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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000628/2023

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**Preliminary Hearing
Held in Edinburgh
on 3 June 2024**

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Employment Judge A Jones

Mr J McKenzie

**Claimant
In person**

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Scottish Ambulance Service

**Respondent
Represented by
Mr Fletcher, solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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1. The claimant was at the material time a disabled person for the purpose of section 6 Equality Act 2010 by reason of a mental health condition of anxiety and depression.
2. The respondent's application that the claimant's claim of unfair dismissal be struck out or that the claimant be required to lodge a deposit to continue that claim is refused.

E.T. Z4 (WR)

3. The case should be listed for a final hearing in person in Edinburgh before a Tribunal sitting with members on 16, 17 and 18 September 2024.

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Reasons

Introduction

1. The claimant lodged a claim of unfair dismissal and disability discrimination.
10 The respondent accepts that the claimant was a disabled person at the material time as a consequence of being in remission from the condition of head and neck cancer. The claimant argues that he was also suffering from a mental health condition at the material time of anxiety/depression/PTSD which arose at least in part as a consequence of the claimant's recovery
15 from cancer. The respondent did not accept that the claimant was a disabled person by reason of a mental health condition and in the alternative indicated that the respondent was not and could not reasonably have been aware of such condition.
2. The case had been listed for a final hearing to commence today. The
20 respondent made an application on 2 May that the final hearing be cancelled and that a hearing on the question of disability status and also whether the claimant's claim of unfair dismissal should be struck out or the claimant be required to lodge a deposit in order to continue with that claim be listed. That application was renewed on 20 May. The respondent
25 indicated that it had not as yet received the claimant's medical records. The claimant wrote on 20 May indicating that he had only just received his medical records and objected to the respondent's application. He provided the respondent with those records.
3. On 23 May the respondent renewed its request and indicated that the they
30 had only just received 176 pages of medical documentation and that therefore they would not be in a position to proceed with the final hearing.
4. The final hearing was therefore postponed and a preliminary hearing was fixed to deal with two preliminary matters:

- i. Was the claimant a disabled person for the purposes of section 6 Equality Act 2010 by reason of a mental health condition and if so did the respondent have knowledge of that fact and,
 - ii. Did the claimant's claim of unfair dismissal had no or little prospects of success.
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5. The respondent sought to raise issues of time bar in submissions at the conclusion of the hearing, but this was not a matter the notice of hearing indicated would be dealt with at this hearing and therefore this issue was not discussed further. It would of course be open to the respondent to raise issues of time bar at the final hearing.
6. The Tribunal heard evidence from the claimant. A bundle of documents was lodged and reference was made to a small number of documents therein. The respondent helpfully provided a written skeleton submission.

Relevant law

7. Section 6 Equality Act 2020 ('EA') provides that person has a disability if he or she has a physical or mental impairment and that impairment has a substantial and long term adverse effect on the person's ability to carry out normally day to day activities. Substantial means more than minor or trivial. There is also statutory guidance which should be taken into account where appropriate.

Findings in fact

8. Having been referred to documents and listened to the claimant's evidence and submissions from the respondent, the Tribunal found the following facts to have been established.
9. The claimant is in remission from stage IV cancer.
10. The claimant suffers from anxiety and depression and believes he may suffer from PTSD but has not been diagnosed with any specific mental health condition.

11. The claimant took medication for a short period to help with his condition but does not like taking medication and wished to develop coping strategies.
12. The claimant's condition means that he does not generally socialise.
13. The claimant does not eat out in public. He can only eat in front of family and friends where adjustments have been made. In particular he will eat only from a side plate. He has little appetite and often forgets to eat all day. He has significant difficulty eating and swallowing.
14. When the claimant is feeling down, he will not leave his house other than to walk his dog. He has no hobbies. While he used to play music in public he has not been able to do so although hopes to be able to do so in the future.
15. The claimant obtains support from an online group of cancer survivors with whom he exchanges coping strategies and advice. He received support from volunteers at Maggie's centre in Edinburgh for a period.
16. The claimant attended his GP on 22 July 2022 when he reported 'long struggle with bouts of low mood & anxiety, sounds like much worse since cancer Rx in 2018....If not at work then doesn't really leave house other than to walk the dog. Chronic poor appetite'
17. The claimant was referred to a mental health nurse whom he saw on a number of occasions. He found these consultations helpful in developing coping strategies.
18. The claimant was referred for a psychological assessment at some point in 2022 but is still on a waiting list for that assessment.
19. The claimant does not sleep properly and naps for an hour or two at a time at most.
20. The claimant engaged with Salus, an occupational health service provided by the respondent in December 2021. At that time, he scored 13 and 14 on the HADS scale for anxiety and depression respectively.
21. The claimant had a meeting with his line manager on 6 March 2023. The line manager emailed a summary of the meeting to the claimant the following day which stated: "As discussed, you opened up about your mental health journey and that you are usually aware of your triggers and can manage your symptoms, however over the past 4-5 years, you have struggled to determine your triggers. You confirmed that you are safe and

not currently suicidal. You have been reviewed and triaged by the Forth Valley Mental Health team and deemed 'safe' at present, however you are on a lengthy waiting list to be reviewed by the Psychiatry team in Forth Valley. I have suggested that you may find it beneficial to link back in with the mental health team at your local GP for support and guidance. You had advised they previously wanted to place you on medication for your anxiety, however you declined as this would affect your nightshifts."

22. Thereafter the claimant was referred to occupational health by the respondent to answer specific questions.

23. A report was completed by an occupational health doctor on 1 June 2023.

The report responded to the question "Can you detail any diagnosed health conditions that Jez has, how long they have had them, their symptoms, treatment, prognosis?" by stating "This question relates to confidential health information. Mr McKenzie has follow-up in place with an appropriate specialist following treatment for a declared health conditions, He was seen by his specialist this year and hopes to be discharged from regular follow-up in the next few months with a favourable prognosis. We discussed a possible diagnosis associated with psychological symptoms. Mr McKenzie confirmed he has linked in with appropriate NHS services to address related symptoms. My view is that the proposed input is likely to be of benefit once accessed. Associated symptoms are not currently impacting on work fitness or ability to meet requirements of his training programme in my opinion." In response to the question "Is there any further support that SAS could offer Jez at this time?" the report indicated "If Mr McKenzie wishes to continue with technician training, I would suggest that you arrange to meet with him to discuss the reported issues with a portfolio submission and agree a plan to address relevant factors to avoid further associated stress."

Discussion and decision

Was the claimant a disabled person?

24. In the first instance, the Tribunal determined whether the claimant has an impairment. The claimant suffers from anxiety and depression. He has

difficulty eating and swallowing and eats mainly liquids. His difficulties in eating cause him to lose weight which cause him further difficulty in eating. He often forgets to eat until late in the day. He doesn't sleep more than an hour or two at a time. He does not socialise and will during some periods
5 only leave the house to walk his dog.

25. It is the effect of an impairment, not its cause which is of importance. The claimant's position is that he suffers from a mental health condition which causes him anxiety and depression and that he may suffer from PTSD. He has not been diagnosed with any particular condition, and has been waiting
10 for some time for an assessment. His condition at least in part derives from or has been exacerbated by his cancer diagnosis and the stress of living with cancer. He indicated it was difficult to unpack his mental health difficulties from his cancer and treatment for that cancer.

26. The Tribunal accepted that while the claimant has not been diagnosed with
15 any particular mental health condition, he does suffer from an impairment in relation to his mental health in that he has significant difficulty in eating and sleeping, and is not able to socialise. He had sought to develop coping strategies in order to deal with his condition and while he does not take medication at present, he does take part in a support group with other
20 cancer survivors. These impairments were apparent during the claimant's employment with the respondent and while he indicated that he has improved somewhat having obtained alternative employment, clearly continued for at least a year and were therefore long term.

27. The claimant has been seeing his GP and/or a mental health nurse on and
25 off since 2022 regarding his mental health. The condition has a long term adverse impact on the claimant's ability to perform normal day to day activities. Eating and sleeping are normal day to day activities. The Tribunal accepted that the claimant had only had two occasions of absence during his employment for anxiety or depression. However, that does not take into
30 account the claimant's coping mechanisms or the impact coping with work was likely to have on his mental state. The fact that the claimant has been able to attend work does not mean that he cannot also be a disabled person for the purposes of the EA. Although the respondent appeared to suggest

that the work environment was crucial for assessing the question of disability, this is not accurate. The work environment and the activities performed there may be relevant to the assessment of whether or not a person is disabled but it is by no means conclusive. Every case has to be considered on the basis of the facts presented.

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28. In these circumstances, the Tribunal was satisfied that while the claimant had not received any formal diagnosis, he did have a mental health condition which amounted to an impairment, which caused him significant anxiety and depression which severely impacted upon his ability to eat, sleep and socialise and as such he had the protected characteristic of disability in terms of section 6 Equality Act 2010 throughout his employment with the respondent.

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Respondent's knowledge

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29. The respondent's secondary argument was that it did not and could not reasonably have known that the claimant was so disabled. That argument is simply unsustainable. The claimant's line manager makes reference to the claimant not being at present suicidal. It is clear that the claimant was open with his line manager regarding his mental health challenges. The Tribunal accepted the claimant's unchallenged evidence that he and his line manager discussed both their challenges in terms of mental health and 'traded war stories' and discussed the benefits of a particular form of medication. In addition, the occupational health report makes reference to a possible diagnosis of a mental health condition. The claimant has also interacted with Salus which gave his scores in terms of the HADS scale.

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30. The Tribunal did not accept that the respondent was not or could not reasonably be aware of the claimant's disability in those circumstances. The respondent did not refer the claimant for an assessment as to whether he did suffer from any particular conditions, but simply asked the occupational health doctor what conditions the claimant had been diagnosed with. The doctor flagged that there was a possible diagnosis that the claimant was waiting for but the respondent took this no further. Given this, the HADS scores of the claimant and the discussion with the claimant's line manager,

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the respondent knew or ought reasonably to have known that the claimant was a disabled person.

Strike out application

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31. In terms of the strike out application, the Tribunal was of the view that this could not succeed. The striking out of a claim is a draconian step. The claimant is unrepresented. The respondent's position was because the claimant had indicated that he would not continue completing his portfolio which would allow him to qualify for his role, he could not succeed in a claim of unfair dismissal. The claimant's position is that while he accepts that he indicated he would not continue with his portfolio, this was on the basis that he had not been given the assistance he had asked for on a number of occasions in terms of consistency of supervisor. His position is that he was not wilfully refusing to do so but simply could not do so having asked and been refused the accommodation he was seeking on a number of occasions.

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32. The claimant's position is that he was seeking redeployment from the respondent. The respondent's position appeared to be that it was not obliged to consider redeployment and therefore this could not found a claim of unfair dismissal. The Tribunal found this submission to be unsustainable. While it may well be the case that a failure to offer redeployment did not render the claimant's dismissal unfair, it would be necessary to hear evidence on this point before reaching a conclusion. The Tribunal rejected the respondent's submission that such a failure could have no bearing on the fairness of a dismissal.

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33. The Tribunal was of a similar view in relation to the suggestion that the claimant's claim had little prospects of success. It would be necessary to hear evidence on the issue of redeployment in order to determine this issue. Therefore the Tribunal could not say that the claimant's claim of unfair dismissal had no or little prospects of success.

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Further procedure

5 34. In these circumstances the case should be continued to a final hearing
before a Tribunal sitting with members on 17, 18 and 19 September. If
parties are of the view that additional or less days are required for a final
hearing or that there are any witnesses whose evidence cannot be
accommodated within that period, they should inform the Tribunal as soon
as possible.

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Employment Judge:	A Jones
Date of Judgment:	05 June 2024
Entered in register:	06 June 2024
and copied to parties	06/06/2024

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