



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107522/2019

Held in Glasgow on 22 November 2019

Employment Judge M Kearns

Ms L McIntyre

**Claimant
In person**

**Natalie and Martin Lightfoot
t/a Solo Convenience**

**Respondent
Represented by:
Mr R Eadie
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant has not established that she was disabled as defined in the Equality Act 2010 at the relevant times. The disability discrimination claim is dismissed.

REASONS

1. The claimant was employed by the respondent as a store supervisor from 7 September 2009 until her dismissal on 16 April 2019. On 30 June 2019, having complied with the early conciliation requirements she presented an application to the Employment Tribunal in which she claimed unfair dismissal and disability discrimination.

Issue for determination at Preliminary Hearing

2. The respondent does not accept that the claimant was disabled as defined in the Equality Act 2010 at the relevant time. From discussions at the outset of the hearing, the relevant time (when the alleged acts of discrimination occurred) is the period between 24 October 2018 and 16 April 2019.

Evidence

3. The claimant lodged a bundle of documents ("C") and referred to them by page number. She gave evidence on her own behalf.

Findings in Fact

4. The following material facts were admitted or found to be proved:-
5. The respondents are a married couple who run a convenience store as a partnership. The trading name of the partnership is 'Solo Convenience'. The claimant was employed by the respondents as a supervisor in the store from 7 September 2009 until 16 April 2019.
6. On around ten occasions during July, August and September 2018 the claimant experienced feelings of anxiety when in the store. These were related to confrontations she had with Mr Lightfoot about inappropriate behaviour towards other members of staff. The claimant experienced tightness in her chest and feelings of agitation. However, she was able to attend work normally and the problem did not have a substantial effect on her ability to carry out normal day to day activities.
7. On or about 16 October 2018 the claimant was working on her own in the shop. Her colleague had gone to the cash and carry. There was an attempted robbery. The police were called and they apprehended and charged the robber who was remanded in custody.
8. The day after the robbery the claimant went back to work alongside her colleague but she felt anxious and on edge. On 18 October the claimant went to see her GP

asking for medication to calm her down (C8). She complained of being unable to sleep and panicking about going back to work. Her GP prescribed diazepam. The following Monday the claimant went back to see her doctor. She said that she was feeling really low and was agitated and could not sleep. She was getting flashbacks.
5 The doctor prescribed sleeping pills.

9. The claimant carried on attending work for a couple more days, but on Friday 19 October she “went to pieces”. She could not stop crying. On leaving the shop the claimant went to her mother’s house. She visited her GP again on Monday 22 October and was signed off sick. The GP record (C8) states so far as relevant:
10 “2mg diazepam insufficient. Anxiety/stress sky high. Debilitated by it. Cannot sleep. Throwing cups against the wall. Ongoing family issues but main exac factor was hold up in shop. Has to go to court as witness/identify culprit. cannot face going back to work. Increase dose diazepam. Acute stress reaction hopefully no long term sequelae but having nightmares flashbacks. Prev on ads in past and was keen
15 not to go back on them. eMED3 (2010) new statement issued, not fit for work FitNote.pdf Diagnosis: acute stress reaction; Duration 22/10/2018 – 5/11/2018”.

10. Despite the sick line the claimant tried going into work the following week, but on Wednesday 24 October she broke down in the shop and was sobbing uncontrollably. She called her sister, who came to take her home. From that point
20 until the termination of her employment on 16 April 2019 the claimant was unable to attend work. She went to stay with her mother and for a number of weeks was unable to get herself out of bed except for doctors’ appointments.

11. The claimant became agoraphobic and on the days when she did manage to get out of bed she would lie on the couch in her pyjamas. She was frightened to answer
25 the door. The claimant found eating difficult and she lost a stone and a half in weight. The claimant stayed at her parents’ home for a few weeks but she found that her parents’ attempts to make her get up in the mornings were causing her agitation, so she moved back home. She attended her GP every two weeks. She found it difficult to eat. She tried counselling, but it made her tearful.

12. On 15 January 2019 the claimant was assessed by the respondent's occupational health adviser, Professor Ewan B Macdonald. Professor Macdonald produced a report on the same date (C2b). He noted that the claimant had anxiety and gastro-intestinal symptoms; that her sleep was disturbed, but that the medication was helping; and that the claimant had low mood and low energy. He concluded that the claimant had symptoms of post-traumatic stress disorder ("PTSD") with some agoraphobic symptoms. He stated that she was not currently fit for work. He said: "The pending court case is clearly a cause of anxiety, and I would suggest that she should be able to return to work after the court case." He recommended a very slow phased return to work. Professor Macdonald advised that the claimant should be able to work within 1 – 2 months with appropriate treatment. He gave the following supplementary answers to the respondents' questions:

"Does the employee have a physical or mental impairment? Yes, at present.

If the employee has an impairment, does that impairment have an adverse effect on the employee's ability to carry out day-to-day activities? Yes she is impaired at present in terms of her ability to tolerate going outside and into shops.

If the employee has an impairment with an adverse effect on her day-to-day life, is that effect substantial? It is substantial at present, but it is diminishing.

If there is an impairment with an adverse effect on the employee's day-to-day life, is that effect long-term? No.

How long do you consider the effect might last? As I have mentioned above, with appropriate treatment and management and getting her court appearance over, she should be fit to return within 1-2 months.

.....
What is the likely timescale for recovery, and when do you anticipate her return to work? With effective treatment, her problem will improve significantly, and I anticipate her return to normal working within three months."

13. The claimant was called as a witness at the robber's trial in April 2019. The trial was set down for three days. On the first day, the accused was ill. The claimant was in a terrible state and had telephoned the doctor to ask for a letter to excuse her from court. However, the accused finally pled guilty on day two of the trial and the claimant did not have to give evidence after all. Once the trial was over the claimant's health gradually started to improve. She started getting up and dressed again.

14. The claimant continued to be signed unfit for work until August 2019 (C8). She continues to take Mirtazapine.

Applicable Law

15. Section 6(1) of the Equality Act 2010 is in the following terms:

"6 Disability

(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."*

16. Section 6 is supplemented by Schedule 1. Part 1 of that Schedule deals with the determination of disability and provides, so far as relevant as follows:

"2. Long-term effects

(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*

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

17. Section 6(5) Equality Act 2010 ("EqA") empowers a Minister of the Crown to issue guidance on matters to take into account in deciding any question under subsection

(1). In 2011 the Secretary of State issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability'. The Guidance does not impose any legal obligations in itself, nor is it an authoritative statement of the law. However, Schedule 1, paragraph 12 to the Act requires that a tribunal which is determining a person is disabled as defined must take into account any aspect of this Guidance which appears to it to be relevant. I therefore take it into account where relevant below.

Discussion and Decision

18. The definition of disability in Section 6 of the Equality Act 2010 (as supplemented by Schedule 1) raises the following four questions. In Goodwin v Patent Office [1999] IRLR 4 the EAT made clear that these must be considered separately and sequentially.

- (1) Does the claimant have a physical or mental impairment?
- (2) Does that impairment have an adverse effect on his ability to carry out normal day-to-day activities?
- (3) Is the effect substantial?
- (4) Is the effect long-term?

19. Goodwin also emphasised that tribunals and courts should give a purposive construction to the legislation, which is designed to confer protection rather than restrict it. I address each of these questions in turn.

(1) Does the claimant have a physical or mental impairment?

20. The onus is on the claimant to establish that she was suffering from a mental impairment at the relevant time. As noted above, the 'relevant time' in this case is said to be between 24 October 2018 and 16 April 2019. I accept the written report evidence of Professor Macdonald (C2b) and find that the claimant had post traumatic stress disorder with some agoraphobic symptoms at the relevant time and that this was a mental impairment.

(2) *Did that impairment have an adverse effect on her ability to carry out normal day-to-day activities?*

5 21. Paragraph A7 of the Guidance makes clear that "*What it is important to consider is the effect of an impairment, not its cause.*" I concluded that from around 19 October 2018 the claimant's impairment had an adverse effect on her ability to carry out the normal day to day activities of sleeping, getting up in the morning, dressing, and going outside. Also, her appetite was diminished.

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(3) *Is the effect substantial?*

15 22. "Substantial" is defined in Section 212(1) Equality Act 2010 as "*more than minor or trivial*". The Act does not create a spectrum. Rather, unless the adverse effect can be classified as "minor or trivial" it must be treated as substantial. That is a relatively low standard. I concluded that the effect was substantial during that period in the sense that what the claimant could not do was not trivial or insubstantial.

(4) *Is the effect long term?*

20 23. As set out above, an impairment will have a long term effect only if:

- (a) *"It has lasted for at least 12 months,*
- (b) *It is likely to last for at least 12 months, or*
- (c) *It is likely to last for the rest of the life of the person affected."*

25 24. As submitted by Mr Eadie, on the evidence before me the claimant's PTSD and other symptoms had not lasted 12 months at the relevant time. The relevant period was October 2018 to April 2019. The claimant's evidence was that the effect of her mental impairment on her ability to carry out normal day-to day activities had begun around 19 October 2018 following the attempted robbery in the store.

30 25. In the absence of expert medical evidence, it was not possible to determine whether the claimant's symptoms, which began in October 2018 were likely to last for at least 12 months. As paragraph C3 of the Guidance makes clear, "likely" in this

context should be interpreted as meaning that 'it could well happen'. The Guidance also states at C4:

5 *"C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age)."* (My
10 emphasis).

26. It is not what actually later occurred but what could earlier have been expected to occur which is to be judged. The fact that a condition has, since the date of the alleged discrimination, lasted for 12 months is not relevant to the question whether
15 these eventualities were likely at the time of the discrimination. A tribunal must determine the hypothetical question of what the prognosis would have been in the light of the information available at the time of the alleged act or acts of discrimination. Where a tribunal is asked to make a judgement of this nature in relation to a mental illness, it needs an evidential basis for doing so, and expert
20 medical evidence is usually required. I am afraid that I am unable to determine whether the claimant's condition, assessed at the latest relevant date (16 April 2019) would have been expected at that point to last longer than 12 months. The only evidence before me which is relevant to that issue is the report of Professor
25 Macdonald, which suggests that it would not have been likely to last 12 months or longer. In January 2019 he stated that he expected the claimant to be fit to return to work within 1-2 months, and to normal working within three months. There is no evidential basis before me for anything more.

27. In the case of Royal Bank of Scotland v Morris UKEAT/0436/10 the EAT said this:
30 *"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 it 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.”

28. In this case the claimant’s impairment began around 19 October 2018. By the end of the relevant period it had lasted a maximum of 6 months. In the absence of expert medical evidence I do not find that it was, at that point, likely to last at least 12 months. Since the onus of proof rests on the claimant to prove this, I find that she has not established that she was disabled as defined in the Equality Act 2010 at the relevant times.

29. It follows that the claims of disability discrimination are dismissed.

30. The claimant also claims unfair dismissal and a hearing of that claim will now be fixed. Date listing letters will be sent to parties to list a suitable date for that claim.

Employment Judge:

M Kearns

Date of Judgement:

02 December 2019

Entered in Register,

Copied to Parties:

03 December 2019