



# EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

V

RESPONDENT

Ms M Ensell

Companion Care (New Malden)  
Limited

Heard at: London South Employment Tribunal

On: 8 November  
2019

Before: Employment Judge Khalil sitting alone

Representation

For the Claimant:

In person

For the Respondent:

Mr B Uduje Counsel

## RESERVED JUDGMENT ON PRELIMINARY ISSUES

### Decision

1. The Tribunal considers it just and equitable to allow the claimant's complaint of disability discrimination to proceed out of time under S.123 of the Equality Act 2010.
2. At all material times the Claimant was a disabled person within the meaning of s.6(1) Equality Act 2010. She is therefore entitled to proceed with her substantive claim.

## REASONS

### Claim

3. By a claim form received by the Tribunal on 16 April 2019 ("the Claim")

following ACAS early conciliation which started and concluded on the same day, the Claimant complains of disability discrimination. She says she was denied the opportunity to undertake a diploma, that she was disciplined for obtaining an email/notes referring to her mental health. She then resigned on 16 January 2019. She relies on Body focused OCD as her disability. At a Preliminary hearing on 18 July 2019 the claimant confirmed her case was for direct discrimination and harassment too in respect of the decision to take disciplinary action.

### **Issues**

4. The claim was presented outside of the primary limitation period as early conciliation commenced on 16 April 2019 which was 6 days too late (if the claimant relies on the last act being 11 January 2019) or 1 day too late if the claimant relies on her resignation on 16 January 2019. Thus, is it just and equitable for the Tribunal to extend time?
5. Also, the respondent denies that the Claimant was disabled within the meaning of s.6(1) Equality Act 2010 ('EqA').
6. The purpose of the preliminary hearing was therefore to determine these issues.

### **Hearing**

7. The Tribunal heard evidence from the Claimant and both the claimant and Counsel for the respondent addressed the Tribunal with submissions. There was a small Hearing bundle containing some medical records, the claimant's impact statement which the claimant had been ordered to provide at the preliminary hearing on 18 July, limited to 750 words. The claimant also produced a short statement setting out her case for extending time.

### **Relevant law**

8. Pursuant to section 123 of the EqA, a Tribunal is prevented from hearing a complaint of discrimination which has been brought after the end of the period of three months starting with the date of the act of which the complaint relates. The Tribunal has a discretion to hear a claim out of time if it considers it to be just and equitable.
9. The Tribunal can also have regard to section 33 of the Limitation act 1980 which explains that in the exercise of discretion the Tribunal may consider prejudice to each party, the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party pursued has cooperated with any request for information, the promptness with which the claimant acted what he knew

of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

10. The law on the definition of “disability” is provided by S.6 EqA 2010, with further assistance is provided in Schedule 1 of the same Act.
11. S.6(1) of the EqA defines disability as follows:

*“A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities”*
12. The above definition poses four essential questions:
  - a. Does the person have a physical or mental impairment?
  - b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
  - c. Is that effect substantial?
  - d. Is that effect long-term?
13. Under para 2(1) of Schedule 1 to the EqA, the effect of an impairment is long term if it:
  - a. has lasted for at least 12 months
  - b. is likely to last for at least 12 months, or
  - c. is likely to last for the rest of the life of the person affected.
14. The term “substantial” is defined in S.212(1) EqA as meaning ‘more than minor or trivial’.
15. Guidance on the definition of “disability” is also contained in a document produced by the Office for Disability Issues in May 2011 called “Guidance on matters to be taken into account in determining questions relating to the definition of disability” (“the Guidance”).
16. The Tribunal reminds itself that the case of **Goodwin v Patent Office [1999] IRLR 4 (EAT)** emphasised that Tribunals and courts should give a purposive construction to the legislation, which is designed to confer protection rather than restrict it.
17. The Tribunal was clear that the Claimant bore the burden of proving that it was just equitable for the Tribunal to extend time and for the claimant to prove that she was disabled.

### **Relevant findings of fact**

18. The following findings of fact were reached by the Tribunal, on a balance of

probabilities, having considered all of the evidence given by the claimant during the hearing, including the statements prepared and the documents referred to, taking into account the Tribunal's assessment of the witness evidence.

19. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine for the preliminary issues, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute.
20. The Claimant was employed by the Respondent as a Veterinary assistant from 10 September 2018 until 16 January 2019 when she resigned.
21. Following the claimant's resignation, the claimant did not approach ACAS until 16 April 2019. By then, more than 3 months had elapsed.
22. The claimant says she delayed her actions because of the potential impact on her mental health. She says this was an avoidant coping strategy. In oral testimony, the claimant said she wished to feel better first. Further that she wished to be mentally strong enough. The Tribunal accepts the claimant's evidence in this regard.
23. Also, for the same mental health reason, the claimant had not enquired of her rights until she approached ACAS, it was only then that she became aware of the 3-month time limit.
24. The claimant had attempted to contact ACAS in January 2019 when she was experiencing issues at work but says that she didn't get through and then did not try again.
25. The claimant had produced some medical evidence in relation to her mental health. These were pages 34-38 of the bundle.
26. On page 34, the claimant produced a summary of "repeat" medication prescribed on 19 June 2019 (Sertraline 50 Mg & 100 Mg) and on 5 July 2019 Mirtazapine 15 Mg tablets. The quantity for both was 28 tablets. The Tribunal notes that these were prescribed for dispensing after her employment had ended and after the initial 3- month time limit.
27. Page 35 was fully redacted.
28. On Page 36 was some medical history. Besides a 2 May 2018 entry, it was noted as follows:

*"patient requesting a letter of support today. Does have some debts that she is trying to appeal but due to depression issues find it difficult to face and manage her affairs/administration. Today also discussed her overall health, tells me mood is quite stable on the medications which she uses mirtazapine infrequently on a permanent basis. Did have some relationship issues last*

*month and resorted to drinking and did superficially cut but tells me nil since. Living with a partner and two children. Denies SI. Other past issues of anxiety and agoraphobia controlled but body dysmorphia still root cause of problems. Works full-time as a vet nurse and enjoys this. Review of mental health Care plan. Normal speech and eye contact today, well kempls, colourful clothes. Can do letter of support and also discussed ways she can get support for routine fasting gbloods. Assessment - mental health care programme approach.*

29. Page 37 was fully redacted.

30. On page 38, there was some further medical history. Besides 29 January 2018 it was recorded:

*"GP surgery Dr Goel. Last two or three days feeling angry, feeling like hurting herself, not suicidal, feeling flat, patient is taking her medication okay, patient is in a lot of debt, full-time mum, feels exhausted, feels worn out, normally is happy and says the medication works does not know what triggered, sometimes PMT affects her, patient's partner was angry with her two days ago, things are okay otherwise, patient has been in tears through consultation, would like to stay off work to feel better. MED 3 statement issued not fit for work, diagnosis - depression exhaustion"*

31. Further, besides 18 October 2017 it was recorded:

*"GP surgery Dr Goel. Routine check and following event in may, Patient tells me her MH issues stem from body dysmorphia but currently she is feeling quite stable and good about things. Denies DSH/SI, lives with partner and daughter, partner is supportive, she is busy with work. Has also had drinking issues but also feels she and partner keeping it under control. Well Kempl, normal speech/eye contact, happy today. Blood pressure reading 135/100. Comment: continue medication has support offered, patient will let us know if she would need or like referral or counselling"*

32. The claimant also visited the GP practice in May 2017. On Page 38 there was entry besides 28 May 2017 which records:

*"Mr Dooman. Attachment - clinical letter Kingston & Richmond Assessment Team Mental Health Letter encounter"*

33. The attachment letter for the last entry was not produced in evidence and no evidence was given about it either.

34. The claimant says in her claim form and said in evidence that she has been on medication for 5 years, but the Tribunal did not have supporting evidence for this. The Tribunal accepts at a point before October 2017, the claimant had been prescribed medication and that the entries in June and July 2019 referred to the medication being "repeat".

35. The claimant did not go to her GP since resigning in January 2019 to when she submitted her claim in April 2019. The claimant maintained that at that point she couldn't face the problem.
36. The claimant's alleged disability is (body focused) obsessive-compulsive disorder ('OCD') and body dysmorphic disorder ('BDD') which are obsessions with the way an individual looks sounds, smells and feels.
37. The claimant states that in 1995 she became obsessed with managing her weight and would compulsively starve herself or make herself sick up to 6 times a day. She says she took her first overdose when she was 17 years old. She informed the police that the reason she did this was because she couldn't live with how ugly she was. Between 1998 and 2003 the claimant says she suffered severe agoraphobia caused by the fear of being seen in daylight. The claimant says it was impossible for her to hold down a job being too afraid to leave the house or going home to be sick. In 2004 the claimant was hospitalised due to paranoia and in 2005 she took another overdose. The claimant gave birth to her daughter in 2006 when her symptoms went into remission. Following a bereavement in 2013 the claimant relapsed and again was unable to work due to obsessive concerns about her body. This is when she says she was finally diagnosed with OCD and BDD. The Tribunal was not taken to any other supporting medical evidence to confirm the extent of her medical history. However, the Tribunal accepts that the events the claimant describes did happen. The Tribunal found the claimant to be credible, sure and consistent. Also, there is support in relation to her more recent medical history for the root cause of her mental health being body dysmorphia. This is recorded on 2 separate medical visits.
38. The claimant's evidence was that her body focused OCD impacted from the moment she woke up and even haunts her in her dreams. She explained that she was constantly on the edge of panic with a persistent desire to hide away. She explained that she takes medication (150 Mg Sertraline) every morning for anti-obsessional relief and 15 Mg mirtazapine every evening to prevent the constant worrying from keeping her awake. The Tribunal accepts the claimant's account and her evidence on dosage was consistent with the prescription evidence in the bundle.
39. In her impact statement, the claimant explained that when she wakes up, she immediately obsesses about her skin, hair and body weight and measures her waistline three or four times. The claimant finds getting ready for work extremely challenging as she finds using a mirror very distressing. The claimant constantly applies make-up often crying it off in despair before applying again. When dressing, the claimant explains that she obsesses over the way clothes look and feel on her body and these worries stay with all day. The claimant says that on leaving the house her symptoms usually improve although her entire day is consumed by managing obsessive thoughts and resisting the panic. This can often cause her to run late and she generally starts the working day stressed and flustered. She is also

subject to panic during warm temperatures, feelings of thirst, discussions around weight or appearance, the presence of or contact with weighing scales or food or interpersonal conversations which she can attribute to physicality. She summarised that it takes all her energy to get ready for work and outside of work the claimant says she avoids social situations through fear even refusing to answer the door. Any social events take weeks of planning and are likely to be cancelled at short notice as she finds herself unable to leave the house. She has even cancelled or not attended her own birthday celebrations on several occasions. In oral testimony the claimant also explained that if she did not take their medication, she would not be able to leave the house and couldn't hold a job down as she will have obsessional thoughts. The Tribunal accepted the claimant's evidence on this impact on her.

40. Whilst the respondent challenged the absence of sufficient medical records, it did not challenge the 'impact' on her by reference to for example, contrary accounts when at work or in relation to the degree/extent of impact.

### **Conclusions**

41. Dealing first with the Tribunal's jurisdiction in relation to the time point, the Tribunal notes it has a wide discretion and further notes that the discretion to extend time on a just and equitable basis is the exception rather than the norm. The Tribunal also has regard to the factors set out in the Limitation Act 1980 referred to above.
42. The Tribunal concludes that insofar as the claimant's ignorance of the time limit is concerned, having regard to the findings reached, the claimant's ignorance was reasonable. The Tribunal concludes that it was not unreasonable for the claimant to concentrate on her mental health/well-being before turning to ACAS and presenting a claim in the Employment Tribunal when she felt able to do so. The Tribunal notes that the claimant does have a substantial medical history in relation to her mental health and other personal issues. The Tribunal has noted but does not place significance on the fact that the claimant did not seek any medical support in the period from when the alleged discrimination occurred to when she presented her claim for example from her GP or a medical practitioner. This was because she was able to apply her own coping strategy and the Tribunal concludes that the claimant had experience of managing her own condition and that is what she was doing.
43. The Tribunal also has regard to the length of delay and considers the period in this case to be minimal as it was a matter of days at most. The Tribunal also concludes that the balance of prejudice lies in favour of the claimant in not being able to pursue her claim compared with the respondent's prejudice which is that they will need to defend the claim. The respondent did not advance any prejudice in relation to the passage of time and evidential difficulties and the Tribunal concludes that there is little or no prejudice in this regard in any event. The Tribunal also concludes that when

she did approach ACAS on 16<sup>th</sup> of April and became aware of the time issue, she presented her complaints promptly on the same day.

44. Accordingly, the Tribunal considers it just and equitable to allow the claim to proceed outside of the primary time limit.
45. Turning to the question of disability, the Tribunal considered the guidance on matters to be taken into account in determining questions relating to the definition of disability.
46. The Tribunal noted that in paragraph A5 under the meaning of impairment, obsessive compulsive disorders is listed as an example of an impairment which could qualify has a disability.
47. Further, in dealing with the definition of substantial in section B, an example is given in B3 in a relation to a person who has an obsessive-compulsive disorder who constantly checks and re-checks that electrical appliances are switched off and that the doors are locked when leaving home. A person without the disorder would not normally carry out these frequent checks. The need to constantly check and recheck has a substantial adverse effect.
48. The Tribunal also considered the guidance given in relation to cumulative effects of an impairment in paragraph B4, whereby it is important to consider whether the alleged effects of day-to-day activity, when taken together, could result in an overall substantial adverse effect.
49. In paragraph B9, the guidance also stresses the importance of considering the things that a person cannot do all can only do we difficulty and further under paragraph B11, the guidance refers to environmental conditions which may exacerbate or lessen the effect of an impairment for example temperature, humidity, lighting, the time of day or night, how tired the person is or how much stress he or she is under.
50. In relation to normal day-to-day activities guidance provides examples. Under D3 this includes getting washed and dressed, household tasks, walking and travelling by various forms of transport, taking part in social activities, general work-related activities and interacting with colleagues.
51. In relation to adverse effects on the ability to carry out day-to-day activities paragraph D 16 provide some guidance and states that this will also include activities that are required to maintain personal well-being or to ensure personal safety and that account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, keeping warm personal hygiene.
52. In the appendix to the guidance, there are examples of where it would be reasonable to regard (the examples) as having a substantial adverse effect on normal data rate day-to-day activities. This includes difficulty in getting



dressed, persistently wanting to avoid people or significant difficulty taking part in the normal social interaction or forming social relationships, for example because of a mental health condition or disorder and compulsive activities or behaviour.

53. Having regard to the findings of fact reached earlier by the Tribunal and having regard to the guidance set out above, the Tribunal concludes that the claimant did have a mental impairment namely her body dysmorphia OCD which affected her in a substantial way. The claimant's evidence was that her disorder affects her daily activities from the moment she wakes up. She explained that she was constantly on the edge of panic with a persistent desire to hide away. Her evidence on her morning routine, getting ready for work, dressing for work and leaving home leads the Tribunal to conclude that the claimant was substantially impacted taken in isolation or cumulatively. Further, all of the aforementioned activities are normal day to day activities.
54. Whilst the respondent considered there to be insufficient medical evidence in support of the claimant's assertions about her alleged disability, that overlooks the direct evidence of the claimant herself. The test for disability under the EqA is a legal not medical test.
55. In addition, the evidence was that the claimant takes different medication for her disorder during the day which controls her obsessiveness (during the day) and another medicine which helps her sleep at night. Ignoring the effect of medical treatment, the claimant explained she would not be able to leave the house during the day and at night, the constant worrying would keep her awake. The Tribunal also took into consideration the claimant's evidence on the effect of warmer temperatures.
56. In relation to long-term effect, the Tribunal concludes that the claimant was suffering with OCD and its associated symptoms at some point in 2013. If the Tribunal is wrong in its conclusion in this regard, the Tribunal concludes that at least from October 2017 the claimant had been suffering from her OCD and had been prescribed medication and seen her GP on at least 2 occasions.
57. The Tribunal concludes that the reference to the claimant continuing her medication in the entry besides 18<sup>th</sup> of October 2017 must mean that she was already on the medication for which the Tribunal did have evidence in the bundle and in relation to which the claimant gave evidence. The Tribunal further concludes that the medical history showed that the claimant was presenting with a mental disorder from May 2017 when there was an attachment from Dr Dooman (which the Tribunal did not see) referring to a clinical letter to Kingston and Richmond assessment team mental health.
58. Taking all the above into account it is the Tribunal's judgment that the Claimant was disabled within the meaning of the Equality Act 2010 by reason of body focused OCD at all material times and she is therefore

entitled to proceed with her substantive claim which is listed for hearing in **18 to 20 May 2020 (3 days)** 2019. The orders sent to the parties on 16 September 2019 following the case management hearing on 18 July 2017 remain in force.

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**Employment Judge Khalil**  
**26 November 2019**