



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4113697/2019

Preliminary Hearing Held in Dundee on 8 December 2020

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Employment Judge I McFatridge

Ms S Okeze

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**Claimant
Represented by:
Ms Campbell,
Solicitor**

Cygnnet Health Care Limited

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**Respondent
Represented by:
Mr S Hughes,
Advocate
Instructed by:
Mr M Creamore,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant was not disabled in terms of the Equality Act at the relevant time.

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REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had unlawfully discriminated against on grounds of disability. She also claimed breach of contract and unlawful deduction from wages. The

respondent submitted a response in which they denied the claims. They did not accept that the claimant was disabled in terms of the Equality Act. A preliminary hearing was fixed with the sole purpose of determining the issue of whether or not the claimant was disabled in terms of section 6 of the Equality Act. At the hearing the claimant gave evidence on her own behalf. She adopted a disability impact statement which she had given to her solicitor on 20 February 2020 as her evidence in chief and was then cross examined on this. A bundle of productions was also lodged which included various excerpts from the claimant's medical records. On the basis of the evidence and the productions I found the following essential facts to be proved or agreed.

2. The claimant was diagnosed as suffering from anxiety and depression in or about 2016. Since then she has been on medication having been prescribed anti-depressants by her GP. The claimant lives alone and is a full time student studying a Masters Degree course in social work at Dundee University. As well as being a student she worked for the respondent until her employment was terminated. Since then she has obtained another job working in a warehouse.
3. The claimant grew up in Nigeria. She completed a Law Degree in Nigeria.
4. The claimant complains of suffering a degree of mental and physical abuse whilst living in Nigeria.
5. The claimant originally came to the UK to study in Portsmouth for a Postgraduate Law qualification. Unfortunately she failed to complete her degree and thereafter moved in with her older sisters in London. Whilst living in London she helped look after her sister's children.
6. Unfortunately, the relationship between the claimant and her sisters broke down in or about spring/summer 2018 and the claimant was thrown out of their house. The claimant found this extremely upsetting and remains extremely bitter towards her sister as a result of this. The claimant returned to Portsmouth where she was homeless for a time. She went to the Police for assistance and she was placed in a hostel. She then successfully applied for the postgraduate study course in Dundee. On arrival in Dundee she consulted her GP who decided to refer her to a Community Mental

Health Nurse in November 2018. The claimant attended two appointments with the Community Health Nurse following which the Community Mental Health Nurse (Ms Grant) provided a report to the claimant's GP which was contained in a letter dated 13 December 2018 which was lodged (pages 27-30). The report accurately sets out the history given to the Community Health Nurse by the claimant at that time.

7. The claimant spoke angrily of her relations with her siblings. It was noted that the claimant was in regular contact with her mother and also an aunt who lived in the UK who had been very supportive of her. Ms Grant reported that the claimant gave mixed responses regarding her social work course sometimes intimating that she enjoyed it and at other points not. Under assessment (page 28) the report goes on to state

"Shirley's presentation throughout our first interview was variable. Initially, she presented as quiet and apologetic, but very quickly and assertively directed the conversation to the above family situation and displayed much anger in relation to that, frequently seeking affirmation of her right to be aggrieved.

She reported having had to wear heavy make-up to 'mask' her poor appearance, but her make up was light and unremarkable. She also indicated having previously 'hacked' at her hair when distressed, but her hair appeared tidy and evenly cut. She was dressed smartly but casually, with no self care deficits apparent.

Shirley intimated that she often speaks to herself, which concerns others. However, this was not in response to hallucinations or other perceptual disturbance or thought disorder, of which there was no evidence, but rather as a habit that she finds useful. She seemed surprised that I did not therefore consider this to be problematic. There was no evidence consistent with thought disorder or perceptual disturbance.

There were points of incongruity in her descriptions, but she did not present as anxious at interview, or indicate any specific symptoms to suggest this in her day to day functioning. Towards the end of the interview, she stated that at some point she had induced vomiting, but gave no other corresponding information relevant to this, and again

directed the conversation away from it when further questioning was attempted.

5 During our second contact, Shirley responded positively to very focussed questioning, with a solution focussed approach. Whilst unhappy about elements of her life, her mood presented as euthymic, with no impairment in concentration, motivation or interest levels. There was no evidence of thought disorder or perceptual disturbance. She presented as of fragile self esteem in certain areas, although not in others. She was assertive and appeared to want to engage. She
10 seemed unhappy that she had failed in certain areas and worried that at her age, she had not achieved more. Some anxiety regarding her course and her future career success was apparent, but this did not appear to be outwith normal parameters, nor affecting her functioning to any extent.

15 Her appetite was unimpaired, although she reported difficulties with sleep latency.

She was enjoying cooking and baking, which she was still doing. However, it surprised her to consider that the lack of regular pleasurable activities such as singing, dancing and acting may be
20 linked to her mood. Similarly, she appeared unaware of the links between sleep hygiene, and sleep volume and quality, but appeared interested in both of these concepts.”

8. Following this meeting the claimant was discharged from further treatment on the basis that she would be engaging with the University counselling
25 service. No follow-up appointments were arranged.

9. The claimant continues to live alone. She travels on public transport although she does not like this and sometimes feels anxious about it. She has assistance from friends and members of a church community who help her with things like shopping.

30 **Matters arising from the evidence**

10. At the start of the hearing the claimant indicated that she was feeling stressed and the meeting was adjourned so that she could obtain a glass of water. Due to Covid restrictions, water had not already been provided

on the table. During her evidence the claimant's representative indicated that she had decided that following consultation with the respondent that the claimant would simply adopt the disability impact statement which she had previously lodged. The claimant duly did this. The disability impact statement referred to the claimant having difficulties in a number of areas stating that she had difficulty sleeping and was unhappy about her life, the background with her family in Nigeria and also with her sisters. She referred to impacts on her eating and referred to a feeling of being left out. She referred to low mood. She said that she was prescribed Fluoxetine and it would appear that she has been prescribed this since 2016. It was her view that if it was not for the Fluoxetine her symptoms would be worse although she did not provide any medical evidence to back this up. She referred to having panic attacks and triggers could be low mood, school or when crowds are too big. She described every day as being a constant battle. She said that her friends helped her with finance and with shopping and paying bills. She indicated that sometimes the Pastor at the church would have to remind her to go to church. She said she found change difficult. It was put to her by the respondent's representative that there was absolutely no medical evidence to support any of her contentions. This was despite the fact that, as noted in the various notes of case management discussions, the preliminary hearing on disability was supposed to have been held in May 2020 and that it had been adjourned so that the claimant could obtain medical evidence. The claimant did not give any explanation as to why no additional medical evidence had been provided. The respondent's representative took the claimant through the report from the mental health clinician who had examined her in November/December 2018 which was the only medical report which had been tendered by the claimant. He put it to the claimant that absolutely none of her contentions were supported by this report. The claimant did not accept this. It became clear during the claimant's evidence that the claimant was extremely angry with her family and her sisters. She has very strong views as to what is wrong with her life and that others are to blame for this. She did not go into any further detail regarding any specific effects of her impairment on her day to day activities. She was not able to give any explanation as to why Ms Grant had made the clinical findings she had which ran contrary to what the claimant was now saying. She did not give any explanation for points of

direct conflict where for example the claimant said that she had problems with cooking for herself but Ms Grant stated that in 2018 the claimant had indicated that cooking was one of her hobbies. The claimant indicated that by this she meant cooking for her sister's children when she had been
5 looking after them. She indicated that she had very much enjoyed that.

Discussion and decision

11. The sole question which I required to determine was whether or not the claimant was disabled in terms of the Equality Act. Both parties made full submissions however rather than repeat these at length I will refer to them
10 where appropriate in the discussion below.

12. Section 6 of the Equality Act states that a person P is disabled 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.

13. I am required to take into account Schedule 1 of the act which provides supplementary provisions regarding the determination of disability. I am also required to take into account the guidance which has been produced by the Secretary of State in terms of section 6(5) of the Act. A useful summary of the approach which requires to be taken in relation to the
20 determination of disability is contained in the case of Goodwin v Patent Office [1999] ICR 309. Although this referred to a previous definition contained in previous legislation (which contains a reference to a requirement for mental impairment which is no longer required) I consider it still provides a useful summary of the approach. The first question is does
25 the claimant have a physical or mental impairment? If so, then the question is does it affect their ability to carry out day to day activities. Thirdly, is that affect substantial and finally, is it long term bearing in mind that Schedule 1 indicates that effects are to be taken to be long term if it has lasted for at least 12 months or it is likely to last for at least 12 months or it is likely to
30 last for the rest of the life of the person affected.

14. In relation to the first question relating to impairment I note that in the guidance the term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be

established nor does the impairment have to be the result of an illness. I note that in the case of J v DLA Piper [2010] IRLR 936 tribunals were cautioned against trying to become too involved in identifying a specific impairment. Often the impairment can be identified and established from evidence relating to its effects. In the J v DLA Piper case it was indicated that if a Tribunal were to find that the claimant's ability to carry out normal day to day activities had been substantially impaired by symptoms characteristic of depression for 12 months or more it would in most cases be likely to conclude that he or she was suffering clinical depression rather than simply a reaction to adverse circumstances.

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15. In this case I note that the claimant stated she was diagnosed as suffering from anxiety and depression in or about 2016 by her GP. She has been prescribed Fluoxetine or other anti-depressants since then.

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16. The difficulty for the claimant is in relation to other parts of the definition of disability. Many people suffer from depression and anxiety without being disabled. Whilst the impact statement provided by the claimant sets out a number of impacts on her everyday life the difficulty for the claimant is that absolutely none of these are supported by any medical evidence whatsoever. The respondent's representative quite candidly started his cross examination by advising the claimant that in the normal course he would advise respondents to concede disability if there is any medical evidence whatsoever to support this. He stated that in this case despite the claimant having a considerable amount of time there was absolutely no medical evidence supporting the claimant's version of the effect of her depression on her ability to carry out day to day activities. Many of the matters which she complained were directly contradicted by the only report which existed.

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17. There is no doubt in my mind that the claimant feels that she suffers from mental health difficulties. How much of this is due to impairment and how much of it is simply a reaction to adverse circumstances is difficult to determine. What was very clear from the claimant's own evidence is that she becomes very animated and angry when describing her family. There is no doubt that on the claimant's view of things they have treated her badly and in many respects her sleeping difficulties and so on are a perfectly

normal reaction to these particular adverse life circumstances. It was clear from Ms Grant's report that that is certainly what Ms Grant believed. At several points in the report she indicates that the claimant had some anxiety regarding her course and future career success but this was not outside normal parameters and that there was no impairment in concentration, motivation or interest levels. The report goes on to say that the claimant had indicated that far from having problems with tasks she in fact had taken the initiative in complaining to her flatmates for not cleaning dishes etc.

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Employment Judge:
Date of Judgment:
Date sent to parties

Ian Mcfatridge
12 January 2021
12 January 2021

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