



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant** **Respondent**  
Mrs Katarzyna Gotlib AND Samworth Brothers Limited t/a Tamar Foods

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT** Plymouth **ON** 5 May 2017

**EMPLOYMENT JUDGE** N J Roper

### Representation

**For the Claimant:** In person, assisted by her husband Mr M Gotlib  
**For the Respondent:** Mr C Finlay, Solicitor, Head of Legal Services

### JUDGMENT

The judgment of the tribunal is that:

1. The claimant was a disabled person with effect from late April 2016;  
and
2. The claimant's claim in respect of alleged failures by the respondent to make adjustments on her return to work in February 2016 is dismissed.

### RESERVED REASONS

1. This is the judgment following a preliminary hearing to determine whether the claimant was a disabled person at the material times, and whether (and if so when) the respondent knew of the claimant's disability.
2. I have heard from the claimant. For the respondent I have heard from Mr Mark Deeley. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence,

both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

3. The claimant who is of Polish national origin worked for the respondent food manufacturer as an operative from 5 October 2014 until her dismissal for gross misconduct on 19 July 2016. In November 2014 the claimant and her husband together with three other employees raised a complaint of harassment against a colleague Mr T Chudziak, as a result of which he was issued with a final written warning but allowed to return to work. The claimant and her husband appear to have felt that this matter was not resolved satisfactorily, and there was a difficult working relationship with some colleagues. On 6 November 2015 the claimant raised a further complaint to the effect that she had been assaulted by a supervisor namely Mr Z Dziurdzik. She was then absent on certified sick leave until 20 November 2015. The ensuing investigation led to disciplinary proceedings against the claimant to determine whether she had fabricated the allegation and left the respondent's site without permission, for which she was ultimately dismissed. The claimant was suspended on full pay in mid April 2016, and Mr Deeley commenced the disciplinary investigation at that stage. He subsequently took the decision to dismiss her on 19 July 2016.
4. The claimant has brought two claims of disability discrimination. The first is an allegation that the respondent failed to make two reasonable adjustments when she returned to work on 20 February 2016. The second is one of direct disability discrimination namely that Mr Deeley failed to carry out an appropriate disciplinary investigation against her because she is disabled. Mr Deeley's investigation ran from mid April 2016 until her dismissal on 19 July 2016. The disability on which the claimant relies is a depressive illness.
5. The claimant has claimed in her evidence that from November 2015 and the alleged assault she was wholly debilitated by her mental illness of depression and unable to leave her room during the day. She suggests that she had "vulnerable mental health" before that, but it was the events of November 2015 that left her incapacitated. However, this evidence is not consistent with the medical evidence and her actions at that time.
6. The claimant's medical records do not give any indication that she had suffered from any mental health condition before November 2015. The claimant attended work between 6 and 19 November 2015. During this time she worked on without complaint, and judging from her Facebook entries appears to have enjoyed a normal social life, including enjoying her birthday celebrations on 13 November 2015. She then commenced a period of certified sickness absence on 20 November 2015. The reason given for her absence was an injury to her back, and there is no suggestion or evidence of any mental health impairment until 3 December 2015.
7. The claimant complained of work related stress to her GP and was prescribed an antidepressant on 3 December 2015. She also attended the respondent's occupational health department on 4 December 2015. Dr Parker reported that she was tearful and distressed and that "the psychological fallout from this incident is likely to be more long-standing". He advised that the claimant was likely to improve, but that this was likely to take a minimum of four to six weeks. There was no suggestion at that stage of any long-term mental illness.
8. On 8 January 2016 the claimant attended at the respondent's premises to hand in her sickness certificate. She had a meeting with the respondent's HR department and made no mention of any mental health condition. The claimant was then certified as being fit to return to work with effect from 20 February 2016, which was two days after her prescription for the antidepressants had expired.
9. The claimant returned to work at that time, and resumed her normal duties. Between the period from her return to work on 20 February 2016, and her suspension on 10 April 2016, the claimant worked normally and satisfactorily. She was not prescribed antidepressants and did not have any need to visit her GP. She appeared to continue to live a normal life both at home and at work. She made no complaint to the respondent about any mental health impairment.

10. The claimant then attended the disciplinary hearing on 26 April 2016. She became visibly upset during this hearing and it was therefore adjourned by Mr Deeley. She visited her GP later that day (which was her first appointment since 20 January 2016) and her GP prescribed antidepressants again. The respondent then obtained a report from its occupational health nurse. That report dated 28 April 2016 noted that she had seen her GP and was on medication and had been advised to attend counselling sessions. The report recommended a further report from the claimant's GP. That subsequent GP's report in June 2016 confirmed that the claimant was suffering from anxiety and was being assessed by counselling agencies and continued on her medication. The claimant's condition appears then to have deteriorated, and she remained on certified sick leave up to and including her dismissal in July 2016.
11. Having established the above facts, I now apply the law.
12. The claimant alleges discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. As confirmed in the case management order dated 8 March 2017 the claimant alleges direct disability discrimination, and a failure by the respondent to comply with its duty to make adjustments.
13. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
14. As for the claim for direct disability discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
15. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
16. Under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) ... that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.
17. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
18. I find that the claimant was a disabled person by reason of her mental health impairment of depression, but only with effect from the end of April 2016. At that stage the claimant suffered from a mental impairment which had a substantial adverse effect on her ability to carry out day-to-day activities, in the sense that these were not minor or trivial. It was only at that stage that the condition could be said to have become long-term in the sense that it had lasted or was likely to last for at least 12 months. The respondent concedes that the claimant was disabled from this time, and also accepts that it knew or ought reasonably to have known that the claimant was so disabled from this time. This follows

- from her condition during the disciplinary hearing on 26 April 2016, and the subsequent occupational health reports.
19. However, I do not accept that the claimant was a disabled person in February 2016 when she returned to work. There is no persuasive evidence that the claimant was suffering any substantial adverse affect on her ability to carry out day-to-day activities. The claimant was certified as fit to return to work and was no longer prescribed medication. Between the period from her return to work on 20 February 2016, and her suspension on 10 April 2016, the claimant was not prescribed antidepressants and did not have any need to visit her GP. She appeared to continue to live a normal life both at home and at work. She made no complaint to the respondent about any mental health impairment. The claimant simply does not meet the statutory definition of a disabled person during this time.
  20. Accordingly, at the time that the claimant alleges the respondent failed to make reasonable adjustments, namely on her return to work in late February 2016, she was not a disabled person. The statutory duty to make adjustments does not therefore arise. I therefore dismiss this aspect of the claimant's claims. Even if the claimant were disabled at that time, in that the condition could be said to be likely to have lasted 12 months from then, and was having a substantial adverse affect on some day-to-day activities, the respondent could not have known this. The respondent could not be said to have known, nor ought reasonably to have known, that she was disabled. Again, for this reason the statutory duty to make adjustments did not arise. I would also have dismissed this aspect of the claimant's claims for this reason as well.
  21. On the other hand the claimant was disabled, and the respondent knew of the disability, during the disciplinary process which led to the claimant's dismissal. Her remaining allegation of direct disability discrimination, namely that Mr Deeley failed to deal with the disciplinary investigation appropriately because she was disabled, can proceed to be determined at the forthcoming full main hearing. Further case management orders will now follow to ensure that the parties are fully prepared for that hearing.

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Employment Judge N J Roper  
Dated 5 May 2017

Judgment sent to Parties on

10 May 2017