



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs S Howard

**Respondent:** ST & H Group Limited

**Heard at:** London South via CVP **On:** 12 October 2020

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

## **Appearances**

For the claimant: Ms R Barratt, Counsel

For the respondent: Ms D Masters, Counsel

## **RESERVED JUDGMENT ON A PRELIMINARY ISSUE**

### **Decision:**

The claimant was not, at the material time, a disabled person within the meaning of S.6 Equality Act 2010

### **Reasons**

#### **The claim, appearances and documents.**

1. By a claim form presented on 13 March 2019, the claimant brought complaints of disability discrimination.
2. The issue of whether the claimant was disabled at the material time within the meaning of S. 6 Equality Act 2010 was listed to be heard as a preliminary issue today following the preliminary hearing on 19 June 2020.
3. The claimant was represented by Ms Rachel Barratt, Counsel and the respondent by Ms Dee Masters, Counsel.

4. The Tribunal had before it an agreed Bundle which contained amongst other documents the medical notes/evidence of the claimant and her disability impact statement.
5. Both Counsel had helpfully produced written skeleton arguments/submissions which were expanded on orally.
6. The hearing took place by CVP. The claimant was offered the opportunity more than once to take a break but in the end her evidence was taken without interruption. Her evidence lasted about 45 minutes.

**Relevant findings of fact**

7. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered the evidence given by the claimant during the hearing, including the documents referred to and taking into account the Tribunal's assessment of the witness evidence.
8. Only relevant findings of fact relevant to the issue to be determined, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine peripheral facts in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in evidence.
9. The Tribunal's findings focused on the long-term aspect of the disability definition as this was the key dispute between the parties. This was uncontroversial.
10. The claimant was employed as personal assistant from 12 June 2018 until her dismissal on 14 November 2018.
11. The claimant's dismissal was based on the respondent's assertion that the claimant had not been responsive to efforts to contact her whilst she was signed off.
12. The claimant was signed off from 22 October 2018 to 29 October 2018, from 29 October to 5 November 2018 and from 5 November to 25 November 2018.
13. The fit notes referred to stress and anxiety and anxiety states. The descriptions did not indicate anything long term expressly. Whilst that would not be unusual, the diagnosis did not refer to general anxiety disorder or depression or provide any other information on prognosis beyond the duration as stated on the notes (see paragraph 12 above).
14. The GP records at the time showed that on 17 October the claimant visited a GP (Dr Mankragod) (page 55). The notes recorded the claimant being

“stressed”, her unhappiness at work and wanting to spend more time with her children.

15. On 22 October 2018, page 54, the claimant saw a different GP (Dr Eze). The notes record “anxiety states (*first*)’ besides ‘problem’. There was reference to stress at work and her daughter’s asthma attack which had caused the claimant to suffer with panic attacks, constantly checking if her daughter was breathing. (The claimant repeated this in her evidence referring to it as “*weird checking behaviour*” and stated that this happened in October and lasted until the end of November 2018). There was also reference to stress and anxiety after “diagnosis”.
16. On 29 October 2018, the claimant saw another GP (Dr Pryse). The notes record that she said she was feeling better, there was reference to her children and having lots of guilt and bringing work home. The claimant said she had counselling lined up, discussed ‘mindfulness’ and was also considering yoga. The problem was recorded as “anxiety states” (page 54).
17. The claimant also saw 2 other GPs on 29 November 2018 and 17 December 2018 but these appointments were in connection with wrist pain and an X-Ray, unconnected with the claimant’s mental health (page 54).
18. On 18 December 2018, the claimant saw another different GP (Dr Mahmood). This post-dated her dismissal. The notes record the claimant feeling very low, having difficulty sleeping, low motivation, some negative thoughts. The claimant was prescribed medication – Sertraline (page 54). Anxiety states was recorded as ‘new’. Under cross examination, the claimant said “*things definitely got worse for me*”.
19. The claimant next visited her GP practice on 18 March 2019 and saw a different GP (Dr Le Feuvre). The notes referred to anxiety and depression (*first*). This was the first reference to depression. The notes also stated that the claimant had only just started to take Sertraline. Under cross examination, the claimant said by then “*things had got a lot worse*”.
20. The Tribunal was taken to the GP letter to the claimant dated 1 May 2019. There were 3 versions of this letter but the only variance the Tribunal observed was in relation to the date on which the GP was being asked to assess the long term effect of the claimant’s alleged impairment. The date change from 19 November to 14 November 2018.
21. The letter of instruction from Leigh Day solicitors was also in the bundle at page which did set out the relevant legal test.
22. The GP who provided the opinion (Dr Smyrnov) did not see the claimant before providing his opinion. There was no examination or consultation with the claimant. This was accepted by the claimant under cross examination. The GP

had had a *telephone* consultation with the claimant once before (unrelated to mental health) but otherwise there was no existing/on-going patient-doctor relationship.

23. The opinion did not specify the impairment – the second paragraph provided a short summary of her symptoms. There was reference to anxiety but there was also reference to feeling fatigued, stressed, panic attacks and general unwellness too; it was not clear if these were symptoms of an impairment or otherwise. In each version of the letter there was also mention that the impairment “was” substantial and having ‘had’ long term effects which was not clear if that was about future long term impact, or the previous 12 months (which was not part of the claimant’s case). If the former, it was not clear which period this statement was for notwithstanding the reference in the next paragraph to the claimant’s mental impairment ‘could well’ last for at least 12 months.
24. The claimant had also provided a disability impact statement (‘DIS’). The statement was signed on 29 November 2019 and the narrative did not distinguish between the impact on the claimant then compared with impact in October/November 2018.
25. The statement began by the claimant stating that she had been asked to set out what effect my disability “has on me.” The claimant described the occurrence of panic attacks and the effect on her sleep. Whilst the claimant did comment on these occurring almost daily when she went to see a GP in October 2018, the claimant did not specify the continuance of these, by date, beyond that date to 14 November 2018. The claimant’s reference to her irrational fear in paragraph 7 was not specified by reference to a date. There was however reference to a work example in paragraph 9 which would have been pre- 14 November 2018.
26. The claimant’s description of the impact on her loss of concentration also contained a mixture of tense. The Tribunal found that the claimant was describing her feelings at the time she wrote her statement – for example her mind often “feels” cloudy and that she “will” make mistakes.
27. In relation to loss of interest in activities and social interactions, the claimant again described the effect with a combination of tenses. The impact on getting washed and dressed was stated to be in the present, whilst commenting on spending time alone and missing events as a past occurrence. Paragraph 15 (regarding social events) read like a statement of the claimant’s state of feeling when she wrote her statement or around that time, though the Tribunal noted paragraph 16 referred to a particular incident in September 2018.
28. The claimant’s description of her lack of confidence and low self esteem was also combined with the past and the (then) present. The claimant stated she “has” no confidence or self -esteem but also has “had” feelings of

worthlessness. The description about everyday tasks in paragraph 18 was about the (then) present.

29. The claimant's eating disorder described in paragraphs 20 to 21 were also a combination of the past and present
30. The claimant was prescribed medication (Sertraline) but when did start it, the Tribunal finds in or around March 2019, she suffered side effects and stopped taking the tablets.
31. The claimant said under cross examination that between November 2018 and October 2019 she had deteriorated saying it was "*very bad, got worse after the sacking*". The claimant did also say that it was not fair that it was not as bad as October 2018. She also stated "*it was a problem then and a problem now*". The claimant accepted that the GP notes at the time did not make reference to the impact on her concentration, her (loss of interest in) reading, her social interaction and eating disorder as set out in paragraphs 11 to 20 of her DIS.
32. The claimant said she had mentioned the impact on her concentration but could not explain why the affect on social interaction was not in the record. She also stated she was not a big talker.
33. Within the confidence of a GP however, she had managed to explain other specific private feelings such as her perceived guilt about her children. The Tribunal found that these matters (page 31) were not mentioned at the time and that in the light of the Tribunal's findings above regarding the conflated nature of the DIS, these were symptoms which the claimant experienced after the material time.

### **Applicable Law**

34. The law on the definition of "disability" is provided by S.6 Equality Act ('EqA') 2010 and further assistance is provided in Schedule 1 of the same Act.
35. 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"
36. 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?

37. Under paragraph 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.
38. Under paragraph 2 (2) of Schedule 1 to the EqA, 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 to have that effect if that effect is likely to recur.
39. The term "substantial" is defined in S.212(1) EqA as meaning 'more than minor or trivial'.
40. 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').
- 41.** In relation to long-term effect, the Tribunal needed to consider the substantial adverse long-term effect at the material time. The material time is the date of the alleged discriminatory act (***Cruickshank v VAW Motorcast Ltd 2002 ICR 729 EAT.***)
42. In determining likelihood that an impairment may last for 12 months i.e. projecting forward, a Tribunal should not have regard to subsequent events; the likelihood must be assessed as it existed at the date of the alleged discrimination, not in the light of what has happened after including by the time of the Hearing. (***McDougall v Richmond Adult Community College 2008 EWCA Civ 4 CA.***) Only medical evidence obtained after the event, as long as it relates to the circumstances at the material time, can be considered.
- 43.** Likely means 'could well happen' which is a different test to a balance of probabilities ***SCA Packaging Ltd v Boyle [2009] UKHL 37*** and C3 of the guidance.

### **Conclusions and analysis**

44. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.
45. The claimant did not rely upon her alleged impairment having lasted for 12 months. Her assertion was that it was likely to last for 12 months (or more) at the material time namely the date of the alleged comment in October and her dismissal on 14 November 2018.

46. The Tribunal had no doubt that in period October 2018 to 14 November 2018, the claimant was experiencing anxiety symptoms. Anxiety was mentioned during her visits to the GPs at the time.
47. It was not however until March 2019 that there was mention of depression. At this point the claimant had started to take medication. Evidence of actual deterioration is not a permissible factor to have regard to (*McDougall*).
48. The entry in her medical notes on 22 October was triggered, on the claimant's own admission, by her daughter's asthma attack. The Tribunal concludes that this was episodic, and it did cause the claimant to have a substantial adverse effect on her ability to carry out normal day to day activities. Compulsive behaviour is listed as an example in appendix 1 of the guidance. The Tribunal also concludes that the two references to work stress and bringing work home were also episodic/transient at that time.
49. The entry in December 2018 also stood out as manifesting a decline in her well-being which was also the first occasion the claimant was prescribed medication. Whether or not the claimant was suffering with *persistent* low motivation (which is also listed in the appendix to the guidance), this was beyond the material date and the trigger for which was likely to be the claimant's dismissal on 14 November 2018 and thus consequential.
50. However, there was nothing within these GP notes/visits to support an argument that the claimant's impairment of anxiety *could well* last 12 months at the material time.
51. In relation to the GP's report dated 1 May 2019, which did contain a retrospective view, the Tribunal concluded that on a qualitative and sufficiency basis, the report was not convincing. To not assess the degree or depth of an opinion would mean there would be no difference between a 'disability definition affirming' statement compared with, for example, a detailed report, following examination addressing each element of the definition, particularly where an opinion is being given almost 7 months after the material time and projecting forward from then. As found above, there was no consultation, in person or via telephone to discuss the prognosis with the claimant. There was no detail about *why* the GP felt the impairment was likely to last for 12 months or more at the material time. There was no mention by illustration or examples, on what the substantial effect on normal day to day activities was. The separate elements of the test should be viewed together (see *Nissa* below). There was no specificity about what the impairment was. There was no patient – doctor relationship which might have enhanced the medical prognosis of the impairment having regard to wider knowledge of the claimant and all the circumstances. The Tribunal noted the claimant's argument that as a professional GP the opinion should weigh into consideration. The Tribunal did do that but for reasons given herein and having regard to all material before the Tribunal it was not sufficient.

52. In ***Nissa v Waverly Education Foundation Ltd and another*** **UKEAT/0135/18/DA** the EAT (HHJ Eady QC presiding) stated regarding long term effect:

*“Having considered both terms - long-term and substantial - separately as the ET did in this case, I note that these words go hand in hand; they qualify each other. The substantial effects must also be long-term; see **Cruikshank** at page 739F-G.”*

53. The Tribunal concludes that the assessment was no more than an assertion. Whilst the test for the Tribunal is a legal one, the Tribunal can look to the only medical evidence available expressing a retrospective view and form a view on the reliability and quality of it to assist its task. Medical evidence can support both a finding of long-term impairment or a rejection of that finding.

54. It was said in ***SCA Packaging Ltd***:

*“For one thing, as already pointed out, the ultimate question is not purely medical, even though the medical input into any answer is likely to be significant. As in most legal proceedings, the decision is for the Tribunal - and Tribunals, like courts, are accustomed to using the available medical evidence to draw conclusions on [the balance of probabilities] when that is required”.*

55. The Tribunal had regard to the claimant’s own DIS. As a result of the Tribunal’s findings above, the DIS lacked clarity or consistency about which symptoms were prevalent at the material time and what was the impact on normal day to day activities at the material time. The Tribunal rejected the universal statement by the claimant in paragraph 5 of her DIS that the effects she was describing all began in August or September 2018. This was because the statement did not sit well with the combined tense of the remainder of the statement. It would have been easier to assess the projection the Tribunal was tasked to do with a clear divisible position – a before and now. It was also not referenced in the GP letter.

56. The Tribunal considered if the claimant had an impairment at the material time which had a recurring effect – that is, if she had an impairment which had a substantial adverse effect on her normal day to day activities which had ceased but which was likely to recur (C5 of the guidance). This was not argued by the claimant in evidence or in submissions and the medical evidence or the claimant’s evidence did not support such a proposition either.

57. Having regard to the Tribunal’s assessment of the totality of the evidence, the Tribunal was not satisfied that the claimant had discharged the burden of proof in establishing that she was a disabled person within the meaning of S.6 EqA by reason of anxiety or depression.



58. That is not to say the claimant had not suffered with anxiety or depression or that her impairment did not go on to deteriorate but that it was not, in the Tribunal's conclusion, an impairment which *could well happen* to last for 12 months or more at the material time. The Tribunal concluded that at the material time, as referred to above, the claimant's impairment was much more closer to being episodic or transient at the material time.

59. The hearing listed to be heard on 30 March, 31 March and 1 April 2021 is vacated.

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**Employment Judge Khalil**

**19 October 2020**