

sb



## EMPLOYMENT TRIBUNALS

*Claimant*

*Respondent*

Ms K A Stewart

AND

Governing Body of Westminster City School

**HELD AT:** London Central

**ON:** 31 July 2019

**BEFORE:** Employment Judge Palca (Sitting Alone)

***Representation:***

**For Claimant:** Ms A Boyd, Solicitor

**For Respondent:** Mr L Dilaimi, of Counsel

## JUDGMENT

The Claimant is disabled within the meaning of s.6 of the Equality Act 2010 and has been so since 22 November 2017.

## REASONS

### Parties

1. The Claimant was employed as an English Teacher by the Respondent Academy School. Her employment with the school ended on 20 July 2018. On 26 August 2018 she lodged proceedings with the Employment Tribunal claiming that she had been discriminated against on grounds of disability and sex and had suffered detrimental treatment after exercising a statutory right concluding in her forced dismissal, and breaches of health and safety regulations. By its ET3 dated 8 November 2018 the Respondent denies the allegations.

2. Following a preliminary hearing and case management discussion in February 2019, the case was referred to this hearing for consideration of a preliminary issue.

Issue

3. The sole issue for the Tribunal to determine is whether or not the Claimant meets the definition of disability set out in s.6 Equality Act 2010, and if so, from what date.

Evidence

4. The Claimant gave evidence in person and had prepared a disability impact statement. There was an agreed bundle of documents.

Facts

The Tribunal found that the material facts were as follows:

5. The Claimant's employment as an English Teacher at the Respondent's school began on 3 January 2017.

6. In October 2017 the Claimant's father became critically ill in Jamaica, and he died before the Claimant had the chance to go out to see him. When she did get to Jamaica she organised her father's funeral arrangements and then returned to work in London. It is clear that she was immensely grief-stricken.

7. On the Claimant's return to work, her case is that she was criticised for taking too long a leave of absence and made to feel guilty that her absence was overburdening her colleagues. During the hearing today the Claimant gave evidence about the pressure she felt from the Respondent from this point on, including pressure to resign. However, these issues are not material to the decision whether or not the Claimant is disabled, and therefore no findings of fact are made in relation to this.

8. The Claimant gave evidence as to her mental state. Her factual evidence was not challenged, and the Tribunal found her evidence convincing.

9. Following her return to work the Claimant became very tearful and withdrawn. On 9 November she attended an NHS Walk-In Centre and was referred to her GP. From this point on the Claimant began to suffer panic attacks and bouts of tearfulness. She was prescribed medication to help her sleep and stay calm. She was signed off work for two weeks, the fit note referring to her having the condition of bereavement. Her GP referred her to specialists dealing with anxiety and bereavement. However, she was informed by the anxiety counsellor that she could not attend sessions with

both sets of counsellors simultaneously. She therefore decided not to pursue anxiety counselling at this stage, but to focus on bereavement counselling.

10. The Claimant returned to her GP practice on 22 November 2017 when she was signed off work for a further two weeks, again the fit note stating that she was suffering from the condition of bereavement. She returned to work a fortnight later.

11. The Claimant told the tribunal that she had an aversion to using drugs where possible, and that it had taken her until January or February 2018 to finish the twenty-eight sleeping pills she had been prescribed in November 2017. She said she preferred to use herbal remedies to prescription drugs, and did so until things became so severe that she moved on to anti-depressants in June 2018

12. The Tribunal found that from mid-November 2017 and throughout her employment with the Respondent, which ended on 20 July 2018, the Claimant was suffering from a number of adverse effects upon her ability to carry out day to day activities. From this point on the Claimant began to experience nausea, palpitations and claustrophobia. She found it difficult to go into busy places such as supermarkets, banks, public transport and her local town centre because she was stressed, fatigued and anxious. She developed coping mechanisms involving only visiting these places when she could see that there were few people there, changing her travel arrangements to less popular routes, and not travelling in rush hour. She would also break her journeys on public transport, rather than continuing straight through from beginning to end.

13. In addition, the Claimant, who lives alone, has been immensely fatigued, so that she did not cook her meals or clean her house, relying on members of her family to do this for her. She could not concentrate for long periods, for example finding it difficult to watch movies on TV at night, and found it difficult to concentrate on reading books. Instead of attending the gym five days a week, as she had before October 2017, she had to force herself to attend it twice a week for fifteen minutes each time. The Claimant has also not been sleeping properly on work days. She would wake up at about 3am to calm herself so that she could get up for 5.30am to get into school before the rush. She stopped socialising with friends. Various normal activities make her nervous so that she puts off doing them, such as opening mail.

14. These effects have continued throughout the period to 20 July 2018. Many of them still continue.

15. By early June 2018 the Claimant had become lethargic and unable to concentrate. She suffered feelings of despair, hopelessness, panic and poor concentration. On 22 June the Claimant was unable to go to school because she felt paralysed, had extreme panic attacks and was very tearful. She visited the doctor on 25 June who noted that she had bereavement and emotional problems and was suffering from anxiety. The GP prescribed a low dose depression medication, Sertraline. The Claimant returned to the GP

practice on 16 July when the strength of medication was doubled. On 23 July 2018, after her employment with the Respondent had ended, the Claimant went) back to the doctor who noted that she felt that she was on the fringes of burnout with more panic attacks and proposed various remedies.

16. In Autumn 2018 the Claimant, who is studying part-time for a PhD, decided to move University from Greenwich to the University of East London. As part of this she needed to submit a Disabled Students' Allowances Disability Evidence Form. On 30 October 2018 her GP filled in the form stating that she was suffering from depression and bereavement which had been diagnosed on 22 November 2017. In a report for the University of East London dated 26 November 2018 by Kent Assessors, it is recorded that the Claimant has been diagnosed with depression and behavioural anxiety and had suffered anxiety increasingly since her father's death.

17. At the preliminary hearing in this matter in February 2019 the Claimant was advised to obtain medical advice. The present hearing was originally listed to take place in early April, and there was not much time available. The Claimant therefore approached Dr Michael Isaac, a Consultant Psychiatrist and Hon Senior Lecturer in Psychological Medicine. He interviewed her by Skype for about fifteen minutes and wrote a report. His conclusions included that the Claimant had been diagnosed as suffering an impairment – the chief impairment at least initially being a normal grief reaction but that Ms Stewart's grief was made worse by the treatment or perceived treatment by the Respondent. It also reported that the Claimant would be characterised as displaying Other Problem Related to Employment, an occupational problem which was the focus of clinical attention thought it might not necessarily amount to a diagnosable medical disorder. He noted that grief, especially where severe or exacerbated, can constitute a medically recognised disability, particularly when prolonged. Dr Isaac stated, in effect, that he could not find evidence that the impairment gave rise to any substantial adverse effect upon the Claimant's ability to carry out day to day activities and noted that the Claimant was likely to be more prone to depression in the future. He concluded on balance that the Claimant did not meet the definition of disability defined by s.6 Equality Act 2010.

### Law

18. S.6 of the Equality Act 2010 provides that a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long term adverse effect on their ability to carry out normal day to day activities. The EAT in Goodwin v Patent Office [1999] ICR 303 EAT identified four distinct questions which a Tribunal should address while considering this issue:

- (1) Does the applicant have an impairment which is either mental or physical?
- (2) does the impairment affect the applicant's ability to carry out normal day to day activities, and does it have an adverse effect?
- (3) is the adverse effect (upon the applicant's ability) substantial?

(4) is the adverse effect (upon the applicant's ability) long term?

This categorisation came with the timely reminder that, despite disaggregation of the four conditions, the Tribunal needed to view the whole picture.

19. Underhill J in J v DLA Piper UK LLP [2010] IRLR 936 drew a distinction between clinical depression and a reaction to adverse circumstances, though the borderline between the two was often very blurred in practice. Underhill J observed that the requirement in the Equality Act that any adverse effect on normal activities had to be long term would normally render it easy to distinguish between the two conditions. He noted too that clinical depression might also be triggered by adverse circumstances or events, so that the distinction cannot be neatly characterised as being between cases where the symptoms can be shown to be caused or triggered by adverse circumstances or events and cases where they cannot. Finally, he stated "it remains good practice for a Tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it). However, in reaching these conclusions the Tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense to start by making findings about whether the Claimant's ability to carry out normal day to day activities is adversely affected (on a long-term basis) and to consider the question of impairment in the light of those findings".

20. Schedule 1 of Equality Act, in so far as is relevant, defines a long-term effect as one which is likely to last for at least twelve months. The test is whether or not it could well happen that the effects last for twelve months – a lower test than a decision that it is more likely than not that this would happen – in other words, one is looking at whether or not a long-term effect is a real possibility rather than a probability.

### Submissions

21. The Respondent quite rightly accepted, having heard the evidence, that the effect of the Claimant's condition on her ability to carry out normal day to day activities was both substantial and adverse. It also acknowledged that at present the Claimant is suffering from depression. However, it argued that the Tribunal must, somewhat artificially, look at the position as it was during the relevant period of November 2017 to 20 July 2018, and should ignore events which occurred after that. The Respondent's representative pointed to the case of McKechnie Plastic Components v Grant UK EAT/0284/08/MAA which indicated that a Tribunal does not have slavishly to follow expert evidence, particularly where it trespasses on matters which are the prerogative of the judge.

22. The Respondent argued that the Claimant was not suffering from an impairment, but from grief and stress following conditions at work. While this later crystallised into an impairment, clinical depression, this was not until after her employment with the Respondent had ended. During the course of her

employment she was suffering the effects of adverse life events – this was one of the rare cases, the representative said, where acknowledgment of an impairment did not flow from identifying adverse and substantial effect. He cited the case of Herry v Dudley Metropolitan Council [2017] ICR 610 EAT where this maxim had been applied, and Appleby v Colburn Community Primary School [2016] UK EAT/0334/15/JOJ as another example of where symptoms did not amount to mental impairment.

23. If the Tribunal was against the Respondent on the issue that any impairment began after the termination of the Claimant's employment with the Respondent, the Respondent argued that the impairment had begun in June 2018 when the Claimant had returned to her medical practitioners.

24. On the question whether or not any substantial adverse effect on the ability to carry out normal day to day activities would be long term, the Respondent argued that it could not be, particularly if the impairment only began in June 2018 – the evidence was all after that date, and though artificial the Tribunal had to put subsequent events out of its mind. There was no evidence that, during the Claimant's employment, the adverse effect was likely to last for twelve months.

25. The Claimant's representative had produced a skeleton argument, She drew attention to the fact that Dr LeFeuvre had, in Autumn 2018, noted that the Claimant had been diagnosed with depression and bereavement since 22 November 2017. She relied on the case of J v DLA Piper UK LLP. On the question of whether or not the effect was long term, she argued that the impairment had clearly been in place since November 2017 and its effects had lasted until July 2018 and had got worse, and were therefore likely to last for at least twelve months. If the impairment had started in, say, June 2018, by that stage it was clear that the adverse effect had got worse rather than better, and therefore that it could well happen that it would continue until June 2019. She argued that Dr Isaac's report had been prepared in haste, following only a brief Skype interview, and therefore his conclusion that the Claimant was not suffering from a disability as defined by s.6 Equality Act 2010 could be discounted.

### Conclusion

26. The Respondents have accepted that the Claimant's condition had a substantial effect on her ability to carry out day to day activities. This is patently true. The Claimant was, and remains, unable to carry out a number of day to day activities such as cooking, cleaning, using public transport without coping mechanisms, socialising, reading, concentrating on TV and sleeping well. These are very far from minor. The Respondent was right to concede that this is the case.

27. The Claimant's expert, in his report, stated that he saw no evidence of adverse symptoms on the Claimant's ability to carry out day to day activities

with respect to her everyday life. There was clearly considerable evidence to this effect. Therefore, the expert's conclusion that the Claimant could not be described as disabled does not stand scrutiny.

28. Turning to the question of whether or not the Claimant had an adverse mental condition, the Tribunal notes that the medical expert argued that the Claimant had been diagnosed as suffering from mental impairments, these being grief, which when severe or exacerbated could constitute a medically recognised disability, particularly if prolonged, and Other Problems Relating to Employment.

29. The Claimant's GPs described her condition in November 2017 as being "bereavement" and around a year later referred to the Claimant as having been diagnosed with "depression and bereavement" on 22 November 2017. Bereavement is a strange word to use in the circumstances of a fit note. It seems clear that it was used as a shorthand. It is also clear that the Claimant was, by mid to end November, suffering from anxiety attacks and other symptoms and that her GP had wanted her to attend anxiety counselling. We heard from the Claimant that she had an aversion to using drugs where possible, and that it had taken her until January or February 2018 to finish the twenty eight sleeping pills she had been prescribed in November and that she preferred to use herbal remedies until things became so severe that she moved on to anti-depressants in June 2018.

30. Taking the steer from Underhill J v DLA Piper, and looking at the substantial adverse effect the Claimant's condition was having from November 2017, which, as found below, was likely to be long term, the Tribunal finds that the Claimant was suffering from an impairment. An impairment no longer has to be a recognised medical condition, but it has to be more than a reaction to life's challenges. This disorder, brought on by grief – whether or not depression from the start, clearly falls within the former category. The fact that the Claimant's GP referred to her condition as bereavement initially is a matter of semantics, and perhaps a misnomer. The evidence from the form completed in October 2018 shows that the claimant's GPs believe that the diagnosis had been depression from November 2017.

31. If the position was clear in November 2017, it is extremely plain that by June 2018 the Claimant had a mental impairment. She was suffering very severe panic attacks and was prescribed with anti-depressants on 25 June 2018.

32. Turning to the issue whether the effect of the impairment was likely to be long term, the Tribunal bore in mind that the Guidance on Matters to be taken into account in Determining Questions relating to the Definition of Disability

states that “likely” should be interpreted as meaning that, as at July 2018, when the Claimant’s employment with Respondent ended, it could well happen. At that stage, the substantial adverse effect that her condition was having had been going on since November, at least eight months. It was getting worse, rather than better. Looking at the position as at July 2018, it is therefore reasonable to state that it could well happen that the substantial adverse effect would continue for at least a further 5 months. Even if one thinks that the impairment had only begun on 25 June 2018, by that time, looking at the history, one could see that the Claimant had been suffering from a substantial adverse inability to carry out normal day to day activities for eight months, and that it was getting worse, and it remains the position that it could well have happened that this position would continue until June 2019. While not relevant to the decision, I note that, as conceded by the Respondent, at present the adverse effects, are still in fact continuing.

33. To sum up, therefore, the Tribunal has decided that from at the latest, 22 November 2017 the Claimant had a mental impairment which had a substantial adverse effect on her ability to carry out normal day to day activities and that, viewed from the prism of 20 July 2018, that effect was likely to be long term. The Claimant’s condition therefore falls within the definition of disability set out in s.6 of the Equality Act 2010.

---

Employment Judge Palca

Dated: 5 August 2019

Judgment and Reasons sent to the parties on:

7 August 2019

For the Tribunal Office