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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100201/2022

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Held on 25 May 2022 by Cloud Based Video Platform

Employment Judge Neilson

Mr A Baledent

**Claimant
In person**

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Slice One Edinburgh Limited

**Respondent
Represented by Mr F
Molloy**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the claimant suffers from, and at the material time (in or about October 2021) he suffered from, a disability within the meaning of section 6 of the Equality Act 2010.

REASONS

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1. This was a preliminary hearing fixed for the specific purpose of determining whether the claimant was disabled within the meaning of section 6 of the Equality Act 2010 ("EA").

2. The claimant represented himself and gave evidence. The respondent was represented by Mr Finton Molloy, a litigation consultant. The respondents Head of Operations – Mr De Mar also gave evidence. There was a bundle of documents prepared and lodged by the respondent. That bundle included a Disability Impact Statement from the claimant (at pages 71 to 72) In addition the respondent produced a short video clip of the claimant and his daughter. All present were able to view that video clip and the claimant did not object to its use in evidence. In addition there was an Agenda for the Preliminary Hearing completed by the claimant.
3. In the course of giving evidence the claimant explained that he had sought medical evidence from his GP but his GP had failed, despite repeated requests, to provide it thus far. After conclusion of the CVP hearing the claimant sent to the Employment Tribunal by e mail at 17:37 on 25 May 2022 a copy of a letter from Dr Caroline Nelson from Slateford Medical Practice dated 13 April 2022 (“Slateford Letter”). The claimant stated in the e mail that he had only received the Slateford Letter that afternoon.
4. The Employment Tribunal sent a copy of the e mail and the Slateford Letter to the claimant and the respondents on 30 May 2022 and stated that they were minded to consider the Slateford Letter but subject to any further submissions from the parties and asked them to provide any additional written submissions within 7 days. The respondent was specifically asked to clarify to the Employment Tribunal, within the next 7 days (copied to the claimant), whether or not they wish to lead any further evidence or cross examine the claimant in respect of any matters relating to the medical statement (in either event consideration would be given to fixing a date for a further CVP hearing).
5. No further response was received from the claimant. The respondent’s representative responded on 14 June 2022 by letter objecting to the consideration of the Slateford Letter on the grounds that it would not be in keeping with the principles in the overriding objective. Specifically the respondents position was that (1) on 22 April 2022 Judge D’Inverno had expressly refused an application by the claimant for a further extension of

time to allow for receipt of a letter from the Slateford practice; (2) the hearing of evidence had been concluded earlier on 25 May and there was a need for finality in the litigation process; (3) there would be prejudice to the respondent in that the claimant had deliberately failed to disclose the Slateford Letter until after conclusion of the evidence and there would be further expense and delay if it was considered now as the respondent would want to cross examine the claimant on the letter – thus a further hearing would be required.

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6. The Employment Tribunal did not consider that there was any evidence to suggest that the claimant had deliberately failed to disclose the Slateford Letter at an earlier stage. The evidence would suggest that the Slateford Letter was not available until 25 May 2022– although dated 13 April 2022. The Employment Tribunal was satisfied that the claimant would have produced it an earlier stage had it been available. However the Employment Tribunal was also satisfied that there would be prejudice to the respondent in allowing this evidence to be received after the hearing had concluded and more importantly that it was not in the interests of justice to occasion further delay and cost by fixing a further hearing to conclude this matter. In particular the Employment Tribunal considered that there was sufficient evidence before it to allow it to determine the section 6 EA issue. Whilst medical evidence may be of assistance in many cases it is not a requirement that it be available in all cases in order for the Employment Tribunal to determine the section 6 EA issue. Whether or not medical evidence is necessary will depend upon the circumstances of each particular case. Accordingly the Employment Tribunal determined that it would not consider the contents of the Slateford Letter as part of the evidence for the purposes of the section 6 EA determination.

Findings in Fact

7. The claimant commenced employment with the respondent on 16 July 2021.

8. The claimant was employed as the manager of the respondent's pizza restaurant in Corstorphine, Edinburgh called West Slice ("the Premises").
9. The claimant's employment ceased on 30 October 2021 following an incident on 23 October 2021.
- 5 10. The claimant was not off sick whilst employed by the respondent.
11. The duties of the claimant consisted of the general day to day running of the Premises; hiring staff; sorting staff rota's; placing orders; cashing up and locking up of the Premises. From time to time the claimant would assist in dealing with customers – both those getting take away pizza and those sitting
10 in.
12. The maximum capacity of the Premises was 12 to 14 people seated with 4 to 6 persons waiting. There would be additional staff who were working. The Premises were one of the respondent's quieter premises.
13. The claimant had a good work ethic whilst working at the Premises.
- 15 14. There had been comments from three other staff members about the claimant's confrontational attitude prior to the incident on 23 October 2021.
15. The claimant was a patient of the Slateford Medical Practice. The claimant was diagnosed in about 2019 by a GP at the Slateford Practice as suffering from depression. Thereafter, in or about the first six months of 2020, the
20 claimant was diagnosed as suffering from social anxiety.
16. The claimant has difficulty communicating with other people and with his depression will have good days and bad days. On a bad day he struggles to get out of bed or to do anything.
17. The claimant has taken medicine for his condition. He has taken Prozac (60+
25 mg a day) or Effexor (approximately 300 mg a day). He also takes Molipaxine (100 mg a day).

18. The claimant has also received some psychological support including online Cognitive Behavioural Therapy (“CBT”) for approximately the last two years.
19. Whilst employed by the respondent the claimant was taking his medication and undertaking CBT.
- 5 20. The claimant lives with his wife and two children who are aged 8 and 12. The claimants wife takes care of the household chores as the claimant struggles, as a consequence of tiredness from his drugs to do any household chores.
21. The claimant finds work difficult – and can only work in small environments with limited interactions. However work does provide him with a helpful routine and he has been able to work in a quiet places with his medication and therapy.
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22. The claimant finds social situations challenging and avoids family gatherings and interactions. The claimant will avoid crowded places such as supermarkets, stores and restaurants. He finds it difficult to socialise or be in busy places.
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23. The claimant would go shopping at night when it was quiet. During the day he would ask others to go shopping for him.
24. In social situations the claimant is prone to panic attacks and outbursts. With his treatment he manages to control the physical symptoms and this allows him to deal with general social situations – but he finds it hard to control himself if he becomes involved in an argument.
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25. The claimant has found that with medication, CBT and counselling he was able to go to work and to deal with social situations to some extent. However he found CBT and counselling less effective than the medication.
- 25 26. The claimant had attempted to obtain a medical report from the Slateford Medical Practice at various stages prior to the hearing on 25 May. He was charged £150 which he has paid. On complaining about the delay the claimant was told that the practice were busy. He spoke to them on 24 May

2022 and was told that the report would be sent out as soon as they could – but they told him they did have 11,000 patients and only 6/7 doctors.

Submissions

- 5 27. The claimant put forward his evidence and the Disability Impact Statement as his support for the position that he had, at the material time, a disability in terms of section 6 of the EA.
28. For the respondent Mr Molloy relied upon his written submissions in terms of which he addressed the four essential questions (Goodwin -v- Patent Office 1999 ICR 302):-
- 10 28.1 Does the person have a physical or mental impairment? (First Question)
- 28.2 Does the impairment have an adverse effect on their ability to carry out normal day to day activities? (Second Question)
- 28.3 Is that effect substantial? (Third Question)
- 28.4 Is that effect long term? (Fourth Question)
- 15 29. In relation to the First Question the respondent accepted that in considering whether or not there was a physical or mental impairment, in the absence of medical evidence, the Employment Tribunal should focus upon the effect the impairments had on the claimant's day to day activities and whether he had a long term condition. Although the respondent did suggest that a negative
- 20 inference should be drawn from the absence of any medical records.
30. In relation to the Second Question the respondent submitted that the evidence did not show an adverse effect. Specifically he did spend time with his family; he worked in a busy restaurant; he went shopping; he was not off ill at any time; there was no evidence of other outbursts or panic attacks.
- 25 31. In relation to the third question the respondent submitted that the claimant could do the activities that he alleged he could not – but insofar as there were any adverse effects these were minor or trivial. In relation to any treatments the respondent asked that the Employment Tribunal take into account the

techniques and benefits C would have received from CBT treatment up until the relevant date and its continued effects after treatment being stopped.

32. In relation to the Fourth Question the respondent invited the Employment Tribunal to draw an inference that the absence of the medical records suggested that these records were likely to support the respondent's position that the claimants impairment was not long term – and that in any event there was no medical evidence to support the claimant's case that it was long term.

The Law

33. Section 6 of the Equality Act 2010 ("the EA") states "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."

34. In determining the issue under Section 6 of the EA the Employment Tribunal should set out its conclusions on impairment and adverse effect separately. However in reaching those conclusions, the Employment Tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings – *J -v- DLA Piper UK Limited 2010 IRLR 936*.

35. The Tribunal also had reference to the "Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)", a statutory code issued under section 6(5) of the 2010 Act. Although the Guidance does not impose any legal obligations in itself, nor is it an authoritative statement of the law, it is stated that "any adjudicating body which is determining for any purpose of the Act whether a person is a disabled person must take into account any aspect of this guidance which appears to it to be relevant".

36. Schedule 1 of the EA provides further assistance in determining the meaning of disability. Paragraph 2 of Schedule 1 states that the effect of an impairment is long term if it has lasted for at least 12 months, or is likely to last for at least 12 months, or is likely to last for the rest of the life of the person affected.

5 37. In addition paragraph 5(1) of Schedule 1 of the EA 2010 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 (a) measures are being taken to treat or correct it, and (b) but for that, it would be likely to have that effect.”

10 **Discussion & Decision**

38. The Employment Tribunal considered that the claimant was a credible witness and accepted that he had attempted to obtain medical evidence from the Slateford Medical Practice but that they had not provided that evidence to him at the time of the hearing. Against that background the Employment
15 Tribunal did not consider that there was any inference, adverse or otherwise, to be drawn from the failure by the claimant to provide the medical evidence.

39. On the issue of adverse effect the claimant gave evidence about the impact that his depression and social anxiety had on his day to day activities both in his evidence before the Employment Tribunal and in his Disability Impact
20 Statement. These might be summarised as the claimant finding social and family interactions challenging (suffering from panic attacks); avoiding busy places; doing shopping at night; only being able to work in small work environments. The respondent in submissions stated that the evidence disclosed that the claimant did spend time with his family; he worked in a busy
25 restaurant; he went shopping; he was not off ill at any time; there was no evidence of other outbursts or panic attacks.

40. On examining the evidence it was clear to the Employment Tribunal that the evidence of spending time with his family was a video of the claimant with his daughter. The claimant’s position was that the video showed the claimant and
30 his daughter on a deserted beach – he would not class that as socialising.

5 With regard to the issue of work there was some dispute about the size of the restaurant and how busy it was. Mr De Mar described the site as one of the respondent's quieter sites and whilst the Employment Tribunal accepted that the claimant clearly did have to interact with customers and staff at the site this was consistent with his position that his medication and therapy helped him to work in a smaller environment. On the issue of shopping there was no evidence from the respondent to contradict the claimant's evidence that when he did shop it was at night to avoid crowds. There was also evidence that there had been some previous issues in the workplace with complaints about the claimants conduct – so it was not entirely accurate for the respondent to say there was no evidence of other issues relating to his disability.

10 41. The Employment Tribunal was satisfied that there was evidence of adverse impact upon the claimant's ability to carry out normal day to day activities, which would include social interactions with family and friends and in a work environment and being in crowds.

15 42. On the issue of whether or not the adverse effect was substantial it did appear to the Employment Tribunal that the effect of the medication and the CBT that the claimant was taking did allow him to function in the workplace reasonably effectively given the demands of the job and the social interactions that were required as part of the role. However it is necessary to consider paragraph 20 5(1) to Schedule 1 EA and the extent to which, but for the measures, the impairment would be likely to have that effect. Based on the evidence from the claimant the Employment Tribunal was satisfied that without the measures of the medication and therapy, it was likely that the claimant would have been unable to work in the respondent's workplace and to maintain the level of social interactions necessary for him to either work in any crowded environment or to undertake social interactions with a larger group of people – and that accordingly the adverse effect was substantial.

25 43. On the issue of long term effect this has to be determined at the relevant time – which in this case is October 2021. To be long term it has to have lasted for 30 12 months or be likely to last for at least 12 months. The respondent submits

that a negative inference can be drawn from the failure of the claimant to provide medical evidence to substantiate that it was a long term impairment. As set out above the Employment Tribunal does not consider that it is appropriate to draw any inferences from the failure to have any medical evidence before the Employment Tribunal. In giving his evidence the claimant could not remember exactly when he was diagnosed with depression and social anxiety. His recollection was that he was diagnosed with depression more than 3 years ago, in 2019. With regard to social anxiety his recollection was that he was diagnosed with that condition in 2020 – either just before or just after the start of the first covid pandemic lockdown (March 2020). He was taking medication for these conditions and was receiving therapy as at October 2021. Based on the evidence of the claimant (and the Employment Tribunal considered his evidence credible) and in the absence of any other evidence the Employment Tribunal accepts that, as at October 2021, his condition had lasted for at least 12 months.

44. Finally having heard the evidence from the claimant, and in the absence of any medical evidence, the Employment Tribunal had to determine if there was a physical or mental impairment. In light of the evidence as regards adverse effect and the evidence from the claimant regarding a diagnosis of depression and social anxiety the Employment Tribunal was satisfied that there was a mental impairment – namely depression and social anxiety.

45. Accordingly it is the decision of the Employment Tribunal that at the relevant time in October 2021 the claimant was suffering from a disability within the meaning of Section 6 of the EA.

Employment Judge: Stuart Neilson
Date of Judgment: 28 June 2022
Entered in register: 28 June 2022
and copied to parties