



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4113695/19 & 4110797/19

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Held on 19 March 2020

Employment Judge J M Hendry

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Miss J Milne

**Claimant
In Person**

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Ladbrokes Coral Group Plc

**1st Respondent
Represented by
Mr R Bradley -
Advocate**

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Ladbrokes Betting and Gaming Limited

**2nd Respondent
Represented by
Mr R Bradley -
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that the claimant was not a disabled person in terms of Section 6 of the Equality Act 2010 and accordingly the claim for disability discrimination is dismissed.

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E.T. Z4 (WR)

REASONS

1. The claimant in her ET1 contended that she had been discriminated against on the grounds of a disability in relation to various events leading up to the termination of her employment. The respondents did not accept that the claimant was disabled for the purposes of the Equality Act in that she did not meet the requisite tests set out in that section.
2. A hearing took place to consider whether the claimant could demonstrate that she was disabled in terms of the Equality Act 2010 ('EA'). Prior to the hearing a bundle of documents was lodged by the respondent's representatives (R1 to 8). The claimant on the morning of the hearing lodged documents in support of her claim which were accepted by the Tribunal (C1 – C13).

Issues

3. Prior to the hearing Counsel for the respondent company indicated that the issue he intended focussing on was whether or not at the relevant time it was likely that the claimant's condition was going to have a long-term adverse effect on her ability to carry out day-to-day activities. The relevant time being at its latest when the claimant was dismissed.

Facts

4. The claimant worked for the respondent company ("Ladbrokes") since she was 18. She worked in various betting shops in Aberdeen. She was initially a cashier and latterly promoted to a customer services manager. She was a loyal employee who enjoyed working for the respondents
5. The claimant had no prior history of mental health problems including stress or depression until she encountered various difficulties at work from February 2019 onwards. These focussed on her relationship with her new line manager

and issues around flexible working to allow her to care for her youngest child, her son. He believed that she was being treated very unfairly and bullied. She raised a grievance.

- 5 6. From around April 2019 the claimant began to suffer with stress and anxiety and became depressed. She consulted a General Practitioner.

Absences

- 10 7. The claimant's first leave of absence was from 24 April 2019 to 12 May 2019. Her G.P. gave as the reason for her absence: "anxiety also diagnosed with heart murmur".

- 15 8. The claimant was absent from 13 May 2019 to 26 May 2019. Her G.P. noted the reason as "anxiety and depression".

9. The claimant was absent from 27 May 2019 to 25 June 2019. Her G.P. gave as the reason "anxiety and depression".

- 20 10. The claimant was absent from 26 June 2019 to 21 July 2019. Her G.P. gave as a reason "anxiety and depression".

- 25 11. The claimant was absent from work from 22 July 2019 to 18 August 2019. Her G.P. gave as the reason "anxiety and depression" The claimant was prescribed Diazepam for what was referred to as "severe anxiety" and prescribed Propranolol for anxiety and heart palpitations, Sertraline as an anti-depressant and Diazepam to help with sleeping.

- 30 12. On 22 July 2019 the claimant was reviewed by her G.P. who noted (R23):
"Patient reviewed. Appeal through Head Office as since February. New manager turned up at Ladbrokes where she works and has done so since she was 18. She feels she has never been left alone and allegedly feels bullied. Poor sleep, stress and anxiety, still unable to drive as anxious she

may see her manager. Propranolol really helps and takes one up to TDS. Not keen to increase dose. Also taking Sertraline 15mgs daily. Planned holiday coming up which she booked a long time ago, encouraged to go. See as needed Diazepam warning intolerance and addictive potential.”

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13. The respondents referred the claimant to their Occupational Health provider “Grant Occupational Health”. They prepared a report on the claimant dated 4 March 2020 (JB12 – 15) and the claimant was seen by the respondents’ Occupation Health providers “Medigold Health” on 25 July 2019. They prepared a report for the respondents dated 2 August 2019 (JBp.6-8) which recorded:

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“Ms Milne’s anxiety has been severe, she has been on betablockers and anti-anxiety medications and she has now been diagnosed with depression and is taking anti-depressant medication, which she has been on for approximately eight weeks. She has also been suffering from dizziness since her absence started and her G.P. checked her heart and discovered a heart murmur and she has now been referred for investigations which she is due to have in August.

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She states that her anxiety is so bad that she is no longer been able to drive and she has struggled to take part in anything and her sleep has been severely affected..... Ms Milne has been diagnosed with anxiety and depression as a result of work-related stress. The work-related stress appears to be the result of what she feels is bullying by her manager which started in the store in February of this year. She states that she has bullied her on a personal level, but has also referred to adhere to the times she is free to work and continually wants her to work and be fully flexible, which, with childcare issues, Ms Milne cannot be.

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In my opinion she is not fit for work and I do not think that she would be fit for work until this issue can be discussed and a conclusion be given.”

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14. In response to the question whether she would consider the condition to form a long-term disability she responded:

“At the present time she has only been on medication for a short period and hopefully this is only a short-term condition if things can be settled. Therefore, I do not think that she would be covered by the Equality Act 2010” (JBp.7).

5 **Effect of Anxiety and Depression**

15. The effects of these conditions, anxiety and depression, were that the claimant often became dizzy when suffering stress. She fell on a couple of occasions when outside. Her G.P. conducted various tests and her condition was investigated by a Cardiologist.

16. The claimant experienced difficulties at work which caused her stress. These problems were not resolved and were ongoing. They did not resolve following her dismissal but worsened.

17. By August the claimant had been periodically signed off work and prescribed antidepressants. The claimant would regularly experience heart palpitations. She would have panic attacks. She found it difficult when not at work to relax. She lost interest in her normal social activities and seldom left the house. She lacked motivation. She would not cook meals from scratch but rely on oven ready meals. The claimant would no longer help her son with homework or play with him. The claimant felt she was too anxious to drive.

18. The claimant lost interest in activities. She did not finish decorating work she had started. She would be forgetful. The claimant did not like leaving her house as she was fearful lest she encountered people who knew her from her work and who would ask about her and her work. The claimant became withdrawn. She became forgetful and found it difficult to concentrate. This affected her ability to follow TV programmes.

19. At this time the claimant would no longer arrange to go out with others and her social life became restricted. She found it difficult to sleep. Her mood was often low and she would dwell on events at work.

20. The claimant had for some time kept in regular contact with her daughter particularly by telephone and text. The claimant would sound depressed. She was not interested in socialising or making plans. Her daughter became concerned about her mental health.

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21. The claimant's conditions worsened following her dismissal which took place on the 8 September 2020. The claimant felt very aggrieved at her dismissal and the company's failure to address the problems she had experienced with her line manager. The loss of her loss of employment had a further adverse impact on her confidence and her conditions worsened.

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22. The claimant's condition had a substantial effect on her ability to carry out day to day activities up until and beyond her dismissal.

Witnesses

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23. The claimant gave evidence on her own behalf. She was a credible and generally reliable witness who gave her evidence clearly and without embellishment. The Tribunal also heard evidence from her daughter Laura Bain. She gave evidence as to how her mother's condition had affected their relationship. She was a patently honest witness who was credible and reliable.

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Authorities

24. The respondents made reference to the following authorities:

1. ***Cruickshank v. VAW Motor Cast Ltd*** [2002] IRLR 24;
2. ***McDougall v. Richmond Adult Community College*** [2008 ICR 431];
3. ***Singapore Airlines Ltd v. Casado-Guijro*** UKEAT/0386/13/BA; and
4. ***Thyagarajan v. Cap Gemini UK Plc*** UKEAT/0264/14/JOJ.

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Submissions

30 25. Mr Bradley first of all reminded the Tribunal of the legal framework surrounding disability discrimination and the tests set out in the Equality Act 2010. He submitted that there were three aspects of her condition having a

long-lasting effect. Firstly, that it would have to have lasted for 12 months or secondly that it was likely to last for 12 months or thirdly that it was likely to recur. The condition had not lasted 12 months at the date of dismissal nor was there evidence that it was likely to recur.

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26. He began his examination of the facts by pointing to the welfare meeting (Rp.2). The claimant had indicated that she: *“generally feel ok, tablets are helping but I have ups and downs. I feel much worse whenever I think about work and the way I have been treated.”* She had confirmed that she was on tablets for anxiety and depression. That meeting had taken place on the 10 August 2019. Mr Bradley also referred the Tribunal to the claimant’s letter to Dr. Gupta in February 2020 which simply asked the doctor if the condition was likely to last 12 months or for the rest of her life. He reminded the Tribunal that the important date was the date of the discriminatory acts. 15 These appear to be events around the redundancy meeting she had on 16 August and later on 23 August (see the claimant’s further and better particulars).

27. Counsel then made reference to the Guidance on disability at paragraphs 20 4.279, 21.22 as to the definition of “likely” to recur (***Singapore Airlines Ltd v. Casado-Guijro***) The issue was he suggested whether or not the claimant’s depressive condition was likely to become long-term. The latest date to consider was the 8 September 2019 being the last date of alleged discrimination. At that point it could not be said that the claimant’s 25 depression/anxiety condition was likely to be long-lasting. Counsel accepted that this was an exercise in prediction but the evidence showed that the claimant’s anxiety clearly related to her work and interaction with her manager. The claimant’s contact with her manager ceased after her dismissal and it would be expected that one the cause of the anxiety was removed the 30 condition would resolve.

28. In response Ms Milne indicated that the facts spoke for themselves. There was nothing in the evidence to suggest that she would be fine the next day after she had being sacked. In her view she had been badly treated and the depression and anxiety had been caused by that and had not been improved
5 by her dismissal.

Discussion and decision

29. The statutory framework is as follows:

“6 Disability

10 (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.*

(3) *In relation to the protected characteristic of disability—*

(a) *a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*

20 (b) *a reference to persons who share a protected characteristic is a reference to persons who have the same disability.*

(4) *This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—*

25 (a) *a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*

(b) *a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*

(5) *A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).*

(6) Schedule 1 (disability: supplementary provision) has effect."

30. A necessary requirement is that the condition relied on has a long-term effect. This is dealt with in Schedule 1 of the EA.

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"Long-term effects

2 (1) The effect of an impairment is long-term if-

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

10 *(c) it is likely to last for the rest of the life of the person affected.*

(2) 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."

- 15 31. The Tribunal must also have regard to paragraph 5. In the present case the Tribunal ignores the effect of the medication the claimant was given to assist her when considering her condition

"5. Effect of medical treatment

20 *(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.

25 *(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid."*

32. A useful analysis of the statute is contained in the case of **McDougall v Richmond Adult Community College** [2008] ICR 431 in which Pill L.J summarised the position thus:
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"21. The statute plainly contemplates that, for a disability within the meaning of the Act to exist, an impairment having a "long-term adverse effect" must

5 be established (Section 1 of the 1995 Act). The starting point is to ask whether the effect of the impairment has lasted at least 12 months (Schedule 1, paragraph 2.1(a)). Sub-paragraphs (b) and (c) of paragraph 1(2) introduce a predictive element. It is not necessary to establish that the effect has lasted for 12 months if it is established that it is likely to last for at least 12 months or for the rest of the life of the person affected (no doubt to deal with terminal conditions).

10 22. Paragraph 2(2) provides a further opportunity to establish a long-term effect. Where the effect of the impairment has ceased, it may still be treated as having a long-term effect if the effect is "likely to recur". By the use of the word "likely" in each of those situations a predictive element is introduced into the test of whether the effect of an impairment is a long-term effect. The word should bear the same meaning in paragraph 2(2) as in paragraph 2(1)(b)."

15 33. The respondents attack on the claimant's position was a focussed one. Mr Bradley argued that she had not demonstrated that it was foreseeable (at the time events must be judged, namely when the discrimination was said to have occurred) that he condition would be likely to last 12 months or more.

20 34. There is no doubt that the evidence discloses that the claimant was unwell throughout 2019 and that her anxiety/depressive condition appeared to relate to her perceptions around her position at work and her interaction with her manager. Depression in this context is sometimes referred to as 'reactive' in that it is a reaction to prevailing circumstances. The claimant's dismissal appears to have prolonged and exacerbated her condition rather than allowed it to resolve.

25 35. I accept that Mr Bradley is correct that whether the claimant is disabled in terms of the EA depends on examination of that condition at the time of the alleged discriminatory events (**Cruickshank v VAW Motorcast Ltd** (2002) IRLR 24). The pleadings are not particularly clear on the exact events relied

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upon but the last act of discrimination could only be the dismissal on the 8 September. There is a danger, as highlighted in the case of **Thyagarajan v Cap Gemini UK plc (2014) WL** for Tribunals to focus on how the condition or impairment developed rather than on the position at the time of those discriminatory events (**Richmond**). As the Court of Appeal Judge Pill.L.J, in that case puts it (paragraph 26):

“Mr Petts makes the point that it is necessary to make provision for the possibility of recurring episodes of the effect of an impairment. That is so and what paragraph 2(2) does under a procedure which is, in my view, plain. Mr Ohringer accepts that, where a recurrence has occurred, paragraph 2(1) read with paragraph 2(2), has the effect of "back-filling" the period since the last occurrence for the purposes of paragraph 2(1) so that the entire period counts towards the relevant period. That does not, in my judgment, bear upon the date at which the likelihood of recurrence is to be assessed for the purposes of paragraph 2(2). It is fundamental that the question whether a wrong has been committed be judged by the circumstances existing at the date of the act or acts alleged to constitute the wrong.”

36. The position in the present case is different in one respect, however, in that the claimant’s condition appears to have continued, uninterrupted as it were, after the dismissal. It is, therefore, not a situation where the claimant’s condition resolved at some point. Nevertheless, the focus must still be on the likelihood of the condition continuing at the point of the discriminatory act not whether it actually did continue. (Paragraphs 15-22 of **Richmond** and paragraph 18 **Singapore Airlines**)

37. With these matters in mind we need to examine what evidence there was about the claimant’s condition in September 2019. The respondents had asked the claimant to be seen by their Occupational Health Provider, Medigold Health, who prepared a report dated 2 August 2019 (R6). They observed that the claimant had been absent from work from the 26 April. The

exact date was in fact the 24 (C3). The claimant had not worked for some time by that point. The Adviser narrates that the claimant had no previous history of anxiety or depression and that her issues began with a new manager in February. This reflected the evidence that she gave at the hearing. The Adviser writes that the claimant's anxiety has been severe pointing to her being on anti- anxiety and anti-depression medication for approximately eight weeks by that point. Concurrent with these matters the claimant was diagnosed with a heart murmur. (That matter luckily did not appear to have much significance).

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38. The Adviser writes that the claimant was diagnosed with anxiety and depression as a result of work- related stress (R8). The Report also concludes that the claimant will not get well until 'this issue' is resolved referring to the core issue involved in the workplace dispute that of flexibility around child care. It is interesting to note that the Adviser suggested that the claimant could be moved to a different shop.

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39. The Adviser, who unfortunately did not give evidence, writes in response to the question posed to her as to whether the disability was long term the following: *"At the present time she has only been on medication for a short period and hopefully this is only a short- term condition"* The Adviser did not say that the condition was likely to resolve indeed the Report indicates that the condition is not likely to resolve until the issues are discussed and resolved. I take her use of the word 'hopefully' as indicating no more that if the issues are resolved the condition was unlikely to be long term. The Report could be read as saying that the condition would be likely to continue as long as the background problems were unaddressed. She writes that the claimant would be unlikely to be able to work with the manger in question in the future. However, the matter is not clear.

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40. The claimant obtained a Report from her GP, Dr Gupta, and provided the Tribunal with her medical records. At question 6 she writes that the Act protects workers where the effect of the impairment has lasted at least. 12

months *'or is likely to last 12 months or for the rest of their life'* (R9) The upshot was that the claimant was seen by Granite Occupational Health in March 2020 and a Report provided. (R11-15). Dr Vukoja, who prepared the report for the claimant's GP, considered question 6 (R14) concluded as follows:

5 "In my opinion at the time of her dismissal Ms Milne would not have been covered by the Equality Act 2010, as she did not have the aforementioned problems for longer than 12 months. Since this was her first episode of Mental Health issues it would be impossible to predict how long would her symptoms last and to what extent would the severity be. This is, however, a legal
10 decision and legal advice should be sought in this matter".

41. Unfortunately, Dr Vukoja did not give evidence to respond to the question raised in the earlier Occupational Health Report as to the likelihood of the condition resolving without the workplace issues being resolved. The
15 claimant's sense of grievance at the way she had been treated was palpable but perhaps not fully articulated to him. That sense of grievance was compounded by the claimant's dismissal. His Report does support in general terms the claimant's position as to the impact the condition has had on her and the adjustments that might have helped. Another issue arises from the
20 Doctor's conclusions and that is the connected issue of whether the condition was likely, as viewed without the benefit of hindsight, to remain as bad as it had been in August/September 2019 as time went on.

42. The problem the claimant faces is that her own Occupational Health Report
25 does not assist her and although to a lay person ignoring what actually happened after her dismissal and focussing on what might be predicted from a standpoint in September 2019 alone must seem bizarre but that is what must be done. There is insufficient evidence before me to say that it was likely that her condition, and the adverse effects it had, would have continued in the
30 absence of the main cause which was the manager's interactions with the claimant. The Doctor does not analyse or examine the likely effect the

dismissal would have been likely to have on the claimant's recovery if it compounded her sense of injustice, as indeed it did.

5 43. This case highlights the problems that face those without a history of mental health difficulties in proving the likelihood of their condition continuing to meet the 12 month threshold or to recur against a background where such conditions are usually short term. It presents a perverse incentive for an employer to consider dismissing in such a situation on the basis that it will be difficult for a claimant, particularly, as here, one representing themselves, to identify and then prove such a likelihood rather than wait until the 12 month threshold is reached while remaining in employment.

10 44. In conclusion, I am drawn to the position that the claimant cannot demonstrate that she was disabled at the relevant time and that as a consequence her claim for disability discrimination must be dismissed. I note that she has a claim for unfair dismissal which can proceed and a case management hearing will be arranged for that purpose.

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25 **Employment Judge:**
Date of Judgment:
Date Sent to parties:

James Hendry
26 May 2020
28 May 2020