EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103310/2019 (V)

Held via Cloud Video Platform (CVP) on 18 and 19 November 2020

Employment Judge: M Sutherland

Mrs K Lucas	**Claimant** **In Person**
Scottish Widows Services Limited	**2nd Respondent** **Represented by:-** **Mr F McKay, Solicitor**
Krispal Bhachoo	**3rd Respondent** **Represented by:-** **Mr F McKay, Solicitor**
Dawn Bowden	**4th Respondent** **Represented by:-** **Mr F McKay, Solicitor**
Bryony Robertson	**5th Respondent** **Represented by:-** **Mr F McKay, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the Claimant was not disabled during the relevant time and her claim for disability discrimination is dismissed.

REASONS

1. The Claimant has presented various complaints including of disability discrimination. An open preliminary hearing was arranged to determine whether the Claimant was disabled in terms of Section 6 of the Equality Act

2010 at the time of the alleged acts of discrimination ('the relevant time'). For the purposes of this hearing it was agreed between the parties that the relevant time was the period from June 2018 until January 2020 (inclusive).

2. The Claimant appeared on her own behalf. The Respondent was represented by Mr Finlay McKay.

3. At a prior case management preliminary hearing the Claimant had been referred to the statutory guidance on the definition of disability. The Claimant provided further particulars of her disability on 28 June 2019. She advised that she was disabled from 1 May 2018 "my disability is an anxiety condition which has impaired my memory and concentration, causes me to suffer mood swings, panic attacks, sleeping disturbances, unexpected fatigue, irritability, digestive disorders and frequent incontinence." At the start of the hearing and following receipt of medical advice the Claimant sought to amend that impairment to "anxiety and depression" which was allowed following discussion.

4. The Claimant gave evidence on her own behalf and Dr Tom Griffin gave evidence on behalf of the Claimant. The Respondent did not call any witnesses.

5. Parties had been directed to prepare witness statements but in the absence of a detailed order that direction had not been complied with. Following discussion it was determined that the witnesses would give their evidence in chief orally at the hearing.

6. Parties had each prepared a bundle of documents.

7. Following discussion it was agreed by both parties that Dr Tom Griffin could refer to the completed HADS questionnaires when giving evidence which was in his possession but that it was not necessary for that to be included within the bundle of documents.

8. Parties had not agreed a List of Issues. Parties were advised that the tribunal required to determine the following issues: At the relevant time, did

the claimant have a mental impairment? If so, did that impairment have an adverse effect on her ability to carry out normal day to day activities? If so, was that effect substantial (more than minor or trivial)? If so, was the substantial effect long term having lasted (or being likely to last or recur) for 12 months?

9. The parties made oral submissions.

Findings of Fact

10. The Claimant has been employed by the First Respondent since 3 November 2014 and remains in their employment. Throughout the relevant period (June 2018 to January 2020) she worked full time (compressed hours over 9 days a fortnight). The Claimant worked as a Fund Reporting and Analysis Manager.

11. The Claimant is a highly intelligent and very capable person. The Claimant's role with the Respondent is highly demanding and used to entail providing detailed reports. She has not been required to provide such reports since 2017.

12. The Claimant's father-in-law passed away in May 2015, the Claimant's husband was diagnosed with cancer in July 2015, the Claimant's father passed away in August 2015, and the Claimant's husband passed away in February 2016. The Claimant was absent from work by stated reason of stress for 2 weeks from April 2016. The Claimant attended bereavement counselling in in 2016.

13. The Claimant raised internal grievance proceedings at work in March 2017 regarding a complaint of harassment. The Claimant was prescribed sleeping tablets in March 2017 which she took for 4 months. (The Claimant was not prescribed any medication in relation to anxiety and depression until June 2020.)

14. The Claimant raised employment tribunal proceedings in July 2017. The Claimant was absent from work by stated reason of work-related stress for 4

weeks in July 2017. She saw her bridesmaid during that period and found it difficult to have social interaction with her. The Claimant advised that she had few friends apart from her husband. The Claimant attended her GP to discuss stress on 10 and 24 July 2017 who noted "symptoms likely secondary to delayed bereavement reaction and stress at work…would likely benefit from anti-depressants"; on 25 July 2017 the GP noted "still looks anxious will a degree of mild echolalia". The Claimant attended her GP regularly (every few months) during the relevant period, and the 12 months prior to it, in relation to various physical conditions.

15. The Claimant attended occupational health on 14 September 2017 by virtue of a 25-minute telephone call with a senior OH nurse. The occupational health report advised that the Claimant was fit to continue in her role of Fund Analysis and Reporting Manager working full time in an office environment. It stated that the Claimant "appears to be managing to undertake the usual day to day activities outside of work. She reports being sleep affected"; "The terms of the Equality Act 2010 are unlikely to apply to your colleague's recent health matters".

16. The Claimant prepared for and attended an 8-day final employment tribunal hearing as a litigant in person in respect of a prior tribunal claim in April 2018. The Claimant went on holiday with her daughter to Japan in May/ June 2018. The Claimant attended her GP to discuss stress on 8 May 2018. The Claimant received an employment tribunal decision in July 2018 which she felt unable to open. The Claimant was advised that the decision was not in her favour and her complaints had been dismissed. The Claimant was absent from work by stated reason of work-related stress from 12 June 2018 to 1 October 2018 (3 ½ months).

17. The Claimant attended 5 counselling sessions with Valedium (organised through the Respondent's employee assistance programme) from 19 June to 19 July 2018. She mentioned to the counsellor the need to tidy her house. The Claimant attended 6 sessions of bereavement counselling with Cruse 9

August to 4 October 2018. Both sets of counselling were arranged at short notice. The Claimant did not attend any further counselling thereafter.

18. The Claimant attended the occupational health on 1 August 2018 by virtue of a 25-minute telephone call with a senior OH nurse. It stated that "your colleague may be noted to have some deficit in the expected range of focus and concentration initially."

19. The Claimant attended her GP to discuss stress: on 12 June 2018 the GP noted "mood irritable and low"; on 26 June 2018 the GP noted "mood ok"; on 20 August 2018 the GP noted "mood stable"; on 26 September 2018 the GP noted "mood much better, stable".

20. The Claimant attended occupational health on 30 October 2018 and had a face to face consultation with Dr Tom Griffin which lasted over an hour. He did not have access to her medical records. She had spent a few minutes completing a HADS questionnaire on anxiety and depression. It asked the patient 14 multiple choice questions and generated a score based upon their answers of 0-7 "normal"; 8-10 "mild"; 11 – 15 "moderate" and 16- 21 "severe". The Claimant scored 10 for anxiety and 7 for depression. The completed questionnaire gives an indication of a possible problem but it does not give a diagnosis. Dr Griffin did not make and was not seeking to make a diagnosis of anxiety and/ or depression.

21. Dr Griffin produced a report "which must be read in conjunction with the previous occupational health reports". He noted that "Mrs Lucas reports that she is presently carrying out her full duties, which she now feels she is managing 'fine'"; that her psychological health "continues to be somewhat fragile at times"; "Mrs Lucas is medically fit at this current time for her duties"; and he did not consider that further medical or occupational health advice was necessary. It stated that: "Mrs Lucas' overall health situation is such that I now believe it is likely that she may fall within the scope of the disability provision of the Equality Act 2010. As you know, a definitive decision regarding this legislation is not medical. I believe that such considerations may well be debatable, but on the basis of prudence, and

from an occupational health perspective, I currently recommend that all workplace considerations be made as if such legislation was relevant. Such actions are not likely to disadvantage one or other party; and are likely to be to the potential benefit of all." Dr Griffin did not make any diagnosis of a mental impairment of anxiety and/or depression. Dr Griffin understood she was still managing to undertake her day to day activities. He was not aware of any impact on her day to day activities. He was by no means certain that the Equality Act applied and he raised it simply out of prudence.

22. The Claimant was subject to formal absence management proceedings from October 2018 until January 2019.

23. The Claimant attended her GP to discuss stress on 14 November 2018 where she was described as "quite highly strung but usual for her from recollection and otherwise obj. euthymic" (of normal not low mood).

24. On 21 November 2018 the Claimant engaged in office banter by exchange of email with a colleague where she joked about intending to kill herself. At no stage (including during the relevant period, or for 12 months prior to it) did the Claimant raise with her GP that she was suffering from suicidal ideation or thoughts of self-harm. The GP notes consistently reference that she was not suffering from suicidal ideation or thoughts of self-harm.

25. The Claimant attended occupational health on 21 January 2019 and had a face to face consultation with Dr Tom Griffin which lasted over an hour. He did not have access to her medical records. The Claimant completed the HADS questionnaire on anxiety and depression. It asked the patient 14 multiple choice questions and generated a score based upon their answers of 0-7 "normal"; 8-10 "mild"; 11 – 15 "moderate" and 16- 21 "severe". The Claimant scored 19 for anxiety and 9 for depression. The completed questionnaire gives an indication of a possible problem but it does not give a diagnosis. Dr Griffin did not make and was not seeking to make a diagnosis of anxiety and/ or depression. He felt that there had been a deterioration in her mental health. Had there been serious concerns this would have prompted immediate contact with her GP. There was no such contact.

26. Dr Griffin produced a report "which must be read in conjunction with the previous occupational health reports". It stated that "Ms Lucas confirms that she recognises that some mild impairment of memory/ concentration can be a temporary symptom/ manifestation of the mental health experiences that she has recently been experiencing. (Please note, through Mr Lucas' occupational health consultations, both today and previously, there was no indication of any clinically significant impairment or compromise of cognitive functioning – either in terms of memory or concentration.)…With regards her psychological health and wellbeing; Ms Lucas indicates currently that she continues to remain somewhat unsettled and still fragile. She indicates that this remains mostly unchanged, as compared to a couple of months or so ago"; "Presently I believe that Ms Lucas is medically fit at this time for her current duties – albeit at times only just so". It stated that: "Mrs Lucas' health circumstances are such that I believe she is likely to fall within the scope of the disability provisions of the Equality Act 2010. As you know, a definitive decision regarding this legislation is not medical. I believe this legislation is relevant with regards her psychological health experiences". He considered it debatable as to whether she met the criteria but thought it prudent for it to be taken into account. Dr Griffin understood she was still managing to undertake her day to day activities but she had previously raised an issue with his nursing colleagues regarding her household chores. She was still engaged in her hobbies of hill walking and cycling. He was not aware of any impact on her day to day activities. He was not certain that the Equality Act applied and he raised it out of prudence.

27. The Claimant raised employment tribunal proceedings on 31 March 2019. The Claimant ticked the box advising that she did not have a disability. The Claimant prepared for and attended employment tribunal preliminary hearings as a litigant in person on 31 May 2019, 20 August 2019 and 4 November 2019. The Claimant raised and attended employment appeal tribunal proceedings. The Claimant provided further detailed specification of her claim September 2019.

28. The Claimant attended her GP to discuss stress 26 September 2019 and advised that she was really tired and her concentration was poor and she sought from them a letter seeking adjustments for the tribunal hearing.

29. The Claimant was referred to A & E by her doctor after suffering chest pains on 14 November 2019. On 28 November 2019 the Claimant was referred to hospital for tests. On 13 December 2019 the Claimant was referred to hospital for continence care. On 28 January 2020 her GP wrote to advise that stress resulting from a full day in court may have played a role in these chest pains.

30. The Claimant attended her GP to discuss stress on 4 June 2020. The GP considered she had symptoms of depression and generalised anxiety and prescribed anti-depressants. The Claimant advised that over time her mental health condition had “got gradually worse” / was “just deteriorating”.

31. On 5 June 2020 the Claimant’s GP wrote to advise that she suffered from anxiety and depression in July 2017, June 2018 and June 2020. The Claimant was prescribed anti-depressant medication for the first time in June 2020.

32. The Claimant considers that her memory and concentration have been impaired from before and throughout the relevant period. The Claimant has as yet felt unable to obtain her husband’s probate (confirmation). From April 2016 and continuing, including throughout the relevant period, the Claimant regularly was unable to find her mobile phone and her comb. From April 2016 and continuing, including throughout the relevant period, the Claimant has felt unable to regularly tidy and clean the house and would do so only occasionally. From March 2017 and continuing, including throughout the relevant period, the Claimant has been reluctant to open the door to strangers. From October 2018 and continuing, including throughout the relevant period, the Claimant comes back to her house multiple times to check that she has switched off the lights, locked the door and removed the keys. From October 2018 and continuing, including throughout the relevant period, the Claimant regularly left an item of shopping behind at the

supermarket. In August 2018 the Claimant experienced difficulty interacting with a person she met at a local community fair. The Claimant regularly argued with her teenage daughter until she left for university in September 2019. The Claimant's mother sent her Chinese medication in January 2019 which she had a difficulty remembering to take. Despite seeing her doctor regularly, Claimant did not raise these issues with her doctor (aside from mentioning having a short fuse at home in July 2017).

Observations on the evidence

33. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event, etc was more likely than not, then the Tribunal is satisfied that the event did occur.

34. In evidence in chief the Claimant asserted that she had thought about taking her own life in the relevant period (suicidal ideation). Under cross examination she accepted that she had not raised this with her GP and indeed her GP had regularly noted that she was not experiencing suicidal ideation or thoughts of self-harm. She then said that she wouldn't actively kill herself – she just didn't care if she died. She then asserted that she had thoughts of killing herself for 2 -3 days in the relevant period. Shen then changed this to 1 day (the date of the email exchange of 21 November 2018). Her evidence regarding suicidal ideation was inconsistent and was not therefore credible.

35. The Claimant explained and that she had not mentioned the effect on her day to day activities to her doctor because it was shameful not to be able to manage and she was concerned that her daughter would be taken away. Throughout the relevant time the Claimant had discussed other sensitive personal issues with her doctor and this shame was not therefore considered credible. Throughout the relevant time her daughter was over the age of 18 and this concern was not therefore credible.

The Law

36. Section 6 of the Equality Act provides that: (1) A person has a disability if: (a) that person has a physical or mental impairment , and (b) the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

37. In determining disability status the Tribunal must take into account any aspect of the Guidance on the definition of Disability (2011) and the EHRC Code of Practice on Employment (2015) which appears to be relevant.

38. The burden of proof is upon the Claimant.

Mental impairment

39. The Equality Act does not define 'mental impairment'. Appendix 1 paragraph 6 to the EHRC Code states: 'The term "mental impairment" is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities'.

40. Where there is no clear medical diagnosis it may be legitimate for a tribunal to first consider adverse effect and then to consider whether the existence of an impairment can reasonably be inferred from those adverse effects (*J v DLA Piper UK LLP 2010 ICR 1052, EAT*).

41. The cause of the impairment does not require to be established (Guidance A3).

42. A distinction may be drawn between a mental impairment such as clinical depression and stress/ low mood (both of which may be a reaction to adverse life circumstances). In some cases tribunals may find that effects suffered by a single claimant were sometimes attributable to a mental impairment and sometimes to stress/ low mood which does not amount to a mental impairment (*J v DLA Piper UK LLP 2010 ICR 1052, EAT*).

Normal day to day activities

43. Day to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing

food, walking, travelling and social activities. This includes work related activities such as interacting with colleagues, using a computer, driving, keeping to a timetable etc (Guidance D2– D3).

Substantial adverse effect

44. The impairment must cause an adverse effect on normal day to day activities but it need not be a direct causal link.

45. The adverse effect must be substantial. Section 212(1) of the Equality Act provides that "substantial" means more than minor or trivial. The EHRC Code notes that a disability is "a limitation going beyond the normal difference in ability which might exist among people".

46. It is important to consider the things that a person cannot do, or can only do with difficulty (Guidance B9). This is not offset by things that the person can do.

47. The time taken by a person with an impairment to carry out an activity should be considered when assessing whether an effect is substantial (Guidance B2).

48. Schedule 1 paragraph (5) of the Equality Act 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. The tribunal should deduce the effect on activities if medication or treatment were to cease unless it has resulted in a permanent improvement.

49. The Guidance provides at para B7 "Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the

coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities."

Long term effect

50. Schedule 1 paragraph 2(1) of the Equality Act provides that the effect of an impairment is long term is it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.

51. Schedule 1 paragraph 2(2) provides that if an impairment ceases to have a substantial adverse effect, it is to be treated as continuing to have that effect if that effect is likely to recur. In *SCA Packaging Ltd v Boyle 2009 UKHL 37*, the House of Lords ruled that "likely to" in this context means "could well happen" rather than "more likely than not".

52. Where a person has a mental impairment with recurring or fluctuating effects, the effects are to be treated as long term if they are likely to recur beyond 12 months (Guidance C6). If a person has separate episodes of a mental impairment (e.g. depression) each of which last less than 12 months the issue is whether these are discrete episodes which are not connected by an underlying condition or whether these short separate episodes are connected as part of a long term underlying condition the effects of which are likely to recur beyond the 12-month period.

53. Whether a person has an ongoing underlying condition and the likelihood of recurrence of its effects must be judged at the relevant time and not with the benefit of hindsight. An employment tribunal should disregard events taking place after the alleged discriminatory act but prior to the tribunal hearing.

Claimant's Submissions

54. The Claimant's oral submissions were in summary as follows –

    a. Her counselling amounted to treatment

    b. She went back to work as therapy but she was less productive

c. The occupational health advisers did not undertake a full assessment of her day to day activities

d. The effect on her day to day activities was substantial and long term

e. Occupational health had said that she was disabled under the Equality Act 2010

Respondent's Submissions

55. The Respondent's oral submissions were in summary as follows –

a. The burden of proof is upon the Claimant

b. Lack of concentration and loss of memory are not of themselves day to day activities.

c. The effects she described were not substantial (they were either trivial or minor). She provided no independent evidence of these effects. Her evidence was not credible or reliable.

Discussion and decision

Mental impairment

56. On 5 June 2020 the Claimant's GP wrote to advise that she suffered from anxiety and depression in July 2017, June 2018 and June 2020. The Claimant was prescribed anti-depressant medication for the first time in June 2020.

57. The Claimant experienced a series of adverse life events including tragically the death of her husband 2016. As Dr Griffin put it "you would have been abnormal not to have reacted to that".

58. The Claimant raised internal grievance proceedings at work in March 2017 regarding a complaint of harassment and raised employment tribunal proceedings in July 2017. She was absent from work by stated reason of work-related stress for 4 weeks in July 2017.

59. The Claimant prepared for and attended an 8-day final employment tribunal hearing in April 2018 which was not decided in her favour. The Claimant was absent from work by stated reason of work-related stress from June 2018 for 3 ½ months. She was not subsequently absent from work for stress or other mental health related reasons.

60. The Claimant attended counselling sessions from June to October 2018. The Claimant's GP noted her mood improving throughout that time by September 2018 noted "mood much better, stable".

61. The Claimant was subject to formal absence management proceedings from October 2018 until January 2019. The Claimant visited her GP in November 2018 who described her mood as normal. In January 2019 occupational health considered that there had been a deterioration in her mental health but she remained fit for work. The Claimant prepared for and attended various employment tribunal preliminary hearings as a litigant in person on from May to November 2019. The Claimant did not visit her GP for the purpose of discussing stress after November 2018 until September 2019.

62. In November 2019 she suffered chest pains which in January 2020 her GP considered may have been attributable to stress and anxiety.

63. The Claimant attended her GP to discuss stress on 4 June 2020. The GP considered she had symptoms of depression and generalised anxiety and prescribed anti-depressants.

64. There was a clear medical diagnosis by her GP that the Claimant suffered from anxiety and depression in July 2017, June 2018 and June 2020. There was no diagnosis that she had suffered from anxiety and/or depression at other times during the relevant period or for 12 months prior to it. The Claimant regularly attended her GP (every few months) for various physical conditions.

65. Accordingly the Claimant suffered from a mental impairment in July 2017, June 2018 and June 2020. It may be that she suffered from anxiety in January 2019 (having regard to the occupational health concerns) but there

was no diagnosis. It also may be that she suffered from anxiety in November 2019 having regard to the chest pains.

66. These were discrete episodes of a mental impairment and there was no evidence that these episodes were part of an ongoing underlying condition of depression and anxiety which persisted throughout all or part of the relevant period (or 12 months prior to it). There was no medical evidence to this effect - her GP had the opportunity to describe the anxiety and depression as continuing during the relevant period but did not do so and instead clearly referenced discrete episodes. During the relevant period and for 12 months prior to it: the Claimant had 2 (possibly 4) episodes of anxiety and/or depression over a period of 2 ½ years; these episodes aligned with adverse life circumstances; the Claimant was not in receipt of GP prescribed medication for anxiety or depression at any time; she was not absent from work apart from in in July 2017 and June to October 2018; and some of the issues with her day to day activities were more than minor or trivial but only marginally so. There no basis upon which it could reasonably be inferred that these episodes were part of an ongoing underlying condition of depression and anxiety which persisted throughout all or part the relevant period (or 12 months prior to it).

Normal day to day activities

67. The Claimant considers that her memory and concentration were impaired from before and throughout the relevant period. She described: being unable to obtain her husband's probate (confirmation); being regularly unable to find her mobile phone and her comb; feeling unable to regularly tidy and clean the house; being reluctant to open the door to strangers; coming back to her house multiple times to check that she has switched off the lights, locked the door and removed the keys; regularly leaving an item of shopping behind at the supermarket; regularly arguing with her teenage daughter; and, forgetting to take Chinese medication.

68. Being able to find personal objects, tidying and cleaning a home, answering the door, leaving the house, and remembering shopping and to take

medication, are all normal day to day activities. Being unable to obtain her husband's probate (confirmation) is not considered a normal day to day activity.

Substantial adverse effect

69. The issue she described with her mobile phone and comb was minor if not trivial. The issues she described of feeling unable to regularly tidy and clean the house, being reluctant to open the door to strangers, coming back to her house multiple times to check the lights, the lock and her keys, and of regularly leaving an item of shopping behind were marginally beyond being classified as minor or trivial and could therefore met the definition of substantial. The issue of regularly arguing with her teenage daughter and forgetting to take the Chinese medication was minor.

70. The Claimant described the issues with her normal day to day activities as continuing throughout and before the relevant period. However the Claimant had a mental impairment of anxiety and depression only sporadically (July 2017, June 2018 and possibly January 2019 and November 2019). She did not have a mental impairment of anxiety and depression which continued throughout the relevant period (or before it). It can reasonably be inferred it was not her mental impairment which caused the issue with her normal day to day activities but rather stress related to ongoing work issues and her tribunal claim.

71. The counselling she received from June to October 2018 resulted in an improvement to her mental health such that by July 2018 she was no longer suffering from anxiety and depression and by September 2018 her mood was much better. The Claimant did not receive any medication for anxiety or depression until June 2020. Accordingly there is no requirement to consider deduced effects.

Long term effect

72. During the relevant period and 12 months prior to it, the Claimant had the following discrete episodes of the impairment of anxiety and depression: in

July 2017, June 2018, and possibly in January 2019 and November 2019. These were discrete episodes and there was no evidence that these episodes were part of an ongoing underlying condition which had persisted or was likely to persist for 12 months and had recurring or fluctuating effects.

Decision

73. Accordingly at no time during the relevant period did the Claimant have a mental impairment which had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. The Claimant was not therefore disabled under Section 6 of the Equality Act 2010 during the relevant period. The claim of disability discrimination cannot proceed and is therefore dismissed.

Employment Judge: Michelle Sutherland
Date of Judgment: 27 November 2020
Entered in register: 07 December 2020
and copied to parties