



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss R Lockyer-Field

**Respondent:** Safesite Facilities Ltd

**Heard at:** Southampton      **On:** 14 December 2018

**Before:** Employment Judge Hargrove

**Representation**

**Claimant:** Mr S Martins, Legal Executive

**Respondent:** Ms S Dickinson, Solicitor.

## JUDGMENT

The judgement of the tribunal is that the claimant was not disabled at the material time. In the circumstances the claims of discrimination on the protected characteristic of disability or not well funded and are dismissed.

## Reasons

1. The issue for decision at this public preliminary hearing is whether the claimant was disabled in respect of her pleaded impairments of anxiety, depression, panic attacks and IBS. The claimant has to prove that at the material time she satisfied the test of disability set out in section 6 (1) and schedule 1 of the Equality Act 2010. The material time for the purposes of this case is the period from when her employment commenced on the 21<sup>st</sup> of November 2016 up to her dismissal on the 13<sup>th</sup> of November 2017.
2. Section 6 (1) of the Act provides: –  
“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 affect on P's ability to carry out normal day-to-day activities."

3. Schedule 1 of the Act materially provides: –

**"2. Long term effects**

(1) the effect of an impairment is long-term if

(a) it has lasted for at least 12 months.

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected....

(2) if an impairment ceases to have a substantial adverse affect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that affects is likely to recur....

**(5) Effect of medical treatment**

(1) 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.

(2). "Measures" includes, in particular, medical treatment and the use of a Prosthesis.

This is a description of the deduced effect principle. In layman's terms it means that in assessing whether or not an impairment has a substantial adverse affect on normal day-to-day activities, the effect of any medical treatment which a person may be taking to ameliorate the effects of the impairment is to be ignored.

4. There are two impact statements from the claimant, the first apparently produced on the 13<sup>th</sup> of June 2018, which is at pages 99 to 100 of the bundle, but which is undated and unsigned; and the second account produced on the 12<sup>th</sup> of October 2018, which is at pages 101 to 103, but which is also undated and unsigned. The tribunal has also seen, for the first time, the claimant's medical records from December 1996 to date and a medical report dated the 15 March 2018 from the claimant's GP Dr Elizabeth Burgess, which is at pages 97 and 98 of the bundle.

5. Unfortunately, the precise issues to be decided by the employment tribunal were not identified at the time of the last case management hearing on the 31st of August 2018, but the claimant was specifically ordered to provide a further disability impact statement in particular identifying the date upon which she claimed that she first satisfied the test of disability. Neither her first, nor the subsequent disability impact statement, address this issue even indirectly. Indeed the statements refer to the adverse effects since her dismissal and to date. They do not address the issues which now arise.

6. The respondent's case is that if the plaintiff satisfied the test in respect of her mental impairments in the sense that they had a substantial adverse effect upon her normal day-to-day activities which was long-term at all, those affects ceased at the latest, in accordance with the medical records in 2013. There are thereafter no references to mental impairments until the 20<sup>th</sup> of November 2017, one week after her dismissal. It is likely that her mental state was adversely affected by her dismissal, but it has to be recognised that the tribunal cannot consider a claim for personal injury caused or contributed to by the dismissal unless that dismissal arose from something to do with an earlier existing disability. The respondent submitted that the claimant was no longer

disabled after 2013; and that in order to succeed in continuing to satisfy the test the claimant would need to establish that the adverse effects existing up to 2013 were “likely to recur”. Paragraph C3 of the Guidance on the definition of disability states that something is likely if it could well happen, reflecting the Judgment in *SCA Packaging v Boyle* 2009 ICR 1056 (HL). In that connection I was referred to *Richmond Adult Community College v McDougall* 2008 ICR p.431 for the principle that the employment tribunal is not to take into consideration what in fact happened to her health after the date of the discriminatory acts in deciding whether the adverse effects were likely to recur. This is reflected also in paragraph C4 of the guidance: “In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time of the alleged discrimination took place. Anything which occurs after that time will not be relevant in the setting this likelihood. Account should also be taken of both the typical links of such an affect on an individual, and any relevant factors specific to this individual (for example, general state of health or age)”.

7. I accept for the purposes of this hearing that since her dismissal it is likely that the claimant has satisfied the test of disability at least in respect of her mental impairments, but I cannot use that to decide whether it was likely to recur earlier. Mr Martin for the claimant takes two points: –He argues first that the claimant has continued to satisfy the test of disability in respect of her mental impairments without a break since 1999. In the alternative, that if she did not, the substantial adverse effects were likely to recur if there were any breaks. In this connection, although no evidential basis for these submissions was contained within either of her existing witness statements, I allowed the claimant to give further oral evidence. In addition she provided a further but short additional witness statement dated the 14<sup>th</sup> of December 2018.
8. Having examined her GP medical records carefully, I find that the claimant was treated for postnatal depression in 1999 following the birth of her first child in June 1998. The last entry relating to that episode of depression appears to be June 2001. Following the birth of her second child in May 2005 there is a record of her having a recurrence of postnatal depression in June 2006, for which she was treated with antidepressants. There was a recurrence when she came off antidepressants in 2007. There are no entries concerning depression thereafter although there was a reference to her having counselling for relationship problems in 2008. The next relevant entry is in September 2010 when she is diagnosed with a depressive disorder new episode and is put back on antidepressants. The dosage is doubled in October 2010. Relevant entries relating to depression ended in December 2013. Thereafter there are records of appointments for other matters unconnected with mental impairment at least until July 2016 when it is noted in relation to another referral that she is “very anxious and tearful”. The next relevant entry is that of the 20<sup>th</sup> of November 2018, a week after her dismissal when she is noted to be depressed following her dismissal and is prescribed antidepressants again and there are similar entries continuing thereafter. In her oral evidence to the tribunal the claimant asserted for the first time that she had had side-effects when she had been taking antidepressants earlier, that is to say in the period from 2006 onwards; and that they did she did not think that they worked. She also claimed that from 2013 onwards she had been treating herself for her depression with herbal remedies, diet, exercise and meditation. I have serious doubts about the credibility of that evidence. There is no suggestion of it in her medical records

that she is unhappy with her antidepressants when she was taking them, or that her depressive mood continued after 2013 (at least until that single entry in 2016), or that she was self-medicating in the way she has claimed. More importantly, if there had been continuing adverse effects upon her normal day-to-day activities, I would have expected that she would have mentioned it to her GP; that it would appear somewhere in her medical records; and that she would have mentioned it in her disability impact statements. I accept that she may well have told Paul Goossens and Anita that she had suffered from anxiety and depression in the past, but I am not satisfied that she had continuing depression and anxiety or, more importantly that it had a substantial adverse affect upon her normal day-to-day activities at any time during her employment with the respondent. There is no evidence medical or otherwise that the claimant has suffered from IBS or that that condition has had the necessary substantial adverse effects. Nor is there any medical evidence to support the proposition that if the adverse effects of her depression were substantial in the past they were likely to recur. Dr Burroughs' report of March 2018 does not assist in any way with that specific issue. When she says that the adverse affect will last for 12 months she is talking about a baseline date of March 2018, or possibly from the date when she first re-presented with depression on the 20<sup>th</sup> of November 2017, following her dismissal on the 13<sup>th</sup> of November 2017. For all of these reasons I am not satisfied that the claimant was disabled in the legal sense at any time during her employment with the respondent.

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Employment Judge Hargrove

Date: 8 January 2019.