EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102226/17

Held in Glasgow on 13 February 2018

Employment Judge: Susan Walker (sitting alone)

Mrs L Fingland	**Claimant** **In person**
Virgin Media Limited	**Respondent** **Represented by:** **Ms Raynor, of counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is the claimant has a disability for the purposes of section 6 of the Equality Act 2010.

REASONS

Introduction

1. This is a claim of disability discrimination. The claimant does not have sufficient qualifying service to claim unfair dismissal. The exact statutory provisions on which the claimant's claim is based still have to be clarified. However, the issue of whether the claimant had a disability in terms of section 6 of the Equality Act 2010 ("the Equality Act") was to be determined as a preliminary issue at this hearing.

2. The claimant gave evidence on her own behalf. Amanda McQueen (the claimant's line manager for part of her employment) and Katherine Holmes, (who was the next in line manager and who heard the appeal against dismissal) gave evidence for the respondent. There were some issues with the productions but, ultimately, the Tribunal had documents from both parties. These included the claimant's medical records since 2006. The respondent provided written submissions and authorities.

Relevant law

3. Section 6 of the Equality Act provides a definition of "disability" as follows:

> (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.

4. S212(1) of the Equality Act provides that "substantial" means more than minor or trivial.

5. Schedule 1 of the Equality Act gives further details on the determination of a disability. For example, Schedule 1 para 2(1) provides that the effect of an impairment is long term is it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.

6. Para 2(2) of Schedule 1 provides that if an impairment ceases to have a substantial adverse effect, it is to be treated as continuing to have that effect if that effect is likely to recur. *In SCA Packaging Ltd v Boyle 2009 UKHL 37*, the House of Lords ruled that "likely to" in this context means "could well happen" rather than "more likely than not".

7. Para (5) provides that 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 activities if measures are being taken to correct it and but for that, it would be likely to have that effect.

8. The Tribunal must take into account Statutory Guidance on the definition of Disability (2011) which stresses that it is important to consider the things that a person cannot do, or can only do with difficulty (B9). This is not offset by things that the person can do. This is also confirmed in *Aderemi v London and South Eastern Railway Ltd 2013 ICR 391.* Day to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This includes work related activities such as interacting with colleagues, using a computer, driving, keeping to a timetable etc (Guidance D2 – D7)

Issues

9. None of the elements of the definition of disability were conceded. Therefore the Tribunal has to determine the following issues:

- Did the claimant have a mental impairment?
- If so, did that impairment have an adverse effect on her ability to carry out normal day to day activities?
- If so, was that effect substantial (as in more than minor or trivial)?
- If so, was the effect long term?
- If the impairment had ceased to have a substantial adverse effect at the relevant time, was the substantial adverse effect likely to recur?

Findings in fact

10. The Tribunal makes the following findings in fact:

(i) The claimant has had a difficult home environment. She had caring responsibilities for her husband. This was an abusive relationship. She first sought medical help for her low mood about 2006. She was prescribed anti-depressants. At that time she was able to carry out normal activities and work in a call centre.

(ii) For the next 10 years she was able to function normally although she had continued to have periods of low mood. She would return to the doctor regularly and was prescribed anti-depressant medication when required.

(iii) The claimant began working for the respondent on 13 June 2016 in their call centre. Her duties involved answering calls, dealing with customer queries about their bills and, where appropriate, adjusting the products they received.

(iv) During 2016 the claimant's condition deteriorated. She started to experience night terrors and have difficulty sleeping. She was also having flashbacks to her childhood. She continued to suffer from verbal abuse from her husband.

(v) On 5 October 2016, the claimant was taken to the emergency department with what were thought at the time to be cardiac symptoms but was in fact a panic attack. She was severely affected and was signed off work. She was staying in bed and did not want to go out. She felt suicidal. She was prescribed medication which helped. She also contacted a counselling helpline.

(vi) The respondent arranged for a referral to occupational health. This resulted in a consultation by telephone with Janet Dyson, an Occupational Health Advisor on 14 October 2016. The claimant did

not wish to discuss all her personal issues on that call. She did not report her medical history. Ms Dyson noted that the claimant reported low mood and acute anxiety. She said that the claimant had stated that this had been triggered by a mistake in her wages. Ms Dyson considered that the claimant was unfit for work but that this was a likely to be a temporary incapacity and she would be able to return when her medication had taken full effect. She recommended a phased return over 4 weeks and a discussion about reducing the claimant's hours to facilitate her caring responsibilities. Ms Dyson suggested that the claimant would not be covered by the disability provisions of the Equality Act as *"although substantial impacts are reported the longevity criteria has not currently been met".* She noted that *"Most people will respond to combined antidepressant and counselling treatment (with compliance) and make a recovery. Recurrence is possible at times of future acute stress."* She suggested that a short course of psychotherapy may be of benefit in building emotional resilience and noted the claimant was already accessing counselling support.

(vii) Although the claimant did not feel ready to return to work after 2 weeks, she was concerned she would lose her job and so she did return to work on 24 October 2016.

(viii) In fact, the claimant found that work was an escape. She was able to carry out her work effectively. However there were occasions where she was unable to deal with calls where the customer was angry and she had to end the call and escape to the toilet or a quiet place for a few moments.

(ix) She was not able to take public transport as she became anxious and had panic attacks if she was with a lot of people. She was able to drive to work.

(x) When the claimant was not at work she was trying to catch up on her sleep. She was not interested in eating and her daughter took charge of the cooking. Her daughter made her a packed lunch to take to work to ensure that she ate something.

(xi) She was friendly with one colleague in particular and would speak to her but did not interact with other members of the team. She attended the team Christmas meal out . She did not enjoy this but felt that she had to go. She found it difficult and she was not engaging in other social events at this time.

(xii) In March 2017, the claimant's condition deteriorated again. She was off work from 28 March 2017. She felt unable to do anything and spent long periods of time on her own in a quiet place. She didn't want speak to anyone or go out. She wasn't eating, cooking and had to be encouraged by her daughter to wash.

(xiii) She went back to work on 9 April 2017. She did not feel much better but again was concerned she might lose her job. At her return to work interview, her manager, Ryan, suggested she contact "Healthy Minds" which is a service provided by BUPA for the employer. The claimant phoned them immediately and spoke to them for about 40 minutes. They considered she was severely depressed and referred her to a therapist.

(xiv) The claimant was offered 6 sessions of CBT but in fact only attended 2 as she was dismissed on the day of the third session. She found these very helpful and considered her condition was improving. In part this was because the therapist encouraged her to get help to make her husband leave the house.

(xv) The claimant at this time was still taking anti-depressants.

(xvi) The claimant attended a Volunteer day on 11 April 2017. She worked with the colleague she was friendly with and she enjoyed the day, sorting donations of children's clothing into different age appropriate categories.

(xvii) The claimant had an accident on 8 May 2017 when she fell off a ladder. She came into work although she felt unwell. Amanda Campbell, who was also the first aider, told her to go home although the claimant did not wish to do so as she was concerned about the effect on her absence record.

(xviii) The claimant was dismissed on 18 May 2017 under the respondent's absence management policy.

(xix) Since then her condition has deteriorated. She is still seeing her GP and is on medication. She has been referred to the Mental Health team and is awaiting an appointment with a psychiatrist. She continues to have difficulty sleeping and to have no interest in eating, washing or going out.

(xx) She did start a course on astronomy at the therapist's suggestion but she has given that up.

Observations on the evidence

11. All the witnesses gave their evidence in a clear way and I considered they were all giving an honest account of events as they remembered them. The claimant did not dispute that she was able to carry out her job and so there was no real point of differences between the parties on that. The claimant did say that she would retreat to the toilet or the stairs and would be tearful. The respondent's witnesses said that they had not observed that but, of course, that did not mean it didn't happen.

12. I accepted the claimant's evidence as to the effect that her condition had outside work during the relevant period. I did not consider that this was contradicted by her attendance at work or at the volunteer day or at the Christmas night out. I found her evidence to be compelling. I was conscious that she is currently clearly unwell and that I had to disregard how she presented to me. I have to consider only her evidence about how she was at the relevant time (s).

13. There was a dispute around whether the claimant had been seen at Asda in January 2017 a day after she had been attended hospital for an unrelated matter. This led to an investigation as to whether she had taken a day of sick leave when she was fit to work. Ms Campbell said the claimant ultimately admitted it was her while the claimant denied this was the case. I did not consider it necessary to resolve this dispute as it did not appear to be relevant to the issues I have to determine.

Respondent's submissions

14. The impairment relied on is a mental impairment of depression, anxiety and panic attacks. Ms Raynor submitted that there is no medical opinion or advice to this effect produced by the claimant. The medical records provided do not support a finding that the claimant was disabled by a mental impairment at the relevant time (which was 13 June 2016 – 18 May 2017).

15. The claimant was dismissed because of poor attendance due to ill health absences. The first occasion there was any mention of stress or anxiety was 28 March 2017 when she had a period of absence which she said was due to sickness and depression. The claimant alleges that this was part of a set of symptoms in October 2016 but the doctor's note from March 17 says that this was the first episode of endogenous depression.

16. Ms Raynor referred to a number of cases in connection with the definition of "disability" including *Goodwin v The Patent Office [1999] IRLR 4, Woodrup v*

Southwark London Borough Council [2002] EWCA Civ 1716, McNicol Balfour Beatty Rail Maintenance Ltd [2002] EWCA Civ 1074, Ministry of Defence v Hay [2008] IRLR 928, J v DLA Piper UK Ltd [2010] IRLR 936. These cases set out a number of principles set out below.

17. The test is a functional and not a medical test, directed to what a claimant cannot or can no longer do at a practical level. "*Impairment"* bears its ordinary and natural meaning and may result from an illness or consist of an illness. Disability may include someone who is not in fact disabled if, without the medical treatment they are in fact receiving, they would suffer that disability.

18. The burden of proving disability lies with the claimant. There is no rule of law that the burden can only be discharged by adducing first hand medical evidence but mental impairment does raise complex questions and in *Morris v Royal Bank of Scotland UKEAT/0436/10,* the EAT held that the existence or not of a mental impairment was very much a question for qualified and informed medical opinion. The EAT held that the particular nature of mental impairments required more than just the provision of medical notes. The issues would often be too subtle to allow it to make proper findings without expert assistance. It might be a pity if that was so but it was inescapable given the real difficulties of assessing in the case of mental impairment, issues such as likely duration, deduced risk and risk of recurrence.

19. The respondent's primary position is that the claimant did not suffer from a mental impairment. Rather her condition was as a result of, admittedly difficult, life events to which she has reacted with stress and depression. There was no underlying condition.

20. It is accepted she had some instances of depression in the past. However, until termination of her employment these were all short and nowhere near the 12-month period required to be "long term".

21. While suffering these episodes, even without medication, the impact on her day to day activities was not substantial. There is no contemporaneous evidence. The respondent submits that the claimant is interpreting how she felt

then through the lens of how she feels now. This is not the test. It seems her health has deteriorated but at the time of dismissal her health was improving. Steps were being taken that were not masking her condition but improving it.

22. The condition was not long term and there was no likelihood at the point of dismissal (in May 2017) of recurrence. There was no reasonable indication. On the evidence provided to the Tribunal and the medical reports and the occupational health report and the observations of the people who worked with her , there was no likelihood that her condition had lasted or would last 12months and there was no evidence at that time that it was likely to recur.

23. *J v DLA Piper* set out the test at paras 41 – 46 and describes the distinction between clinical depression and reactive depression.

24. Ms Raynor referred to *Morgan and Staffordshire University [2002] IRLR 190* as authority that the occasional use of terms such as “anxiety” “stress” and “depression, even by medical professionals will not amount to proof of a medical impairment, still less its proof at a particular time.

25. Ms Raynor referred to *Richard C.C v McDougall [2008] IRLR 227* as authority that the likelihood of the condition lasting 12 months and the likelihood of recurrence has to be assessed at the time and not with hindsight. There was no indication from the medical records that the condition was likely to happen again. The Tribunal needs evidence.

Claimant’s submissions

26. The claimant replied that her medication was on a repeat prescription and that steps were taken to try an adjust her medication to get it right. She had thought her health was improving at the time of dismissal and does not understand why she was dismissed for absence in these circumstances.

Decision

Did the claimant have a mental impairment?

27. Dealing first with the issue of mental impairment, I accept that the claimant's personal circumstances are a significant cause, if not the whole cause, for her depression. However, in circumstances where the claimant first experienced difficulty and sought medical help in October 2006, where she was on medication off and on for the next 10 years and where there were two significant flare ups in October 2016 and March 2017, this seems to me, even without expert medical evidence, to demonstrate an underlying condition and not simply a reaction to life events as described in *J v DLA Piper*. I am satisfied that the claimant had a mental impairment of mental illness at the relevant time, specifically anxiety, depression and panic attacks.

Did that impairment have an adverse effect on her ability to carry out normal day-to-day activities?

28. Turning to the effect of that impairment on her day to day activities, I note the terms of the Statutory Guidance that I should focus not on what the claimant could do but what she could not do or only do with difficulty. I accept that there were things the claimant was able to do, such as driving, taking telephone calls, using a computer. She also attended the volunteer day and enjoyed it. I do not consider that these findings contradict the claimant's evidence, which I have accepted, that she had difficulty in using public transport, socializing, washing, cooking and eating. She was able to do these things but only with difficulty and with assistance from others.

Was that effect substantial?

29. The seriousness of the effects varied over the relevant period. It was clearly a substantial effect when she was absent in October 2016 and March 2017. It is less clear that the effect was substantial at other times. However, on the basis of the evidence given to me by the claimant I consider that throughout the period from October 2016 until her dismissal in May 2017, her impairment was having an effect on her day to day activities as described above, that was more than minor or trivial.

30. Even if I am wrong about that, I have to consider the effect without medication or other treatment. It is difficult for me to assess this in the absence of medical evidence. However, it seems clear from the occupational health report that it is the medication that is expected to enable the claimant to return to work. It also seems self-evident that when she has been taking medication for such a long period, it is not a cure but a way of managing her condition. I consider that without the medication, the impairment would have had a more serious effect on her ability to carry out normal day to day activities and that would have been substantial.

Was the substantial adverse effect long term?

31. I then have to consider whether the substantial adverse effect was "long term". The claimant herself did not suggest that there was a substantial adverse effect before October 2016. This may have been because of the effect of the medication but I simply do not have the evidence to support such a finding. As noted above, I consider that the substantial adverse effect started in October 2016 and continued until her dismissal in May 2017. This is not a period of 12 months and so I have to consider whether it was likely to last for 12 months (till October 2017). The fact that it has, in fact, lasted for that period is not relevant. The question is whether it was likely to last for that period as at May 2017 when the alleged discrimination occurred.

32. I consider that it was likely. The respondent correctly points out that the claimant's health was improving through the use of medication and in particular through counselling. It is possible that her health may have improved more, had the counselling continued. Again I am hampered by the lack of expert evidence. However, I do not consider it likely that counselling would have resolved her condition entirely as the respondent suggests. At least not within that relatively short period, when her condition (albeit not the effects) had lasted for over 10 years. As I am not satisfied that the counselling would have resolved the condition in that period, I have to discount the effect of the counselling. Having done that, I have no hesitation in concluding that the substantial effect on her say-to day activities would be likely to have lasted for at least 12 months from the onset in October 2016.

33. I have not therefore considered the issue of a recurring condition as I consider the substantial adverse effect was present throughout. Again I have no medical evidence. However, if I had to decide this point I would say that when she has had the condition for 10 years and where there have been 2 significant episodes in October 2016 and March 2017, it is likely that there would be a recurrence of the effect.

34. In conclusion, I consider that the claimant did have a disability and the claim can proceed.

Further procedure

35. The Tribunal will contact the parties separately about further procedure in this claim. For the avoidance of doubt, the findings in fact in this judgment relate only to the issue of disability status. They would not bind a future Tribunal dealing with the merits of the claim and considering issues such as knowledge of the respondent.

Employment Judge: S Walker
Date of Judgment: 16 February 2018
Entered in register: 20 February 2018
and copied to parties