



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH  
**BEFORE:** EMPLOYMENT JUDGE BALOGUN  
**BETWEEN:**

Miss P Smith

**Claimant**

and

Gravity Thinking Ltd (1)  
Andrew Roberts (2)

**Respondents**

**ON:** 27 September 2018

**Appearances:**

**For the Claimant: Ryan Painter, Partner**  
**For the Respondent: Mr Rozycki, Counsel**

## **JUDGMENT ON PRELIMINARY ISSUE**

The claimant is disabled within the meaning of section 6 of the Equality Act 2010 by reason of her IBS.

## REASONS

1. The claimant brings a claim of disability discrimination, amongst others, against the respondents and in order to pursue that claim, she must qualify as a disabled person for the purposes of section 6 of the Equality Act 2010 (EqA).
2. Section 6 provides that a person has a disability if they have a physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day to day activities.
3. The relevant time for determining disability is the date on which the alleged discriminatory act occurred. For our purposes that was the 21 October 2016.
4. The claimant relies on IBS (Irritable Bowel Syndrome) and anxiety & depression as her qualifying disabilities. The burden is on the claimant to prove that she meets the section 6 criteria in respect of these conditions.
5. Dealing first of all with anxiety and depression. The claimant told the tribunal at the previous hearing that she was diagnosed with depression in July 2016. Although there is reference in her doctor's notes to anxiety much earlier, anxiety on its own does not amount to a disability.
6. In order for disability to be long term, it must have lasted for 12 months or be expected to last for 12 months or for the rest of the person's life. At the relevant time, the depression had only lasted for 3 months. Although the claimant says that she has continued to suffer from depression since then, anything which occurs after the relevant date cannot be used in assessing the likelihood of an effect lasting for 12 months or more as account can only be taken of the circumstances at the time of the alleged discriminatory act. That prognosis can only really be satisfied by medical evidence, which the claimant was ordered to provide on the last occasion. All she has provided is a psychotherapist's report dated 23 January 2018, which the tribunal saw at the last hearing. Unfortunately, the report does not address the key issue of the prognosis as at October 2016. There is insufficient evidence that anxiety and depression was long term and in those circumstances, it does not satisfy the definition of a disability under the the EqA.
7. Turning to the other condition - IBS - the respondent accepts that the claimant suffers from this condition and there is evidence within the claimant's medical records that she has suffered from IBS and severe IBS symptoms for a number of years prior to the relevant date. [191-192]. The issue in dispute is whether at the relevant time the condition had a substantial effect on the claimant's ability to carry out normal day to day activities.
8. The claimant has provided a statement setting out the impact of her condition on her day to day life and expanded upon this in oral evidence. She said that her condition caused strong abdominal pain and nausea and was usually followed by an episode of severe diarrhoea or sickness. This became worse when she was anxious, stressed or upset. The claimant told the tribunal that her daily routine usually involved her waking up drained and exhausted, having slept fitfully because of her rumbling stomach (a symptom of the condition). She would wake up 2 or 3 times in the night to go to the toilet and during the day would need to use the toilet 7 or 8 times. Travelling on public transport was difficult for the claimant. Her commute to work was 1 hr 20 minutes each

way and the trains had no toilets. She therefore got up early, around 5am every day, to settle her stomach before starting her journey. However, she was sometimes forced to get off the train early to use the toilet and then had to wait for another one so she could continue her journey. The claimant said that her condition also impacted on her social life and she would often have to leave social events without telling anybody out of embarrassment because of a need to use the toilet. She said that travelling abroad was difficult as being on an aeroplane and using the aeroplane toilets was particularly stressful for her.

9. The claimant has been prescribed medication – Amitriptolen – to relax her stomach and control the spasms. She says that without it, she has no control over her bowel movements. The claimant also said that she avoided eating as a way of controlling her symptoms.
10. The claimant’s evidence was challenged by counsel for the respondent on the basis that the reasons she gave for absence when employed by the respondent were inconsistent with IBS. He based this on correspondence written by or on behalf of the respondent in which is set out a schedule and description of the claimant’s absences between 6 July 2016 and 24 October 2016. It is unclear where this information was lifted from but the claimant contends that it is the respondent’s summary of the absences and does not fully reflect the conversations and email exchanges she had at the time relating to her absences. That aside, the reasons given are, in the main, stress related and stomach related. Stomach issues are clearly a key symptom of IBS and the claimant has told us that stress is an aggravating factor. I do not therefore accept that there is any inconsistency between what the claimant says about her symptoms and the information in the document.
11. I considered the claimant to be a straightforward and credible witness and I accept her evidence.
12. In considering the issue of disability, I have had regard to the EqA guidance on matters to be taken into account in determining questions relating to the definition of disability ( the Guidance), as well as the EHRC Employment Code. ( the Code)
13. Appendix 1 of the Code provides the following guidance on the meaning of substantial:  
*“The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which exists among people. Account should be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment because of loss of energy and motivation”*
14. The appendix to the Guidance cites as an example of factors which it would be reasonable to regard as having a substantial adverse effect: *Difficulty carrying out activities associated with toileting, or caused by frequent minor incontinence; Difficulty using transport, for example, because of a frequent need for a lavatory.* It is clear from the claimant’s evidence that the impact of her condition on her toileting was frequent and more than minor incontinence.

15. Paragraph B12 of the Guidance provides that where an impairment is subject to treatment or correction, it 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. The claimant's evidence that without her medication, she would not have control over her bowel movements strongly suggests that this would substantially interfere with many aspects of her daily life.
16. I have also taken into account that by avoiding food in order to control her symptoms, the claimant does not have a normal eating pattern.
17. Taking all of these matters into account, I find that the claimant's IBS did have a substantial adverse effect on her ability to carry out normal day to day activities and that she is a disabled person for the purposes of the EqA.

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Employment Judge Balogun  
Date: 28 September 2018