EMPLOYMENT TRIBUNALS

BETWEEN

Claimant **Respondent**

(1) MISS P SCOTT **AND** **(1) CORDANT PEOPLE LIMITED**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 3RD MAY 2018

EMPLOYMENT JUDGE MR P CADNEY MEMBERS:

APPEARANCES:-

FOR THE CLAIMANTS:- **IN PERSON**

FOR THE RESPONDENT:- **MS S LOVELL (SOLICITOR)**

PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

(i) The claimant was not at the material times a disabled person within the meaning of s6 Equality Act 2010.

REASONS

1. By this claim the claimant brings claims of constructive dismissal and disability discrimination. The case was listed for a preliminary hearing to determine the issue of whether the claimant was a disabled person within the meaning of the Equality Act 2010, and also whether she should be ordered to pay a deposit and/or whether any of her claims should be struck out. The latter application is not pursued by the respondent.

2. Accordingly the only issue before me this morning is whether the claimant is or is not a disabled person within the statutory definition. The evidence I have is the medical records, the claimant's Impact Statement and her oral evidence this morning. The broad thrust of the claimant's evidence is that for a period of eighteen months prior to December 2016 she suffered the build up of stress and anxiety, during which period she was prescribed sertraline, and she referred me to the first entry in the medical records I have on 11th November 2016 which includes "Further diaz (diazepam).. has counselling appointment" to demonstrate that the events between December 2016 and August 2017 did not come out of the blue but were the culmination of a process that had begun some eighteen months or so earlier.

3. It is not in dispute that between December 2016 and August 2017 the claimant suffered an acute stress reaction. During that episode her sertraline prescription was increased to 200mg per day, she was also prescribed diazepam on a regular basis and chlopromazine amongst other drugs. The claimant describes this period as "horrific" and for my purposes today it is sufficient to note that in the medical evidence there is evidence of suicidal ideation which resulted in the claimant taking an overdose in June 2017. The claimant's evidence as set out in the Impact Statement, which I accept, is *"All of the above lead to serious adverse effects on my day to day function. I was reliant on diazepam to come to work each day. If I didn't take my medication I wasn't able to leave the house*."

4. In August 2017 the claimant resigned, the circumstances of which form the basis of the constructive dismissal claim. By the end of August she had obtained a new job and she described those events as having an immediate effect on her, and her becoming "a new person." In terms of the medication she was able to stop taking diazepam almost immediately; chlopromazine at about the point she began her new job in late August or early September; and from that point she was on a reducing prescription of sertraline from 200mg per day down to zero by Christmas 2017. She explained that the reason for this was that it is not a drug which it is safe simply to stop taking and that the dose therefore had to be gradually reduced over that period of time.

5. In order for a condition to qualify as a disability within the meaning of s6 Equality Act 2010 its effects have to be substantial, meaning more than minor or trivial; it must be long term, which means lasting or likely to last more than 12 months; and the effect must be on normal day to day activities. In this case the impairment is a mental impairment and I have been referred by the respondent to the cases of RBS v Morris [2011] EAT, (in particular paragraph 63) and J v DLA Piper [2010]EAT (in particular paragraph 42) , both of which I have borne in mind. In essence both concern the importance of medical evidence.

   J v DLA Piper - *The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, as summarised at para. 33 (3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – "adverse life events".[5] We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case – and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para. 40 (2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve*

months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived.

RBS v Morris - We accordingly hold that it was not open to the Tribunal on the evidence before it to find that the Claimant was disabled during the relevant period. It might well be that the Claimant could have filled the evidential gap by agreeing to the suggestion made during the case management process that expert evidence be sought which directly addressed the questions which the contemporary reports did not cover. But he made a deliberate – and perfectly rational – choice not to do so: see paragraph 55 above. The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted.

6. The respondent concedes that for the period of the acute stress episode, that is from December 2016 to August 2017, that the claimant satisfies the statutory definition of disability (save in respect of the condition being long term) and in my judgment given the evidence summarised above that is a sensible concession and a conclusion I would have drawn myself in any event.

7. The dispute, and the real issue before me, is whether there is evidence either side of that period such that the claimant fulfilled the statutory requirement that the effect be long term. The episode itself lasted for some 8 to 9 months so in and of itself does not satisfy the definition. The respondent submits that the evidence does not allow the tribunal to make any finding that it was of a longer duration. The respondent does not dispute the claimant's account and accepts her evidence that she was prescribed

sertraline (an anti-depressant) for a period prior to December 2016, but submits that there is no evidence in respect of that earlier period that there was any, or any sufficient effect on her ability to carry out normal day to day activities. On her own evidence she described herself as coping during that period, and there is no medical evidence which would allow the tribunal to make any findings about the deduced effect were the medication not being taken. In addition on her own evidence from the beginning of August 2017 she was able to stop taking diazepam, from the end of August or early September to stop taking chlopromazine, and was only continuing to take sertraline on a reducing dose as it would have been ill advised to stop taking it immediately. Accordingly the respondent submits that as with the earlier period, from at the latest early September 2017 there is no evidence that there was any substantial effect on the claimant's normal day to day activities; and no medical evidence which would allow me to make any findings as to the deduced effect. In essence the respondent submits that the evidence can only support a finding that there was a significant but time limited period of an acute stress reaction which is insufficiently long to allow the claimant to fall within the statutory definition.

8. The claimant submits that the evidence should be seen in the round and that the acute stress reaction should be placed in particular in the context of the build up to it over many months leading up to the episode itself.

9. The difficulty I have is that outlined by the respondent, and I am driven to the conclusion that there is no evidence as to the actual or deduced effect for the periods prior to or subsequent to the acute stress reaction episode. On the evidence before me the claimant clearly did satisfy the statutory definition in respect of suffering a substantial effect upon her normal day to day activities during the episode itself, but not before or after. Therefore I am bound to hold that the claimant has not established that she was a disabled person during the relevant period.

10. As the claimant has not established that she was a disabled person the claim will continue solely in respect of the constructive dismissal claim.

Directions

1. No later than 24th May 2018 the parties are to ensure that they have disclosed to each other a list of all documents in their possession which are relevant to any issue in the case, including efforts by the claimant to obtain a new job.

2. No later than 7th June 2018 the parties are to ensure that they have exchanged with each other copies of all documents in their possession which are relevant to any issue in the case, including efforts by the claimant to obtain a new job

3. The parties must co-operate to produce an agreed file of all documents to be referred to at the hearing. It must be paginated, bound, and available to all parties no later than 21st June 2018.

4. No later than 19th July 2018 the parties are to exchange written statements containing the evidence of each witness to be called to give evidence, including the parties themselves.

5. The case will be listed with a time allocation of 5 day(s) to include all matters, including remedy. Parties are reminded of their obligation to assist the tribunal to deal with the case expeditiously and fairly and to save expense.

6. Parties should note that postponements of cases once listed will not be granted, save in the most exceptional circumstances. The non-availability of a chosen representative is not normally a reason to grant a postponement. Any application for a postponement must be made promptly, must be supported by written reasons and must be copied to all other parties.

7. This case is listed to be heard in Cardiff on 24th / 25th / 26th / 27th / 28th September 2018.

8. If any party wishes to apply for further directions, or to vary the directions made above, they must send their application with reasons in writing to the tribunal office no later than 14 days from the date of these directions, with a copy to all other parties. Any party who wishes to object to the application must send their objection in writing to the tribunal office within 7 days of receiving the application, with a copy to all other parties

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EMPLOYMENT JUDGE

Dated: 29 May 2018

Sent to parties on:
3 June 2018

For the Tribunal Office