



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: S/4122942/18 Held on 27 March 2019

Employment Judge: J M Hendry

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Miss M Brander

Claimant
Represented by:
Mrs H Brander –
Mother

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Bachlaw Ltd t/a Lillies Kindergarten

Respondent
Represented by:
Ms S Davis –
Director

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Tribunal determines that the claimant was at the relevant time (July and August 2018) a disabled person in terms of Section 6 of the Equality Act 2010 and that the case will proceed to a merits hearing before a full Tribunal.

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REASONS

1. A Preliminary Hearing took place on 27 March 2019 to determine whether or not the claimant had a qualifying disability in terms of the Equality Act 2010.
35 It was noted that there was a separate issue namely whether the respondents were aware or ought to have reasonably been aware of the disability and this issue remains live. It will be determined in due course by a full Tribunal.

2. The respondents helpfully lodged a list of documents for the Preliminary Hearing (R1-7). The claimant did not lodge a separate inventory but tendered a Report from her G.P. dated 26 March 2009. Previously the Tribunal had received a Report from the claimant's G.P. dated 31 January 2019 which had been accepted for its terms by the respondents. The Tribunal also had regard to an impact statement lodged by the claimant and a witness statement lodged by her. She spoke to the latter document.
3. The Tribunal heard evidence from the claimant and made the following findings in fact.

Facts

4. The claimant is 26 years old.
5. She is a qualified Nursery Practitioner.
6. The claimant was involved in a road traffic accident in March 2017. The circumstances were that she had stopped her car as the vehicle in front of her had driven off the road. She checked that the driver was uninjured and returned to her vehicle. She was sitting in it when it was struck from behind by another vehicle. The accident took place suddenly and without warning. She sustained an injury to her neck and mid back.
7. The injuries the claimant sustained were very painful and she had difficulty sleeping. She contacted her local medical practice and consulted the General Practitioners there one of which was Dr. Alison Barber. The claimant was prescribed painkillers. She also underwent a period of physiotherapy. She was left with continuing pain and weakness in relation to her back and neck. She finds it difficult to lift objects without the action causing immediate pain or pain in the aftermath of the activity. She finds it difficult to carry or lift bags of shopping. Lifting her arms up causes her pain. She found lifting or moving chairs or furniture difficult and painful. Because her recovery was slow she found that driving even for short distances painful. She sought to move from

working as a Nursery Practitioner in Inverurie to employment nearer her home in Macduff with the respondents.

8. In addition, the claimant has been left with psychological problems following the accident. She has felt low and depressed.

9. Her G.P. records as follows (C4):

"It was a long and slow recovery for Melissa from her back pain and it is mentioned in her records that she felt she was starting to suffer from a bit of anxiety as well as at that time. In reading through Melissa's account of the accident's aftermath I feel that this event had a major impact on her mental health. Although I'm not a Psychiatrist, I do wonder whether she has experienced some kind of post traumatic stress after the event. It was obviously quite a scary event and her injuries took a long time to improve. As a result of injuries to her back it made it very difficult for her to continue with her work in Inverurie and because of the injuries she had to eventually give up her job in Inverurie that she very much enjoyed."

10. Following the accident in March 2017 the claimant began to develop symptoms of anxiety. The claimant also began having thoughts of self-harm which she kept to herself. Ms Brander continues to have such thoughts and thinks that suicide would put an end to her problems.

11. She began to experience difficulties at work towards the end of June early July 2018. This prompted her to consult Dr. Barber who saw her on the 2 July 2018. Dr. Barber noted that she was suffering from extreme stress and was feeling very vulnerable. She was prescribed sleeping tablets and signed off work with stress for two weeks. She was followed up on 10 July and signed off for a further period of time with the recommendation of a phased return to work. She was emotional and her mood was low. The Fit Note was extended. The Doctor agreed to put stress-related problems as the reason for absence on the Fit Notes after discussing this with the claimant as she didn't want her employers to know that she had mental health difficulties. She told the G.P. that she wanted to tell the employer herself.

12. The claimant's employment with the respondents came to an end on 1 August 2018. Since then the claimant has continued to have a low mood. She has two part-time jobs and these do not often occupy more than a couple of days per week because they are both on "zero hours contracts". When not working the claimant struggles to get out of bed in the morning. She struggles to motivate herself. She does not take part in any activities apart from texting her friends or occasionally going out to lunch with her Mother. She does not cook, clean or eat much without encouragement. Ms Brander continues to have thoughts of suicide.
13. In July 2018 the claimant told her G.P. she was having suicidal thoughts. She told her G.P. that she thought of killing herself by taking an overdose. Her G.P. suggested that she could get better with the support of her family and friends and that medication "*might not help*". The claimant does not receive any current medication nor has she been referred to either a Psychologist or Psychiatrist or for CBT or for any other intervention therapy.
14. The effects of the claimant's mental health impairment are unabated and unresolved. She finds it difficult to motivate herself to get out of bed in the morning, to cook food for herself, to socialise and take part in normal social activities with family and friends. She dwells on her situation and her mood is low. She continues to have suicidal ideation.

Submissions

15. Neither party made any legal submissions to the Tribunal. The respondent's position was in effect neutral and they indicated that it was for the Tribunal to determine whether or not the claimant was disabled in terms of the Equality Act.

Witnesses

16. I found the claimant a wholly credible witness and as far as her account of the development of her various conditions a reliable one. She was clearly

emotional and upset. The issue of self-harm became apparent only in the course of the hearing and the claimant became visibly emotional and upset. Her evidence appeared wholly genuine and not in any way forced or contrived. Much of the basic history was corroborated by the claimant's
5 General Practitioner's report.

Judgment

17. I first of all had regard to the terms of section 6 of the Equality Act:

10 **"6 Disability**

(1) 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 effect on P's ability to carry out normal day-to-day activities.

15 *(2) A reference to a disabled person is a reference to a person who has a disability."*

18. The focus is on whether the effect of the condition has a substantial effect on the claimant's ability to carry out day to day activities and how long that has
20 lasted or is likely to last. I noted that the most recent medical report (C4):

25 *"I think when Melissa started her job at Lillies around about February 2018 she was suffering from stress and depression. She had already been thinking that life was not worth living, thinking about suicide, feeling depressed, not eating, not going out and she initially felt that being at Lillies would be a new start, but unfortunately this did not prove to be the case as Melissa did not feel supported by senior members of staff and it started to affect her mental health further and she was asked to do tasks where she was lifting furniture which aggravated her back pain. This really escalated her feelings of
30 struggling with life in general. She had further thoughts of hoping that some fatal accident would befall her and that this would be a way out of this very miserable situation she found herself in."*

19. It appears that the claimant does not rely on the physical injuries she has
35 suffered although they seem to restrict at least some of her day to day activities such as driving and lifting. She focusses on her mental condition which she described as depression. A mental impairment presents a Tribunal

with particular difficulties in particular it is always difficult for a Tribunal to assess, without clear medical evidence, the likely effect and duration of the impairment. One the issues here was whether the car accident triggered the condition, in other words it started in March 2017, and the pre-existing condition was exacerbated by the termination or if the condition was not severe enough at the time of termination of her employment it became severe in its effect following that termination. The claimant was working prior to the termination of her employment but appears to have been masking her underlying difficulties. As her GP put it she was trying to soldier on. It therefore appears that the claimant was suffering the effects of her condition from March 2017 onwards and that it became worse following the loss of her employment. It seems however that it was having a substantial effect on her ability to carry out day to day activities, which she only managed with considerable effort. Her pre-existing/underlying situation was made worse and there are no signs of the condition resolving spontaneously.

20. The Tribunal was frankly surprised that despite the claimant confiding that she had thoughts of self-harm to her GP no intervention was proposed and she seems to have been left as it were to her own devices. This is a worrying situation given the evidence that has been heard and the fact that the underlying difficulties seem unresolved.

21. The Medical Report dated 26 March refers to the Doctor's belief that in hindsight the road traffic accident has had a major effect on the claimant's mental health. She goes on to write that the difficulties moving furniture at work which aggravated her backpain led to her 'struggling with life in general. This all points to the severity of the condition from March 2017 onwards.

22. In the particular circumstances of this case I considered whether or not an Expert Medical Report should be instructed. This is probably a matter that neither party has considered nor was it apparently considered at the Preliminary Hearing although helpful guidance was given as to what the claimant had to show to demonstrate she was disabled.

23. I am conscious that the claimant is a party litigant. The respondents have also been represented by their Director Ms Davis. The Preliminary Hearing took place against a background of the claim relating to depression. This condition can, and often is, be diagnosed by a GP as it is a common condition well within a family GP's experience and expertise. The GP in the Report acknowledges that she is not a Psychiatrist and only makes a tentative and qualified diagnosis that the claimant may be suffering from Post Traumatic Stress Disorder brought on by the road traffic accident.

24. After considering the matter carefully I think that there is sufficient material before the Tribunal to come to a view on the matter despite the absence of a specific diagnosis. It is after all the effects of the condition which are important to assess. It is clear that the claimant's condition, whatever the diagnosis ultimately proves to be, has a disabling effect on her from March 2017 onwards. I accept that it seems to fluctuate in severity but that it has remained an active and underlying condition. The claimant has kept the severity of her condition hidden to a great extent from her GP and family. That condition has existed since March 2017 and had had a substantial effect on the claimant's ability to carry out day to day activities. This is most evidenced by her lack of motivation to get out of bed and participate in the normal activities such as cooking and socialising. In these circumstances, I hold that she was disabled in terms of the Act during the relevant periods which were agreed as being July and August 2018.

Employment Judge: James Hendry
Date of Judgment: 09 April 2019
Entered in the Register: 10 April 2019
And Copied to Parties