



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Ms O Khorochilova**

**v**

**Euro Rep Ltd**

## OPEN PRELIMINARY HEARING

**Heard at:** Watford

**On:** 1 March 2018

**Before:** Employment Judge Wyeth

**Appearances:**

**For the Claimant:** Mr P Curry, Friend.

**For the Respondent:** Mr A Mellis, Counsel.

**JUDGMENT** having been sent to the parties on 14 March 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

### The issues

1. Following a preliminary hearing before Employment Judge Smail on 28 July 2017 this matter was listed for a further open preliminary hearing to determine two issues: "(a) whether the claimant has pleaded a claim of disability discrimination which has reasonable prospects of success; (b) whether the claimant was a disabled person at all relevant times; the claimant relies on Mixed Personality Disorder".
2. It was agreed at the outset of the hearing that the sensible way forward was to determine the second issue first because the claimant would need to establish that she was a disabled person before she could proceed with any disability discrimination claim regardless of potential prospects of success.
3. The claimant's own case, as advanced before me today, was that before her dismissal there were no irregularities in relation to her situation specifically with regard to depression and anxiety. The claimant was not seeking to advance that she was suffering an impairment of depression and/or anxiety prior to her dismissal from employment by the respondent. The claimant accepts that she suffered the onset of depression and anxiety

post her dismissal. She says this was a symptom that arose from an adverse reaction to her dismissal that occurred because she suffered from the asserted condition of Mixed Personality Disorder. The claimant confirmed that evidence of the existence of anxiety and depression related to a period post dismissal. Accordingly, it is the claimant's own position that she does not rely on anxiety and depression as part of her case.

### **Procedure**

4. I heard evidence from the claimant in person who also called two witnesses in support of her case, Mr Terrance Shelley and Mr Peter Curry. All three witnesses provided witness statements in advance. Mr Curry explained that he had assisted the claimant in preparing those statements for the purposes of today's hearing. The statements of two of those witnesses were included in an agreed bundle of documents before me totaling 92 pages. The claimant's statement was at pages 53-54, along with a supplementary statement of three pages at 55-57. Mr Curry's statement was included in the bundle at pages 58-59. Mr Shelley's statement was provided independently of the bundle.
5. I took time to carefully read all the statements provided and give proper consideration to the content of the documentation in the agreed bundle ("the Bundle"). References to page numbers below refer to those of the Bundle.
6. Evidence in chief was given by way of those written statements after each witness was sworn in. I sought clarification from the claimant and each of her witnesses whether there was anything further they wanted to add to those statements. Each witness confirmed that they were satisfied that their statements were complete and required nothing to be added or clarified.
7. The respondent was represented by counsel, Mr Mellis who did not consider it necessary to cross examine the witnesses in relation to their evidence. The case was predominantly dependent upon submissions by reference to the available evidence.

### **The Law**

8. Given that Mr Curry was not legally qualified, at the outset I explained to him and the claimant what law I had to consider in this case. I read section 6 of the Equality Act 2010 ("the Act") to the parties and I also explained that I had to take into account guidance within the 2011 Code referred to below.
9. I was grateful to Mr Curry for confirming that he was already familiar with both the relevant sections of the Act and the guidance within the 2011 Code, notwithstanding my own explanation.
10. Under section 6(1) of the Equality Act 2010 ("the Act"), a person has a disability if she has a physical or mental impairment which has a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities.

11. In essence, there are four separate questions to be determined:
  - 11.1. Did the claimant have a mental and/or physical impairment? [the latter is, of course, not relevant in this case] (the 'impairment condition');
  - 11.2. Did the impairment affect the claimant's ability to carry out normal day to day activities? (the 'adverse effect condition');
  - 11.3. Was the adverse condition substantial? (the 'substantial condition'); and
  - 11.4. Was the adverse condition long term? (the 'long term' condition).

The above questions should be posed sequentially and not together (Goodwin v Patent Office [1999] ICR 302 EAT; J v DLA Piper UK LLP [2010] ICR 1052 EAT).

12. Part 1 of Schedule 1 of the Act provides supplementary provisions for determining whether a person has a disability. In particular, under paragraph 2(1), an impairment will be long-term if it has lasted or is likely to last for at least 12 months. Furthermore, under paragraph 5(1), an impairment is to be treated as having a substantial adverse effect described in s6(1) if measures (which includes medical treatment – para 5(2)) are being taken to treat or correct it, and but for that, it would be likely to have that effect.
13. The time at which to assess the disability question and whether any impairment has a long-term effect (the material time) is the date of the alleged discriminatory act (Cruickshank v VAW Motorcast Ltd [2002] ICR 792).
14. In addition, this tribunal is obliged under paragraph 12 of Part 2 of Schedule 1 to take account of the content of "Guidance on matters to be taken into account in determining questions relating to the definition of disability 2011" (here after referred to as "the Guidance") which came in to force on 1 May 2011, having been issued in accordance with s6(5) of the Act.
15. The Guidance emphasises at paragraph B9 that it is important to focus upon what a claimant **cannot do or can only do with difficulty** rather than what a claimant can do.
16. In accordance with B7, account should be taken of how far a person can reasonably be expected to modify their behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities as this may or may not alter the effects of an impairment to such an extent that they are no longer substantial.
17. B12 of the Guidance states that the Act provides that where the impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context "likely" should be

interpreted as meaning “could well happen”. The practical effect of this provision is that the impairment should be treated as having the effect that it would have had without the further measures in question.

18. Paragraph C2 of the Guidance also provides relevant guidance in this case. It states that the cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect for the purposes of meeting the definition of a disabled person. The substantial adverse effect of an impairment which has developed from, or is likely to develop from another impairment should be taken into account when determining whether the effect has lasted or is likely to last at least 12 months or for the rest of the life of the person affected. There is a helpful example given in the code of a man who experiences an anxiety disorder which had a substantial adverse effect on his ability to make social contacts and to visit particular places. The disorder lasted for eight months and then developed into depression which had the effect that he was no longer able to leave his home or go to work. The depression continued for five months. As the total period over which the adverse effects lasted was in excess of 12 months, the long term element of the definition of disability was met.
19. The Appendix to the Guide provides helpful guidance in relation to what might or might not amount to a substantial adverse effect. It contains numerous examples of effects (that should be thought of as if they were the only effect of the impairment) that, if occurring, would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities.

### **Evidential findings of fact**

20. I had before me a psychiatric report by Dr Schuff, Consultant Psychiatrist, prepared in 2010 (no specific date is identified in the report). Despite being prepared over seven years earlier, the claimant relied on that report (along with other evidence) for the purposes of demonstrating that her condition amounted to a disability as defined by the Equality Act 2010. The respondent elected not to seek any medical evidence of its own or engage in any evidence gathering in relation to the claimant's medical condition.
21. I have no reason to doubt the accuracy of that report and to the extent necessary I regard its content as factually accurate. According to that report, there was an assessment of the claimant carried out in July/August 2010 by Dr Schuff. He noted the following at paragraph 1.1.1 (page 67):

“During my direct contact with Miss Sukonkin [the claimant] and when observed by other MFS assessment team members during the assessment period over 6 months, Miss Sukonkin did not show any signs or symptoms suggesting that she is suffering from mental illness.”

22. At paragraph 1.1.2 he states:

“Her past mental states and quality of personal/inter-personal functioning as reported by herself and by Dr Masum Khwaja, Consultant Psychiatrist (28 April and 24 August 2009) and Dr Steven Halford, Clinical Psychologist (30 April 2009) do not seem to support the likelihood of Miss Sukonkin having suffered

from mental illness in the past.

After initial thoughts that she might suffer from a long standing depressive illness including a phase of post-natal depression longitudinal and multi-disciplinary observations by the West End Team more and more emphasised the psychological/personal/reactive/contextual nature of her problems.”

23. At paragraph 1.2.1 he says:

“Although my own impression and that of my colleagues of the West End CMHT point towards considerable, ongoing personality disfunction with intermittent serious crises, neither my colleagues nor I have given Miss Sukonkin a diagnosis of Personality Disorder.”

24. At paragraph 1.2.2 he says:

“From my point of view though she functionally fulfils the diagnostic criteria for Personality Disorder, as there is no reliable evidence for the presence of a developmental aspect required for making such a diagnosis (problems having started at least in adolescence, if not earlier) it is not save [*sic*] to formally make it.”

25. At paragraph 1.2.3 he says:

“Thus I will refer here to ‘problematic personality traits’ which would otherwise be contained in the category of Mixed Personality Disorder, particularly covering features listed under the subgroups of borderline, emotionally unstable, histrionic and narcissistic personality disorder.”

26. That is the diagnosis upon which the claimant relies. In essence, Dr Schuff, as expert psychiatrist concludes that the claimant has problematic personality traits.

27. Turning to some of the observations that he makes in relation to treatment pertinent to the question of disability, at paragraph 3.1.1 of the report (p70) Dr Schuff confirms that in the past the claimant had been treated with antidepressant mood stabilizing medication (Venlafaxine and Mirtazapine) which seemed to have had no more than marginal effects on regulation of her emotions. Despite being past treatment, the expert continues by stating:

“Given her problems this type of medication is not necessarily helpful or needed.”

28. Accordingly the expert indicated that prescribed medication was not necessarily helpful or needed to assist her with any condition she may have.

29. Paragraph 3.1.3 Dr Schuff further states:

“I would not see medication with psychotropic drugs as essential and pragmatic use thereof might best be reserved for crises management on a very temporary basis.”

30. I consider the above aspects of the report to be very relevant in this case.
31. The claimant, in her witness statement, indicated that she had access to an anxiolytic drug (Afobazole/Fabomotizole) which she says was supplied from Russia. When I asked the claimant about this, she stated that she used it sporadically and temporarily for when she suffered bouts of anxiety and that it was not used to control any apparent Mixed Personality Disorder.
32. As I have already recorded above, through Mr Curry, the claimant's unequivocal position was that she was not relying on anxiety and depression as a relevant disability in respect of her claim. Nevertheless, for completeness I considered the matter of her anxiety and depression in case it might have been of relevance.
33. I had before me the claimant's GP records from 24 September 2015 to 7 September 2017. Save for my observations in paragraph 38 below, again, like the content of Dr Schuff's report, I have no reason to doubt the accuracy of those records and to the extent necessary I regard the content as factually accurate for the purposes of determining the issue of disability. A Summary Patient Record existed at the start of the records (p72). The claimant confirmed that the drugs that she was prescribed for a period dating back to around June 2016 are summarised in a table on that page. According to that record, the claimant had not been prescribed any form of antidepressant medication until 10 February 2017, the day after her dismissal. There is a reference to Propranolol, a beta-blocker, which may be used to treat anxiety, but there was no evidence before me to confirm that this was the reason it was prescribed. Indeed, the claimant's GP notes refer to this being prescribed as "preventative for migraines" (p73).
34. The first entry in the claimant's GP records p73 dated 24 September 2015, makes reference to the claimant having depression. The notes state:
- "Diagnosis: Recurrent depression. working now involves animals, says she loves her work and can manage it physically. feeling depressed and anxious and cause migraines which makes things worse, can be tearful, no suicidal ideation, does not want CBT and reluctant to try venlafaxine which she tried before. asking other tablets." [sic]
35. Accordingly, although the claimant suffered from depression, she was able to manage without any form of treatment at that point.
36. The next entry is 3 March 2016, six months later. There is a reference to a planned mental health assessment. The note states "[the claimant] says still feels low but managing well. not on any meds and would not like to start on meds. Working at the moment, and enjoying her work...". Taking account of the other evidence referred to above (which I have accepted as fact), from that record, which I also accept as fact, it is evident on any objective basis that, notwithstanding any previous difficulties with depression the claimant was not suffering any condition that was having an adverse effect on her day-to-day activities at that time.
37. There follows an entry dated 15 September 2016. There is a reference to the claimant having recent panic attacks and suffering some anxiety

because her “boss is leaving” but again there is no suggestion that she wanted any form of prescribed medication or that she was unable to cope in that regard. The claimant acknowledged and agreed that her job was therapeutic for her mental health.

38. Thereafter the next entry is dated 3 February 2017 which appears to have been entered into the notes on 3 March 2017. I find that this date (3 February 2017) is inaccurate because there is a further entry on 14 February (p75) referring to back to 3 February 2017 stating that the claimant had been “dismissed from her job recently but will look for another one”. The claimant’s dismissal did not occur until 9 February. Therefore, the entry on page 74 recorded as 3 February 2017 is an error and should refer to a date post dismissal on 9 February.
39. There is no dispute that, at that point (post dismissal) the claimant’s state of health was such that she might require a mental health assessment. This is entirely consistent with the claimant’s evidence that her dismissal from employment had devastating consequences for her.
40. It is after her dismissal that the claimant is prescribed an anti-depressant drug (citalopram). In a further entry dated 12 July 2017 there is reference to the claimant having a:

“diagnosis of Emotionally Unstable Personality Disorder. She appears to be experiencing a reactive depressive episode in the context of being dismissed for gross misconduct, a charge that she categorically denies”.
41. This is the first reference to any Personality Disorder in the claimant’s GP notes in evidence before me. Even if this was not the first such reference, any purported ‘disorder’ did not feature significantly, if at all, in relation to any of the assistance the claimant was seeking from her GP throughout the relevant period of her employment.
42. Finally, in terms of my assessment of the evidence for the purposes of the findings of fact I have reached above, there is nothing in the evidence before me, and perhaps most importantly, the evidence tendered by the claimant herself about her condition, that demonstrates that, if indeed she suffered from an impairment of ‘multi personality disorder’, any such purported condition (or alleged diagnosis) had or has any substantial adverse effect on her ability to carry out any day-to-day activities.
43. The claimant’s evidence in chief contains nothing more than bare assertions that her alleged condition impacted upon normal day-to-day activities. She offers no substantive evidence or examples of how any purported condition prevents her from carrying out any day-to-day activities.
44. In her first statement (written in the first person) at p53 she describes having difficulty using knives but that she was able to adapt and “find a way to cut greens in a different way” and that she preferred to use the serrated knife. Aside from the fact that she has found ways to adapt so as to cope in using knives, the claimant offers no evidence as to why any difficulty with using knives stems from her purported ‘multi personality disorder’.

45. Likewise, in the supplementary statement written in the third person at p55 to 57, again the claimant offers no specific evidence about how she is prevented from undertaking normal day to day activities. She refers to the fact that she becomes confused and that she has difficulty sometimes at work dealing with certain matters, but there is nothing in her statement which satisfies me on the balance of probabilities that even if any multi personality disorder did amount to an impairment, it had a substantial adverse effect on her normal day-to-day activities. Whilst the list is not exhaustive, there is no suggestion that she has difficulty with any of the examples given in the Appendix to the 2011 Code. The claimant also accepts that she has found coping strategies to ameliorate the impact any alleged impairment has on her day-to-day activities.
46. In her supplementary statement on page 56 she says:
- “She feels it modifies the way others see her and interact with her, most of all it obliges her to adopt routines and coping strategies to avoid the increasing changes of confusion that results if left uncontrolled.”
47. The claimant also refers to the fact that she suffered migraines. There is no suggestion in the medical evidence she relies upon (nor does she state) that her migraines are in any way connected to a ‘multi personality disorder’ and in so far as it may be relevant, I am satisfied on the balance of probabilities that they are not connected to the impairment upon which she seeks to rely.
48. I have examined the claimant's statements very carefully and also those provided by Mr Curry and Mr Shelley. None of those statements advance a case or any evidence to suggest that any condition of multi personality disorder has a substantial adverse effect on her day-to-day activities. Notably, this is consistent with the medical evidence before me, which does not reference the existence of any personality disorder until after the claimant's dismissal and does not suggest that the claimant has any particular difficulty coping with normal day to day activities notwithstanding any recurrent depression and anxiety (upon which the claimant does not rely in any event).

## **Conclusion**

49. In accordance with the claimant's own expert medical evidence upon which she relies, the Psychiatrist, Dr Schuff declines to diagnose the claimant as having a multi personality disorder but describes instead the claimant suffering with “problematic personality traits”. Furthermore, there is no mention of any such condition in the claimant's GP records save for the claimant's own reference to it recorded on 12 July 2017. Accordingly I am not satisfied on the evidence before me that the claimant has the impairment of ‘mixed personality disorder’.
50. Even if I am wrong about the existence of an impairment of ‘mixed personality disorder’, the claimant herself has not advanced any satisfactory evidence to support the assertion that such an impairment if it existed was an impairment that had an adverse effect on her day-to-day activities.



51. Likewise, on the basis of my findings above, even though the claimant does not seek to rely upon them, her depression and anxiety did not have an adverse effect on her day-to-day activities at the material time (29 July 2015 to 9 February 2017). The claimant was not taking any prescribed medication for these conditions prior to 10 February 2017. Even if she was, it is evident from the expert medical report of Dr Schuff, upon which she relies, that any antidepressant mood stabilizing medication was not “necessarily helpful or needed”. Thus the effect of the impairment if it existed, and also the claimant’s depression and anxiety, was unlikely to be ameliorated by the measures being taken to treat it being the use of prescribed medication and counselling. Accordingly, the lack of impact upon the claimant’s normal day-to-day activities would not have been any different but for any treatment measures identified which were, in any event, limited and relied upon before and after, but not during, the material time.
52. Even taking account of how the claimant’s depression and anxiety may have impacted upon her asserted multi personality disorder (if it did exist as an impairment), the cumulative effects did not adversely impact upon her ability to carry out normal day-to-day activities, nor were they substantial.
53. For all the above reasons, the claimant is not a disabled person for the purposes of the Equality Act 2010.

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Employment Judge Wyeth

Date: 17 April 2018

Judgment sent to the parties on

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For the Tribunal office