5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4110677/2019

10 **Preliminary Hearing held at Dundee on 6 February 2020**

Employment Judge I McFatridge

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X	**Claimant** **Represented by** **Mr Lawson** **Solicitor**

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M	**Respondent** **Represented by** **Mr Boyle,** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that

(One) the claimant was not at the relevant time a disabled person in terms of the
35 Equality Act 2020.

(Two) the claim of disability discrimination is dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unlawfully discriminated against on grounds of disability. The respondent submitted a response in which they denied the claim. They did not accept that the claimant was disabled in terms of the Equality Act. A preliminary hearing was fixed for the sole purpose of determining that issue and took place on 6 February 2020. At the hearing the claimant gave evidence on his own behalf. A joint bundle of productions was also lodged. On the basis of the evidence and the productions I found the following essential facts relevant to the matter to be determined at the preliminary hearing to be proved or agreed.

Findings in fact

2. The claimant was employed by the respondent as a non-trade printer between July 2018 and April 2019 when he was dismissed.

3. The claimant attends Downfield Surgery having registered with that practice from about January 2019 onwards. The claimant's medical records at that practice were lodged (page 34). The claimant also lodged his medical records with his previous practice which record entries from around 1998 onwards (page 51-54).

4. On or about 14 February the claimant's medical records record him as having a consultation with his GP in which he reported that he was suffering from low mood and anger management issues and getting frustrated. The consultation note reads

> "Consultation low mood and anger management issues as gets frustrated, no current thoughts of hurting himself or others, feels he gets angry about small issues and makes them in to big things. anhedonia present, no excessive etoh/drug use involved.o/egot tearful at a stage in the consultation good eye contact insight present: likely low mood; suggested we try sertraline. he will think about it and come in to see me next week, offered talking therapies and bth. he will let me know next week."

5. The claimant had not consulted any GP or other medical practitioner about any mental health issues prior to this. During the discussion the claimant indicated that he had been having what he considered to be issues relating to his mental health for around three years.

6. The records then note that appointments were made for the claimant on 22 February and 26 February which he did not attend.

7. In early March an incident occurred where the claimant was found by Police to be walking near a busy dual carriageway in Dundee late at night. The claimant consulted his GP the following day 6 March. The note of the consultation (page 34) states

> "Consultation here with parents, though he asked them to leave half way through. low mood, anxiety, anger, tension headaches for 3 years.used many illegal drugs since aged 14-ongoing-last used a few months ago.occasional alcohol.good relationship with parents, didn't like school, not academic, doesn't like job in a factory, has a girlfriend who he adores but he is paranoid she will cheat on him.ex-girlfriend when 17 cheated on him++,found by police last night on the Kingsway-wandering, thoughts of throwing himself in front of a lorry, absolutely sure he doesn't want to die and wouldn't try to harm himself.plays indoor football for Scotland-trains a lot.good diet, sometimes can't get to sleep.agree need to talk,refr insight, start sertraline, line for work and r/v 1 week."

8. Following this consultation the claimant received a prescription for sertraline which is an anti-depressant.

9. The claimant's records then show that he had a further consultation on 12 March. The note for this states

> "Consultation Attended with partner. Benefitted from week away from work. Works on heavy machines at M. Wanting to go back to work. No suicidal plans or intent although episode last week did seem very sudden. Live at home with parents and sister. Due for need to talk. Advised I'd refer to beating the blues but Insight also good idea. Review in 1 w as could increase Sertraline. Issued med3 but unsure if

he will use it. Has couple of short weeks at work due to holidays so thinks it will be ok."

10. On or about 19 March another incident occurred. The claimant had gone for a walk. Although the claimant had denied any thoughts of self-harm to his GP and had no outward symptoms the claimant felt extremely low. He felt broken and that something had snapped after the incident on the Kingsway. He felt that every day was a burden. He couldn't enjoy life. He found that it was a struggle. The claimant did not share these thoughts with anyone. Part of this was a coping mechanism in that he felt that if he did not verbalise the way he was feeling to others then the thoughts would go away. Whilst out walking the claimant decided that he wanted to injure himself and jumped off a 30 foot wall. In the event he suffered minor injuries and was able to go to a friend's house for assistance. He attended his GP the next day. The consultation notes indicated

"Consultation. Went missing on Monday night. Police etc involved. Jumped off a 30 foot wall and managed to escape with a few injuries. Mum had thought he was getting better on meds but then this happened. Tells me that he just left the house just to get out for a walk. However when out then just thought he wanted to hurt himself. Now says he would never do anything ever again .. refer crisis team."

11. The claimant was referred to Perth and Kinross Health and Social Care Partnership Crisis Resolution Home Treatment Team at Carseview Centre, Dundee. He was seen by two mental health nurses on 28 March 2019 and diagnosed as suffering from depression. Subsequent to this appointment Leanne Williamson a Senior Mental Health Nurse sent a report to the claimant's GP which was lodged (pages 47-49). This sets out the history of the presenting complaint. It is probably as well to repeat what is stated.

"Struggling with emotions for some time however past 3-4 weeks feels functioning and coping have reduced resulting in recent risk-taking behaviour & thoughts to hurt himself. Feels a burden to his family and they would be better off without him.

4 weeks ago describes sudden onset of feeling agitated whilst at a friend's. Walked from friend's house in Fintry towards his own home in Downfield in middle of night. During this walk home felt overwhelmed began crying inconsolably, phone mum but couldn't make sense to her. Began running in and out of traffic on Kingsway beside Charlotte Park, states wanted to be hurt but did not want to die. Police attended however X denied behaviours as being suicidal.

2 weeks ago similar episode of sudden onset agitation, overwhelming emotion and acute desire to hurt himself physically. Left his house just after midnight and walked around Dundee for 6 hours. Decided to go to a secluded embankment at waterfront near Craigtay Hotel. X thinks his thought was to cause himself injury rather than end his life: recounting his intent at the time obviously difficult and distressing for X. Jumped from a 30ft embankment/wall. States immediately regretted his actions before he landed. Sustained injury to ankle, wrists, ribs. Did not seek medical attention. Managed to walk to a friends.

Information from 3rd party (X's girlfriend): Family were concerned by change in X. Family have been by his side for 24/7 since 2nd incident.

Past psychiatric history: No previous contact with psychiatry service. No history of self harm or suicide attempts other than stated above."

Under past medical history it was noted that the claimant had frequent debilitating headaches. It describes the claimant's pre-morbid personality as being cheery and happy.

12. The claimant was given three Diazepam tablets for his headaches although at the end of the day he only ended up taking one of these.

13. The claimant attended two further appointments with the Crisis Resolution and Home Treatment Team, one on 2 April 209. Following this they wrote to the claimant's GP. This letter was lodged (pages 45-46). The letter was signed by Dr Mannan a Locum Psychiatric Consultant. He indicated that he would refer the claimant to a Neurologist in respect of his headaches.

14. He had a consultation with his GP on 11 April 2019 and the notes states

"Consultation attended with girlfriend, doing much better and due to be seen at Carseview later today for discharge meeting. Is keen to return to work, see MED3 covers until next week, will discuss with employer and thinks will need OHSAS review prior to returning. Asking for FIT note, discussed and no need for this. No ongoing thoughts of self harm. Has been taking sertraline, dose increased to 100mg 3 weeks ago. Does feel this helps. Sleeping better. Agree continue sertraline, no need for FIT note can return next week when MED3 ends and await further psych input."

15. During the following few weeks the claimant attended counselling which he found of considerable assistance. He discovered that talking about the way he felt rather than refusing to acknowledge there were issues helped him. The claimant was dismissed from his job with the respondent on 16 April 2019.

16. The claimant was again seen by the Crisis Resolution Team on or about 24 April. He was discharged by the Crisis Resolution Team after this appointment. The letter written to his GP after this appointment was lodged. (p39-40). It is signed by a psychiatric consultant. It states:

"I first saw X 2/4/19 and again in the company of his girlfriend on 24/4/19. He said he is far better. He confirmed that he is not depressed or suicidal. He says he takes sertraline as prescribed and noticed no side effects. He admitted that he did not use his Diazepam. He added he has less attacks of migraine. He is now happy that he is back to work. He did not discuss any recent illicit drugs misuse.

Mental State Examination

X was accompanied by his girlfriend. He was casually dressed. He was co-operative, objectively does not look depressed and there are no anxiety signs. He was not actively suicidal or self harming. He was not psychotic and his insight was intact".

17. Thereafter the claimant duly attended an appointment with a neurologist in or about September 2019. His neurologist indicated that the headaches from which he suffered were probably related to tension.

18. On 16 September 2019 the claimant had his first contact with his GP since April 2019. This is noted to have been a telephone contact and the note states

> "Telephone encounter. Phoned for review of sertraline, feels things going well but feels sertraline makes him feel very numb and also causing increased appetite leading to weight gain. Not suicidal, feels mood and anxiety stable, back at work and managing well. Discussed medication and agree reduce dose to 50mg and see how he goes if things dip will increase back to 100mg, should continue until the new year and if stable keen to consider stopping."

19. On 31 December 2019 the claimant's GP Dr Pearson issued a letter to the claimant's solicitors which had been requested by them in connection with the Tribunal proceedings. This letter was lodged (page 33). It states

> "Thank you for your recent letter regarding the above patient. Please find below the answers to the questions listed in your letter:
> 1. I can confirm X suffers from depression.
> 2. X was diagnosed in March 2019 but reported symptoms for 3 years prior to this.
> 3. X was last reviewed in September 2019 by telephone and reported he was doing well and managing back at work. His records state his mood and anxiety were stable and the dose of his antidepressant medication was reduced. Based on this last assessment I do not think he would meet the test outlined by Section 6 of the Equality Act 2010. However, his condition could have changed in the last 3 months since he was reviewed.
> 4. I am unable to comment on his current symptoms as he has not had a recent assessment.
> 5. Sertraline 50mg
> 6. He has not been reviewed since his medication was reduced so I am unable to predict the impact on his ability to carry out day to day activities without his medication.
> 7. Full medical records have been requested and clinic letters are included, including his recent involvement with the Crisis team."

20. The claimant started working in a new job shortly after he left employment with the respondent. He continues with his involvement in football, training around four times a week.

Matters arising from the evidence

21. As can be seen I have derived much of my findings from the medical records produced in the case. The claimant did give oral evidence and I have no doubt that he was genuinely attempting to assist the Tribunal by giving truthful evidence as to matters as he saw them. The difficulty with his evidence was that he primarily spoke of his feelings and did not give any detailed evidence whatsoever as to the effect of his impairment on his ability to carry out day-to-day activities. The claimant spoke of feeling very low and stated that during the time of crisis in March and April he "really really wanted to kill himself". When he was specifically asked by his agent about the effect on his ability to carry out day-to-day activities he spoke in generalities about each day being a struggle. He said that he had difficulty getting out of bed in the mornings and washing himself and eating. There was no support whatsoever for these symptoms from the medical evidence. The medical records on the contrary talk about the claimant maintaining a good diet. The claimant also complained of being unwilling to engage socially, preferring to stay at home with his girlfriend. No detail whatsoever was provided in respect of this and again the medical records speak of the claimant attending football training several times per week.

22. The claimant said that he probably did not look depressed and stated that a doctor might think he was not depressed because he was "dialling it down in a way".

23. I accepted that the claimant appears to have undergone some sort of crisis in his mental health around March/April 2019 and accept his evidence that at points during that crisis he did genuinely wish to do himself serious harm. I also accepted that the medical treatment he received was effective in preventing him from doing harm. His evidence was to the effect that the conversations he had with the crisis intervention team at Carseview and in particular their suggestion that he ought to speak openly about the matters which were bothering him were of considerable

assistance to him. I note that they were sufficiently impressed by the progress which the claimant had made to discharge him on 24 April with no substantive follow up other than the neurology referral about his headaches.

5 **Discussion and decision**

24. Both parties made full submissions. They were in substantial agreement as to the relative law on the subject. The legal test is set out in section 6 of the Equality Act 2010 which states

"A person (P) has a disability if –

10 (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."

The parties were agreed that in applying the test I should be focusing on the relevant time being the period around 16 April 2019 when the claimant

15 was dismissed.

25. Clause 2 of Schedule 1 of the Equality Act 2010 states that an effect is considered long-term if it has lasted for 12 months or is likely to last 12 months. The word substantial in the definition is used as meaning something which is not trivial. The schedule also makes it clear at

20 paragraph 5 that an impairment is to be treated as having a substantial adverse effect if measures are being taken to treat or correct it and but for that it would be likely to have that effect.

26. In this case it was the claimant's position that the reason the claimant did not present to his GP practice prior to February 2019 was due to a coping

25 mechanism and in particular a belief that if he didn't tell anyone about the way he was feeling then it wasn't real. His position was that the claimant's impairment had a substantial effect because of the claimant's evidence that he struggled at the relevant time with waking up, personal care, getting ready and occasionally struggling with eating. He would rather be

30 alone with his girlfriend rather than in bigger social situations. The claimant's position was that I should regard the effects as being long-term on the basis that the claimant had told his GP in February that he had

been suffering from the feelings of depression for three years prior to this. It was the claimant's position that I should take into account the treatment which the claimant had received and the medication which he was on together with his coping mechanisms.

27. The respondent's position was that it was quite clear that at the relevant time the claimant's impairment had not lasted 12 months nor could it be said that it was likely that they would. Furthermore there was no substantial effect.

28. I note that the burden is on the claimant to show that he was disabled at the relevant time. In this case my view is that the claimant did not meet that burden. The claimant did have a mental impairment at the relevant time. This was diagnosed by the community mental health nurses on 28 March. The respondent's representative referred me to the well-known case of ***Morgan v Staffordshire University [2002] ICR 475***. I note that this case was based on the old law which required any mental impairment to be a well recognised illness. That is no longer part of the law. On the other hand I consider the suggestion in that case that in case of mental impairment one should look carefully at the medical evidence was still appropriate. In this case I note that there is no medical support whatsoever for any of the claimant's assertions about the substantial effects of his impairment. In any event the claimant's evidence regarding substantial effects was, as noted above, extremely scant. Many people find it difficult to get up in the morning. Many people prefer to stay at home with their partner rather than go out to large social situations. Many people sometimes do not like doing things such as looking after their personal hygiene. The claimant's own evidence was really saying no more than that internally he sometimes found these things problematic. He did not give any evidence about specific instances where these effects occurred. The medical evidence was that he did not appear from the outside to be other than a healthy young man who attended football training four times a week, ate healthily and had a good relationship with his partner which he valued.

29. I was invited by the claimant's representative to draw the inference that without the medication the claimant was on, his symptoms would be worse

and that accordingly I should apply paragraph 5 of schedule 1. I note that the claimant's GP refused to be drawn on this issue and specifically states in paragraph 6 of his letter that he cannot speculate as to what the claimant's symptoms would be if he ceased his medication. In those circumstances I am unable to draw the inference sought by the claimant.

30. The claimant's representative made the point that clearly having feelings of self-harm and acting on them was something which would have an effect on day-to-day activities and clearly there will be cases where an individual who presents externally as having no issues but where his internal turmoil leads to repeated acts of self-harm over a lengthy period of time might well be regarded as disabled. That is not the case here. The medical evidence suggests that the claimant went through a particular crisis. This may have been linked to many years of internal feelings but in my view that is not relevant. The claimant's own position is that he hid these feelings from others. He may have had a mental impairment but there were no "effects" of this on his ability to carry out day to day activities. His medical records refer to the onset in each case where he manifested his illness as being extremely sudden. He attended a short period of treatment and since then there has been no recurrence. In my view the claimant has not established on the basis of the evidence that he was disabled at the relevant time. Accordingly, the claim of disability discrimination must fail and is dismissed.

Employment Judge:	**Ian McFatridge**
Date of Judgment:	**20 February 2020**
Date sent to parties:	**20 February 2020**