



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss C Widocks

**Respondent:** Birtenshaw

**Heard at:** Manchester

**On:** 27<sup>th</sup> September 2019

**Before:** Employment Judge Dunlop (sitting alone)

## Representation

**Claimant:** Mr B Henry, Counsel

**Respondent:** Ms R Jones, Counsel

**JUDGMENT** having been sent to the parties on 4<sup>th</sup> October 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Introduction

- (1) The Respondent, Birtenshaw, is a charity providing services to children and young adults with special educational needs and/or disabilities. Miss Widocks commenced employment on 3<sup>rd</sup> January 2018 as an enrichment facilitator. She had some episodes of sickness absence which led to a delay in confirming her probation, nevertheless, in late August 2018, it was suggested that she might be able to undertake the more senior role of senior enrichment facilitator.
- (2) Unfortunately, from 8<sup>th</sup> September 2018, a week into that role, she fell ill, experiencing a significant episode of anxiety. She commenced sick leave on Monday 10<sup>th</sup> September. Without going into detail, the promoted role was withdrawn and she was ultimately dismissed by letter dated 15<sup>th</sup> October 2018. Her sickness absence had continued throughout that period.

- (3) In this claim, Ms Widdocks complains that both the withdrawal of the senior role and the dismissal were acts of discrimination arising from disability under s.15 Equality Act 2010. In order to proceed, she has to show that she had a disability within the meaning of s.6 Equality Act 2010 at the time those acts took place. This was a preliminary hearing to determine whether Ms Widdocks had such a disability in the period 8<sup>th</sup> September to 15<sup>th</sup> October 2018.
- (4) Ms Widdocks relied on alleged impairments of severe anxiety, stress and irritable bowel syndrome (IBS).

### **The preliminary hearing**

- (5) I was provided with an agreed bundle which was mainly comprised of medical records. I read only those pages which were specifically referred to by either party. These comprised mainly the printed "Patient Record" provided by her GP surgery but also correspondence to and from the surgery dating back to 1988 when Miss Widdocks was five. The latest correspondence dated from 2008 and the most relevant item was a letter dated 30 July 2008 from Amy Brierley, a Primary Care Mental Health Worker which describes some medical history and her present state of health at that date.
- (6) I was also provided with an impact statement from Miss Widdocks which she adopted as her evidence before the tribunal. This statement focussed almost exclusively on the effect of the impairments she relies upon from 8<sup>th</sup> September to 15<sup>th</sup> October 2018 and gave a very comprehensive account. Beyond saying that she has suffered from stress/anxiety and irritable bowel syndrome (IBS) since the age of 11 the statement did not include any evidence about the history of these impairments nor the adverse effects which she may have experienced during any previous episodes of ill-health.
- (7) I permitted Mr Henry, in examination in chief, to take Miss Widdocks to relevant medical records covering periods earlier than those covered in detail in her statement. The same records were discussed in cross examination. Overall, however, evidence about those earlier periods remained sparse.
- (8) Neither side had sought to admit any medical report obtained for the purposes of this litigation, and I did not hear any expert witness evidence. The respondent sought to introduce some additional material into the bundle, specifically print-outs of information available from the NHS website about particular conditions. The claimant did not object to the inclusion of this material, and it was duly admitted.
- (9) I received and considered a skeleton argument from Ms Jones, and oral submissions from both counsel.

### **Findings of Fact**

- (10) In his submissions, Mr Henry described Miss Widocks as an “honest historian” of her symptoms. I agree with that description. Miss Widocks gave very clear and straightforward evidence, with no suggestion of exaggeration. She was considered in all her responses and ready to accept points which might seem to go against her case. On the basis of the evidence I heard and was presented with, I make the following findings of fact.
- (11) Ms Widocks was born in 1982. She suffered an episode of severe stomach pain in 1993 at the age of 11 in which resulted in an appendectomy. She was also diagnosed with anxiety around this time and informed the tribunal that her appendix, upon removal, was not inflamed and the symptoms were in fact prompted by her anxiety. She saw both a child psychologist and psychiatrist and began to understand that she was vulnerable to anxiety. I accept her oral evidence as to this matter, and find that this was a major episode of mental ill-health, and particularly troubling to experience at such a young age.
- (12) Subsequent to that, the GP practice records I was taken to showed five distinct occasions when Miss Widocks has sought medical help in relation to mental health issues. The dates and diagnoses taken from the records are as follows:
- |                |  |
|----------------|--|
| July 2008      | Stress-related episode   |
| July 2011      | Agitated depression  |
| December 2013  | Relapse of anxiety/depression  |
| January 2017   | Relapse of depression  |
| September 2018 | Ongoing anxiety/depression (the episode which occurred during employment with Britenshaw). |
- (13) On each of the first four occasions, Miss Widocks was prescribed relevant medication which continued for around one year, save in 2013, where she was on medication for 22 months.
- (14) Miss Widdocks described the September 2018 episode as having ‘stopped her in her tracks’ and ‘completely floored’ her. Her impact statement describes memory and concentration issues (which she contrasts with normally strong memory) and severe panic attacks. I accept her evidence of the intensely debilitating impact this had on her during this period. In response to questioning, Miss Widocks confirmed that this was a particularly serious episode. Aside from the period around her stomach surgery at the age 11, and a period of prolonged vomiting during her teens, this was markedly more severe than other episodes she had experienced. During the other episodes Miss Widocks explained that she had been fit to work and either working or actively seeking work. She contrasted this with her inability to work during the latest episode.
- (15) In relation to IBS, Miss Widocks gave evidence that this is bound up with her anxiety, and that her stomach will ‘flare up’ when her anxiety is bad. The respondent argued that the severity of the IBS symptoms was not borne out by

medical records which contained very limited references to any such condition. It was suggested that, in writing her statement, Miss Widocks may have been confusing a later period of stomach pain in January 2019 with the period we are concerned with. Miss Widocks accepted this may have been the case, but also pointed out that she can buy Buscopan over the counter to treat her IBS and that the complaints recorded in the medical records reflect the limited amount of information that can be shared in a 10 minute GP appointment. I find it is likely that Miss Widocks was experiencing IBS symptoms at the material time, although the focus of her concern was on the panicky feelings she described to her GP. Nonetheless, the stomach problems would also have contributed to the overall affect her impairments were having on her at that time.

## The law

(16) This claim is brought under the Equality Act 2010. Section 6 defines a disability as follows:

**“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.”**

(17) The section goes on to provide that any reference to a disabled person is reference to a person who has a disability. There is no longer a requirement (as was the case under the original version of this provision in the Disability Discrimination Act 1995) that any mental impairment be “clinically well recognised”.

(18) The word “substantial” is defined in section 212(1) as meaning “more than minor or trivial”.

(19) There are some additional provisions about the meaning of disability in Schedule 1 to the Act. Paragraph 2 provides that the effect of an impairment is long-term if it has lasted for at least 12 months or is likely to last for at least 12 months, and that

**“If an impairment ceases to have a substantial adverse effect 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 effect is likely to recur.”**

(20) Under paragraph 5 of Schedule 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.”**

(21) Section 6(5) of the Act empowers the Secretary of State to issue guidance on matters to be taken into account in decisions under section 6(1). The current version dates from 2011.

(22) Section C of the guidance contains provisions around the meaning of the phrase “long term” in the legislation, including in cases where an impairment has recurring or fluctuating effects. I had particular regard to that section and the examples set out within it.

(23) In **Goodwin v Patent Office [1999] ICR 302** the EAT set out a four-stage test for the determination of the issue of disability in this passage:

Section 1(1) defines the circumstances in which a person has a disability within the meaning of the Act. The words of the section require a tribunal to look at the evidence by reference to four different conditions. (1) The impairment condition. Does the applicant have an impairment which is either mental or physical? (2) The adverse effect condition. Does the impairment affect the applicant's ability to carry out normal day-to-day activities in one of the respects set out in paragraph 4(1) of Schedule 1 to the Act, and does it have an adverse effect? (3) The substantial condition. Is the adverse effect (upon the applicant's ability) substantial? (4) The long-term condition. Is the adverse effect (upon the applicant's ability) long-term?

Frequently, there will be a complete overlap between conditions (3) and (4) but it will be as well to bear all four of them in mind. Tribunals may find it helpful to address each of the questions but at the same time be aware of the risk that disaggregation should not take one's eye off the whole picture.

(24) I also had regard to the guidance given by the EAT at paragraphs 41-45 of **J v DLA Piper [2010] ICR 1052** in relation to the handling of the test where the impairment contended for is ‘depression’, ‘stress’ or something similar, and the difficulty in distinguishing between a relevant impairment as opposed to a reaction to ‘adverse life events’ which may not amount to an impairment. In particular, I note that in such cases it may be appropriate to consider the effect of impairment contended for (including whether it is substantial and long-term), with the conclusion in relation to those questions then informing the decision as to whether an impairment is, indeed, present.

(25) Finally, the case EAT case of **Department of Work and Pensions v Conyers UKEAT/0375/13** contains relevant guidance as to the appropriate approach in a case of this type, particularly at paragraph 40:

“40. The importance of a structured approach to the making of findings of disability has often been emphasised: see *J v DLA Piper* at para 39. It is not unusual, in cases of mental impairment, to find that there have been separate periods of illness with a complete or substantial recovery in the meantime. In such cases it will be important to consider and make findings concerning the existence of substantial adverse effects on day-to-day living in each period. Only in this way can the question of “long-term effects” be analysed properly in accordance with the legislation. “

## Discussion and conclusions

- (26) It is clear to me that Miss Widocks did have a mental health impairment between the dates of 8<sup>th</sup> September to 15<sup>th</sup> October 2018, which might be characterised as generalised anxiety/depression/stress. For the avoidance of doubt, I use those as non-medical terms and use them in the sense that a lay member of the public might understand them. I do not find a separate physical impairment of IBS, but accept that stomach symptoms were part of the manifestation of Miss Widocks' mental health condition. There is a difference between an adverse reaction to life events, and an impairment, and I find that, at this time, there was an impairment. (Although these findings are expressed sequentially, I did approach this decision 'in the round'.)
- (27) Again, during the period 8<sup>th</sup> September to 15<sup>th</sup> October 2018, the effect of that impairment on Ms Widocks' ability to carry out normal day-to-day activities was "substantial". That was evident from her impact statement and was not seriously challenged.
- (28) However, the difficulty in this case is establishing whether that effect can be treated as being "long term" within the legal meaning. It need not actually have lasted for 12 months, it is enough for Miss Widocks to show it was likely to. The question must be assessed from the perspective of the time when the alleged acts of discrimination occurred i.e. at the onset of this episode. The question of how it may actually have developed from today's perspective, one year later, is irrelevant.
- (29) Mr Henry submitted there were three alternative routes which he relied on to meet this element of the test.
- (30) Firstly, he invited me to look at the previous episodes and to conclude that each of those had lasted for at least twelve months and therefore invited to make a finding that it was likely that this latest episode would also last for that period as a minimum. However, he was only able to base that submission on bare indications in the general practice record that Miss Widocks had been receiving repeat prescriptions of relevant medication for the period of twelve months (or more) on each occasion. I therefore had no evidence of what the actual adverse effect was said to be during those periods, nor as to what it might have been absent the medication.
- (31) Indeed, the limited evidence I did have seemed to point to the fact that any adverse effect was significantly less severe in these earlier episodes. For example, Miss Widdocks was working or seeking work during previous episodes, it is only on the latest occasion that she has been unable to work. I cannot conclude on the evidence presented that there was a substantial adverse affect on day-to-day activities which lasted for twelve months (or would have done so absent the effect of medication) on any of the previous occasions. That means I cannot use those previous occasions to conclude that the adverse effect was likely to last for twelve months on this occasion.

- (32) Mr Henry's second route was recurrence. As noted above, an effect is treated as continuing for this purpose if it is likely to recur. I accept the respondent's submission that a claimant may have distinct illnesses at different points in her life - perhaps in response to different adverse life events. That is self-evidently true, but it is equally true that a claimant may have an underlying mental health condition which recurs over a period of years, interspersed with non-symptomatic periods. The examples in Section C of the Guidance reflect those circumstances.
- (33) Here, again, the dearth of evidence makes it difficult for me to accept Mr Henry's case. We have a relatively small number of episodes over a period of years, with gaps of some years in between. Although the evidence is scant, there is suggestion in the medical records of particular adverse events which may have triggered the earlier episodes (for example family and financial problems, and anxiety over commencing a new job in China). Whilst the medical records make use of the word 'relapse' in relation to certain episodes, there is no clear medical evidence of an underlying condition leading to recurrent episodes of ill-health.
- (34) There is also the related problem that Miss Widocks has not established that the necessary adverse effect was present in relation to the earlier episodes. It is the adverse effect which must recur, not simply the impairment. Without being able to make a finding that the 2018 episode was itself a recurrence, by reference to previous episodes, I cannot look forward from 2018 and predict that an episode of that severity was likely to recur again.
- (35) On that basis, taking Miss Widock's history as a whole, and on the evidence presented, I do not find that the recurrence case is made out.
- (36) Mr Henry's third route he described as the 'cumulative' route. Essentially, this seemed to be an argument that Miss Widock's disability was a pre-existing one, and not one which commenced on 8th September 2018. This was putting the case in a different way to Miss Widock's statement but I do not think it takes Mr Henry further. Even if the impairment or impairments could be on-going, there was no evidence of a substantial adverse effect at the required level in the first 8 months of 2018. If Miss Widocks was disabled at that point, it could only be on the basis of likely recurrence of an earlier adverse effect. That takes us back to the second route, which I have already dismissed.
- (37) For those reasons Miss Widocks succeeds in the first three elements of the **Goodwin** test but fails on the fourth element. She has not been able to show a long term adverse effect and therefore was not, in my judgement, a disabled person at the relevant time.

### Application for anonymity

- (38) Miss Widock's representatives requested full written reasons in relation to this decision by an email dated 10<sup>th</sup> October 2019. In the same email, they applied for an order under Rule 50(3)(b) of the Employment Tribunal Rules of Procedure that the names of the parties should be anonymised within the written reasons on the grounds that the reasons would refer to evidence relating to the claimant's medical conditions and medical records. The written reasons were therefore likely to contain "sensitive personal data" as defined by the Data Protection Act 2018. Further, it was said that the publication of non-anonymised written reasons may hinder the Miss Widocks in her search for future employment.
- (39) By email dated 22<sup>nd</sup> October 2019 the respondent's representatives set out a detailed objection to the application for anonymity, in the course of which they made extensive reference to the case of **BBC v Roden 2015 ICR 985**.
- (40) When the request was referred to me I directed that the claimant's representatives be given time to provide any further submissions in support of the anonymisation application (in effect, to respond to the respondent's detailed objections). No such further submissions have been received. In the circumstances, I have determined the matter based on the correspondence indicated above.
- (41) Having weighed up the claimant's rights under the European Convention of Human Rights (in particular her Article 8 right to respect for private and family life) and the principle of open justice I do not consider that it is necessary or appropriate to make an anonymisation order in this case, largely for the reasons given in the respondent's email of 22<sup>nd</sup> October 2019.

Employment Judge Dunlop

Date: 5 December 2019

REASONS SENT TO THE PARTIES ON

9 December 2019

FOR THE TRIBUNAL OFFICE