



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100690/2019

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Held in Glasgow on 24 July 2019

Employment Judge S MacLean

Mrs Sarah Wood

**Claimant
In Person**

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Via-K Limited t/a Plan B Consulting

**Respondent
Represented by
Mr A Hardman
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The judgment of the Tribunal is the claimant was a disabled person for the purposes of the Equality Act 2010.

REASONS

Introduction

25 1. This is a claim of disability discrimination. The alleged discriminatory acts took place in September – October 2018 (the relevant time). The issue to be determined at this preliminary hearing is whether the claimant was a disabled person in terms of section 6 of the Equality Act 2010 (the EqA) at the relevant time.

30 2. The claimant gave evidence on her own account. David Wood, the claimant's husband gave evidence on her behalf. The respondent did not call any witnesses. The Tribunal was referred to productions provided by the claimant.

3. The parties gave oral submissions once the evidence had been heard.

**Relevant law
E.T. Z4 (WR)**

4. Section 6 of the EqA provides a definition of “disability” as follows: (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.
5. Section 212(1) of the EqA provides that “substantial” means more than minor or trivial.
6. Schedule 1 of the EqA gives further details on the determination of a disability. For example, paragraph (5) provides that 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 measures are being taken to correct it and but for that, it would be likely to have that effect.
7. The Tribunal must consider the Statutory Guidance on the definition of Disability (2011) (the Guidance). While the general definition of disability has a number of elements and the Guidance covers each element it is important to consider all sections of the Guidance. The appendix sets out illustrative and non-exhaustive list of factors experience by a person that may or may not be reasonable to regard as having a substantial and adverse effect of normal day to day activities.
8. In **Goodwin v Patent Office 1999 ICR 302** the EAT says that the words used to define disability in section 1(1) of the Disability Discrimination Act 1995 (now section 6(1) of the EqA require the tribunal to look at the evidence by reference to four questions:
 - a. Did the claimant have a mental and/or physical impairment?
 - b. Did the impairment affect the claimant’s ability to carry out normal days to day activities?
 - c. Was the adverse condition substantial?
 - d. Was the adverse condition long term?

Issues

9. Initially none of the elements of the definition of disability was conceded. Having heard the evidence for the claimant, the respondent's conceded that:
- a. The claimant has a physical impairment: abdominal pain which in December 2018 was diagnosed as Irritable Bowel Syndrome (IBS).
 - 5 b. The physical impairment had an adverse effect on the claimant's ability to carry out normal day to day activities.
 - c. It was long-term in that it was likely to last or had last 12 months.
10. The outstanding issue to be determined: was the adverse condition substantial?

10 **Findings in fact**

11. The Tribunal makes the following findings in fact.
12. Around July 2014 the claimant was diagnosed with likely IBS and prescribed medication which she stopped taking towards the end of 2014.
13. The claimant continued to have abdominal pain fluctuating from a week to ten days pain free to abdominal pain once to three time per week which included
15 "episodes" of intense pain for around an hour. In retrospect the claimant considered that this was mild to medium IBS.
14. The claimant commenced employment with the respondent in February 2018. This coincided with the claimant experiencing lower abdominal pain on her
20 right side. She did not realise that this was IBS because the pain was different to what she had experience previously. The claimant had several absences from work for ill health.
15. The lower abdominal pain was constant ranging from a dull ache where the pain intensity was about four out of ten to a sharp intense stabbing pain where
25 the pain intensity was ten out of ten. The level of pain fluctuated from for example level ten to level six then back to level ten then down to level four. For around 80 percent of 2018 the claimant's pain level was between level 5 and

level 10. The claimant did not know what triggered the fluctuation in pain intensity.

16. The level ten pain could last about around three hours. At this level the claimant could not function normally, concentrate or continue with normal activities and task. At level four was low grade discomfort which interfered with normal function functioning but would not stop the claimant carrying out normal activities or duties. At level six the pain was too distracting for the claimant to drive to work. Travelling time to work was around 40 minutes to up the two hours depending on the time of say and road works. The claimant could walk but her movement was muted and slow paced. She had to factor in additional time to get ready and walk down stairs in her flat.
17. The fluctuating pain caused the claimant difficulty falling asleep or remaining asleep. She would regularly be awake at 3 - 4 am. Alternatively she would fall asleep but be awoken by pain. As the sleep deprivation persisted the claimant became exhausted, emotional and lacked concentration.
18. The claimant was reluctant to go shopping and visits to the supermarket or clothes shopping were abandoned. The claimant rarely socialised particularly if it involved eating or attending venues where she was unfamiliar about the toilet facilities that were provided.
19. The claimant underwent a medical investigatory process which initially explored gynaecological explanations for the abdominal pain. She was prescribed medication (naproxen and co-codamol) for the pain which provided no relief.
20. As part of the ongoing medical investigation the claimant had key hole surgery on 4 October 2018; no gynaecological abnormality was found. The claimant was absent from work for this procedure. She returned to work in late October 2018.
21. The claimant resigned from her employment with the respondent on 30 October 2018.

22. In January 2019 the claimant was referred to a Consultant Physician and Gastroenterologist. He believed the diagnosis was IBS; advised the claimant to stop taking opiate containing analgesia; and prescribed medication (Mebeverine). The claimant was given strategies to deal with the pain.
- 5 23. In April 2019 the claimant was diagnosed with IBS. She was advised to continue with the medication until she is symptom free for one month.
24. The claimant remains on medication (Mebeverine). The pain level has reduced to a level four, but she continues to have “episodes”. The nature of her condition is one of relapsing presentation which means that it can recur in the
10 future.

Observations on the evidence

25. The witnesses gave their evidence in a clear way. The Tribunal considered they were giving an honest account of events. The Tribunal accepted the claimant’s evidence as to the effect that her impairment had on her in the
15 relevant period. The Tribunal found her evidence to be compelling. The Tribunal was conscious that the claimant’s symptoms have improved and it had to disregard how she presented to at the preliminary hearing. The Tribunal considered only her evidence about how she was at the relevant time.

Respondent’s submissions

- 20 26. The issue the Tribunal had to determine was whether the claimant had a physical or mental impairment which had a substantial and long term adverse effect on her ability to carry out normal day to day activities.
27. The material time for establishing disability (i.e. whether there is an impairment which has a substantial and long-term adverse effect on normal day to day
25 activities) is the date of the alleged discriminatory acts(s)). This is also the material time when established whether the impairment has a long-term effect.
28. The respondent employed the claimant from February to October 2018. The alleged discriminatory acts took place in September – October 2018 which is the relevant period.

29. The Tribunal was reminded of four question that it should ask (see **Goodwin** (above)).
30. The respondent accepted that the claimant had a physical impairment (abdominal pain) which had long-term adverse effect on the claimant's ability to carry out normal day to day activities. The respondent disputed that the effect was substantial.
31. The evidence was that the claimant's pain spikes. When that happens for one to three hours the effect is substantial but that substantial effect is not continuing. The Tribunal was referred to the Guidance as a whole and the appendix in particular.
32. The Tribunal was invited to find that the claimant did not fit into the statutory definition of a disabled person in terms of section 6 of the EqA.

Claimant's Submissions

33. The claimant invited the Tribunal to consider all the productions. She referred to her disability impact statement which the claimant said demonstrated the substantial effect that the impairment had on her ability to carry out normal day to day activities. The claimant also referred to the appendix to the Guidance and

Decision

Did the claimant have a physical impairment?

34. Dealing first with the issue of mental impairment, the Tribunal accepted that the claimant had a physical impairment: abdominal pain at the relevant time.

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

35. Turning to the effect of that impairment on the claimant's day to day activities, the Tribunal noted the terms of the Guidance that it should focus not on what the claimant could do but what she could not do or only do with difficulty. The Tribunal accept that there were things the claimant was able to do, such as

attending work. The Tribunal did not consider that contradict the claimant's evidence, which the Tribunal accepted, that she had difficulty socialising, eating and driving. She was at times unable to do these things or able to do these things but only with difficulty.

5 *Was that effect substantial?*

36. The seriousness of the effects varied but over the relevant period. It was clearly a substantial effect when the claimant was experiencing a level 10 pain. It is less clear that the effect was substantial at other times. The Tribunal considered throughout the day, based on the evidence given by the claimant that the pain was constant, but its intensity fluctuated throughout the day. The Tribunal considered that throughout the period February until October 2018 her impairment was having an effect on her day to day activities as described above, that was more than minor or trivial.

Was the substantial adverse effect long term?

15 37. The Tribunal then considered whether the substantial adverse effect was "long term". The claimant herself did not suggest that there was a substantial adverse effect before February 2018. The Tribunal considered that the substantial adverse effect started in February 2018 and continued until her employment terminated in October 2018. This is not a period of 12 months and so the Tribunal considered whether it was likely to last for 12 months (until February 2019). The fact that it has, in fact, lasted for that period is not relevant. The question is whether it was likely to last for that period as at September/October 2018 when the alleged discrimination occurred.

25 38. The Tribunal considered it was likely. The medical investigation established that the abdominal pain was not related to a gynaecological abnormality. The claimant was recommended to another specialist for further investigation. The respondent conceded this point. The Tribunal concluded that the substantial effect on her day-to day activities would be likely to have lasted for at least 12 months from the onset in February 2018.

39. In conclusion, the Tribunal considered that the claimant did have a disability and the claim can proceed.

Further procedure

5 40. The Tribunal will contact the parties separately about further procedure in this claim. For the avoidance of doubt, the findings in fact in this judgment relate only to the issue of disability status. They would not bind a future tribunal dealing with the merits of the claim and considering issues such as knowledge of the respondent.

10 Employment Judge: S MacLean
Date of Judgement: 25 July 2019

Entered in Register,

Copied to Parties: 01 August 2019