and returned to work
    - He did not argue at the dismissal meeting in March 2018 that he was being dismissed due to a disability
    - The EJ accepted that there may be varying degrees of anxiety and depression which temporarily may have had a substantial adverse effect on the Claimant, such as the back injury and marital stress in 2008, the stress at work in 2015 and the reaction to events in late 2017 but in each case, the Claimant returned to work and there was no underlying condition which can be said to be "likely to recur"
    - The Respondent's evidence was that the first time they knew of any alleged mental impairment was when they received the disability questionnaire some months post termination, ahead of the ET proceedings
    - The EJ concluded that the Claimant was not disabled at the relevant times

- On the issue of knowledge, if the EJ was wrong about whether the Claimant met the s6 test, the Tribunal concluded that the Respondent did not have actual or constructive knowledge.

7. The Claimant's application for reconsideration was refused in April 2019.

EAT

8. The Claimant's appeal to the EAT was submitted in May 2019 and, following a Rule 3(10) hearing in February 2020, the following grounds were permitted to proceed:

    a. Ground 1: Error of law or perversity in the Judge's reference on numerous occasions to the Respondent's knowledge in determining whether the Claimant was disabled.

    b. Ground 2: Error of law or perversity on the question of whether the Claimant was disabled having regard to a letter from Dr Moore.

    c. Ground 3: That the EJ had failed to have regard to the specific diagnostic entries of "E200 anxiety disorder" from September 2015 and "EU 41z anxiety disorder", also from September 2015.

    d. Ground 4: That the EJ had failed to consider whether the condition was likely to recur.

    e. Ground 5: Error of law or perversity in respect of the EJ's approach to actual or constructive knowledge and that the Tribunal had failed to have regard to the test in *Gallop v Newport City Council* [2014] IRLR 211.

The Medical Evidence

9. HHJ Taylor summarised the evidence presented to the ET and referred to the relevant paragraphs of the Tribunal's decision at para 4-20.

10. The EJ considered the Claimant's GP records dating back to 2006 where it was noted that the Claimant stated he was "not feeling depressed". The Claimant asserted that he had been suffering from a mental impairment from 2007. He suffered a back injury in April 2007 and in October 2008, the GP records noted that he "seem[ed] depressed" and was prescribed antidepressants. In November 2008 he was described as feeling as if his mood had levelled.

11. In 2015 the Claimant was recorded as attending hospital for chest pain due to stress. The Tribunal recorded that the Claimant was suffering from stress but did not refer to the GP records which recorded a diagnosis of Anxiety Disorder E200.

12. Later in September 2015, the Claimant was still suffering from anxiety, having raised a grievance at work. A diagnosis of "anxiety disorder, unspecified EU41z" was not recorded in the EJ's judgment. The Claimant was signed off for a period of time between September – October 2015 (all pre-employment with the Respondent).

13. Upon joining the Respondent in November 2016, the Claimant filled out an equal opportunities questionnaire and recorded "no" in respect of any disability/requirement to make reasonable adjustments.

14. The Claimant had, in previous employment, worked with Mr A, who subsequently worked with the Claimant at the Respondent. Mr A was not told by the Claimant about any mental health issues.

15. The distressing event occurred in December 2017.

16. The Claimant was signed off from 15 January 2018 due to ill health and returned to work in February 2018 but had sick certificates until 16 March 2018. On 28 March 2018 the Claimant was called to a meeting and was told he was being summarily dismissed for poor performance.

EAT's Conclusion

17. The EAT considered *Goodwin v The Patent Office* [1999] ICR 302 where four conditions were set out to determine whether a person was disabled. HHJ Taylor reiterated the observations made by Underhill J in *J V DLA Piper UK LLP* [2010] ICR 1052 and stressed that:

> *"While it is good practice to deal with each of the conditions identified by Morrison J in Goodwin separately, there may be occasions on which it is permissible to focus on the question of whether there is a substantial adverse effect on day-to-day activities without having to establish the precise medical nature of the impairment before so doing"*[1]

[1] Para 32, EAT judgment

18. The EAT concluded that, whilst some matters of evidence were not referred to, HHJ Taylor did not find that they had a material adverse effect on the EJ's conclusion. The EAT concluded that there had been arguments for and against the Claimant being disabled within the meaning of s6 and that it was not the role of the EAT to rehear claims. It was held that the EJ had reached conclusions that involved no error of law and that he was entitled to reach having heard all the evidence. Of particular interest are the observations in respect of Ground 1, where the EAT held that:

> *"The respondent's knowledge is not relevant to [the question of whether the Claimant is disabled]. However,* ***that does not mean that what a person says, or does not say, about their abilities is irrelevant to the objective question of whether, at the time in question, the person was disabled****; often the claimant will be best placed to explain what effects any impairment has on day-to-day activities. What is important is what the person says, rather than to whom it is said - so, for example, if there is a period in respect of which there is no medical evidence the act that a claimant told friends, family or an employer that he was continuing to be effected by the condition could be relevant. Similarly,* ***it could be relevant that a claimant did not tell people that an impairment was continuing to have an effect****. While caution should be taken to considering what is not said about an impairment, because disabled people may wish to maintain their privacy, particularly if they perceive that there may be an adverse reaction to their disability,* ***there is no rule of law, as the claimant's Counsel contended for, that the fact that a claimant does not refer to ongoing symptoms can never be relevant to the question of disability****. In a case in which an individual has previously openly spoken about an impairment the fact there is a significant period during which no mention is made of the impairment could potentially be relevant to the issue of disability. This is not a matter of law, but one of fact and degree."*[2] [emphasis added]

Conclusion

19. This decision is a very helpful restating of many of the key principles and authorities to consider when seeking to establish or challenge disability status including *Gallop*, *Goodwin* and *Lawson v Virgin Atlantic Airways Limited* UKEAT/0192/19/VP. The case also demonstrates that disputes about disability status are very difficult to overturn, given the

[2] Para 33, EAT judgment

fact sensitive nature of decisions and the ambit of the EAT's ability to interfere with first instance outcomes.

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