



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103294/2019

Final Hearing Held at Inverness on 9 September 2019

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Employment Judge A Kemp

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Ms J MacPherson

**Claimant
Represented by
Mr J Murphie
Advocate**

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Moray Council

**First respondent
Represented by
Mr E Stafford
Solicitor**

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**Second respondent
Represented by
Mr E Stafford
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant is a disabled person under section 6 of the Equality Act 2010.

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REASONS

Introduction

- 5 1. The Preliminary Hearing had been fixed by Notice dated 27 June 2019, which followed an earlier Preliminary Hearing for case management. It was to determine, if the issue was still disputed, whether or not the claimant was a disabled person as defined by section 6 of the Equality Act 2010.
- 10 2. It was confirmed that the respondent did still dispute that issue, and the matter proceeded on that basis.

Evidence

- 15 3. The Tribunal heard from the claimant. There were documents that the parties had prepared in a single bundle, not all of which were spoken to. In addition the claimant lodged a supplementary impact statement, without objection from the respondent.

20 Order

4. During the course of the hearing, it was intimated to me that a member of the press had indicated an intention to attend. The claimant's counsel Mr Murphie moved for an order for the hearing to be conducted in private, and Mr Stafford
25 the solicitor for the respondent supported that. I considered that it was in accordance with the terms of the overriding objective to do so, in light of the fact that by then the claimant had commenced giving evidence on issues relating to her medical condition, treatment, advice received, and related matters. I considered the terms of Rule 50, particularly the provision as to open
30 justice, but considered that the balance lay in allowing the claimant, who had already exhibited some distress in giving the evidence that she had done up to that point, to do so in private.

5. I therefore granted an Order in terms of Rule 50(3)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 that the hearing before me be conducted in private. For the avoidance of doubt, that Order applies only in respect of that hearing.

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Facts

6. The Tribunal found the following facts to have been established:

10 7. The claimant is Ms Jan MacPherson.

8. She was employed initially by the first respondent on 4 May 2009. She worked for them in both part-time then full-time roles until October 2017 when she was seconded to work at the second respondent as a third sector development officer.

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9. In 2003 the claimant's marriage broke down, and at around the same time her mother died. The combination of those two stressors and chronic fatigue after an infection caused her to become depressed. She consulted her then GP, and was prescribed anti-depressants, and referred to a chartered clinical psychologist. She underwent a course of counselling. After a period she ceased to take anti-depressants.

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10. The claimant suffered a second episode of depression in around 2013. She was again prescribed anti-depressants by her GP. She continued to consult her GP periodically thereafter.

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11. By letter dated 27 November 2015 the claimant's GP asked whether the claimant could undertake a course of cognitive behavioural therapy (CBT) for what she described as "moderate depression which hasn't really responded to Fluoxetine. I have now changed her over to Venlafaxine." Both of those medications are anti-depressants. The claimant did undergo a course of CBT.

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12. On 7 January 2016 the claimant returned to work with the first respondent after the Christmas and New Year holiday. She had previously raised a grievance as to what she claimed was bullying at work, and a first period of secondment had taken place with the first respondent. She was anxious about work at that time. Whilst at work that day she suffered a panic attack, that included feelings of breathlessness, pain in her chest, and numbness in her arms. She was worried that she might be suffering a heart attack. She was seen by a first aider, then taken to Dr Gray's Hospital where she was told that she had not suffered any heart attack but had had a panic attack. She was discharged later that same day. She was prescribed beta-blockers. The first respondent referred her to occupational health advisers and on 11 February 2016 they advised that the claimant was fit for her then role.
13. In June 2017 she went off work through what was described in fit notes from her GP as "stress at work". That related to a redeployment process called Transform, which was applied to the claimant. As a part of that the claimant had undergone in January 2017 a psychometric test. The claimant was not informed of the details of that result, but that she had scored below average on verbal reasoning. That caused her to be concerned at her performance, and she did not recognise the description of herself. She applied for a vacancy in April 2017 but was not matched to it in light of the results of that test. She took the test again in May 2017, and scored very highly in it, in the top 97%.
14. In May 2017 she was informed that she was likely to be made redundant from her then role with the first respondent. That caused her to be greatly anxious. She was then informed that there would not be a redundancy, but some other substantial reason, such that she would not receive redundancy pay. That added to her anxiety. Her anxiety became such that she was absent from work for eight weeks commencing on 14 June 2017. She received fit notes for that absence stating "stress at work". The first respondent referred her to occupational health advisers.
15. On 27 June 2017 the claimant emailed her manager Mr Nick Goodchild with regard to her hosting an exchange student from the USA. She said that "It had

been a whole extra layer of challenge at a time when it has been hard to even cope with normal things.”

- 5 16. On 24 July 2017 occupational health advisers to the respondents prepared a report on the claimant. The claimant had been referred there as she had been absent from work since June 2017. The occupational health nurse, Ms Cath Orr, conducted a health questionnaire which indicated that the claimant was in the highest ranges, and Ms Orr considered that she was not fit for work. She reported daily symptoms that included “feeling down, depressed or hopeless; 10 feeling tired or having little energy; feeling nervous, anxious or on edge; worrying too much about different things; and trouble relaxing.”
- 15 17. When asked if the condition was likely to recur Ms Orr stated “The stress response is situational to the current work events. Jan does seem to have a predisposing history of depression. It is my opinion therefore she may well experience further episodes in the future. I cannot state however the frequency or likely duration of any events.” When asked for an opinion on whether or not the claimant was a disabled person under the Act she stated “Decisions...are 20 legal decisions rather than medical ones. In this case there is a psychological impairment. The condition is such that it may cause substantial and adverse effect on the ability to engage in normal day to day activities. This takes into account the presence of medication to manage symptoms. In my opinion therefore Jan is likely to be considered to have a disability for the purposes of UK disability discrimination legislation.” 25
18. The claimant was seconded to the second respondent in October 2017, with the intention that her position be subject to review six months prior to the end of that secondment, which was intended to end on 31 December 2018.
- 30 19. The claimant continued to be prescribed anti-depressants by her GP, and received repeat prescriptions for them.
20. Following the claimant’s secondment to the second respondent in October 2017 her perception of symptoms reduced initially.

21. She was returned to the Transform policy in about June 2018 so that there could be consideration of her redeployment in the last six months of that secondment. The uncertainty of that, and the process itself, exacerbated her symptoms once more.
22. The claimant continued to be prescribed anti-depressant medication, latterly Duloxetine, for the period up to, and shortly beyond, the termination of her employment by either or both of the respondents on 31 December 2018.
23. The claimant's impact statement and supplementary impact statement are reasonably accurate in setting out the effects of the claimant's condition on day to day activities.

15 **Claimant's submission**

24. The following is a basic summary of the submission. The claimant was a disabled person. The impairment was depression. It was a mental impairment. It had been on-going for 16 years, and was continuing. The occupational health report of 24 July 2017 was important, not just for the opinion that the claimant was a disabled person but also the opinion expressed that it was likely to recur. The claimant had had anti-depressants, counselling and CBT. The effects of the improvements occasioned by that were to be discounted. The effect was substantial. There was a substantial adverse effect on day to day life. There were triggers for it, but the underlying condition was the depression. It was something overlooked in the past, said to be just a reaction to what the person was facing. He invited me to hold that the claimant was disabled.

Respondent's submission

25. The following is a basic summary of the submission. There was no evidence of mental impairment. The diagnosis of depression referred to in the report of 24 July 2017 was not borne out. The fit notes had not referred to depression, but stress at work. There had been one-off responses to stressors. The

claimant had not shown that she had an impairment. It had not been shown that there was a substantial effect on day to day activities by that mental impairment. Neither the fit notes nor occupational health reports did so. The claimant had taken on an exchange student in 2017. The claimant had not
5 proved that the effect was substantial. There had only been a short absence from work. There was no substantial adverse effect. It had also not been shown that the effect was long term. There was insufficient to amount to disability. Reference was made to J v DLA Piper and its contrast between clinical depression and a reaction to difficult circumstances, with the latter not
10 amounting to disability under what is now the 2010 Act.

Law

26. Section 6 of the Equality Act 2010 (“the Act”) provides as follows:

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“(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.

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

27. “Substantial” means more than minor or trivial under Section 212(1) of the Act.

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28. What is “long-term” is defined at Schedule 1 paragraph 2 of the Act as follows:

“2 Long-term effects

(1) The effect of an impairment is long-term if-

(a) it has lasted for at least 12 months,

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(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.”

29. Where it is necessary to project forward to determine whether an impairment is long-term (under paragraph 2(1)(b) of Schedule 1), in ***SCA Packaging Limited v Boyle [2009] ICR 1056***, Baroness Hale, with whom the other Justices of the Supreme Court agreed, clarified that in considering whether something was likely, it must be asked whether it could well happen.
30. The ***Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011)*** (“the Guidance”) states at paragraph C3 that “likely” should be interpreted as meaning that “it could well happen”, not that it is more probable than not that it will happen.
31. 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 appeared during the material period, see ***Cruickshank v VAW Motorcast Ltd [2002] 729, EAT***.
32. In ***J v DLA Piper [2010] IRLR 936*** the EAT commented on matters at paragraph 42 as follows:
- “The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at paragraph 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as ‘clinical depression’ and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – ‘adverse life events’.”

Discussion

33. I was satisfied that the claimant was a credible and reliable witness. She gave her evidence candidly, and clearly. She did not seek to exaggerate matters, and her evidence was generally supported by written records.
34. It was a little surprising that there was no medical report either from a GP or other health professional, but the claimant had moved from Forres, where she lived originally when working with or for the respondents, to Benbecula where she now lives for her current role, and that has necessitated having a new GP. There was however some evidence of the medication history, including a list of medications prescribed, and medical records, together with occupational health records.
35. The first question is whether or not the claimant has an impairment. I am satisfied that she does, and that it is depression. It is true that the condition changes from time to time, and can be significantly affected by situational stressors, but the history of it is I consider sufficiently documented and long standing as to be reliable. It has been referred to in correspondence from her GP, who noted that she had “moderate depression”, and that that had not responded to anti-depressants. She has been on anti-depressants for a considerable period of time. That is itself evidence of the impairment. Whilst the evidence is not as it might have been had there been a comprehensive report, there is I consider sufficient. It is a mental impairment for the purposes of section 6.
36. The second question is whether it caused a substantial adverse effect on day to day activities. I am satisfied that it did. The claimant described eloquently the feelings that she had, and her need to work around them for the sake of her children. She worked, and that is one factor, but does not mean of itself that she is not someone who falls within the terms of section 6. She coped as best she could notwithstanding her depression. That she was able to host an exchange student similarly does not detract from that, and in fact her email with regard to that highlighted the difficulties she was having in practice. The

substantial effect is perhaps demonstrated by the facts, none of which were disputed, of a hospital visit from work in January 2016, and eight weeks of absence in mid 2017. I also took account of the fact that the claimant's prescription of various anti-depressants continued up to the end of her employment and beyond. They had the effect of reducing her symptoms, and without them those symptoms would have been appreciably worse. Whilst again the evidence was not all that it could have been I considered that it was sufficient.

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10 37. The effects on day to day activities were spoken to in evidence, and supported by the occupational health questionnaire from July 2017, and the terms of the impact statements. They included feelings of extreme fatigue, anxiety and a sense of hopelessness, as spoken to in the evidence. Her phrase as to a black cloud hanging over her, affecting every aspect of life, was I considered a vivid
15 summary of the effect of the depression, and the impact on day to day activities.

20 38. The effects have been and are long term, as the symptoms have been experienced for many years, but significantly have included changes to medication, further treatments including counselling and CBBT, and the comment by Ms Orr that they are liable to be experienced in future. That I consider does meet the test set out in the case law set out above, that further incidents could well happen. It is not an issue of likelihood, proved on the balance of probabilities.

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30 39. The effects clearly do fluctuate, and are affected by incidents either at home or work. But I do not consider that they are simply a reaction to difficult circumstances, or one off events, as was submitted for the respondents. The claimant has been diagnosed with and treated for depression over many years.

40. I consider that there is a pattern to matters, and that that pattern is consistent with the claimant having, as the occupational health report indicated, an underlying condition of depression which causes substantial adverse effects on day to day activities, and that that is long-term, all as to meet the terms of

the statutory provision. Whilst the occupational health report of 24 July 2017 is not conclusive as to the claimant being a disabled person, it is I consider highly persuasive, coming as it does from an occupational health practitioner instructed by the respondent who carried out an assessment, including consideration of the result of a questionnaire. I consider that the claimant's condition is a long term one, such that consideration of the possibility of recurrence is not necessary, but if it were to be relevant I consider that there is such a possibility as meets the test explained in authority.

10 **Conclusion**

41. In conclusion, I consider that the claimant has discharged the onus on her to prove that she falls within the terms of section 6 of the Act, having regard to the Guidance, and case law. I therefore concluded that the claimant is a disabled person.

Further procedure

42. Having so determined, I consider that a case management Preliminary Hearing should be fixed as soon as possible. It can be conducted by telephone. Agents should write to the Tribunal within two days of receipt of this Judgment to confirm dates to avoid in the period from October to December 2019.

Employment Judge:
Date of Judgment:
Date sent to parties:

Alexander Kemp
11 September 2019
12 September 2019