



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4104110/2020 (V) Preliminary Hearing by Cloud Video Platform at
Edinburgh on 19 May 2021

10

Employment Judge: M A Macleod

Stephen McLennan

Claimant
In Person

15

Circle Scotland CIC

Respondent
Represented by
Mr A McCormack

20

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

30

1. The claimant was at the material time a disabled person within the meaning of section 6 of the Equality Act 2010; and
2. The respondent did not know, nor ought they reasonably to be taken to have known, that the claimant was a disabled person at the material time.

35

REASONS

1. The claimant presented a claim to the Employment Tribunal on 29 July 2020 in which he complained that the respondent had unfairly dismissed him and discriminated against him on the grounds of disability.

2. The respondent resisted the claimant's claims, and declined to admit that he was suffering, at the material time, from a disability within the meaning of section 6 of the Equality Act 2010.
3. Following the determination that the claims should be allowed to proceed though out of time, a Preliminary Hearing was listed to take place on 1 March 2021 before Employment Judge Kemp, for the purposes of case management.
4. In the Note following that PH, (produced at 41ff in the joint bundle of productions presented in this case) Employment Judge Kemp ordered that there should be a Preliminary Hearing to determine:
 - (1) Whether the claimant was a disabled person at all material times; and**
 - (2) If so, whether the respondent knew or ought reasonably to have known that.**
5. This Preliminary Hearing was set down to take place on 19 May 2021, by CVP. The participants were all able to see and hear each other throughout the hearing, and there were no difficulties presented by the use of remote technology. The claimant was able to give evidence and be cross-examined without impediment, and I was satisfied that in all the circumstances a fair hearing was achieved.
6. The claimant appeared on his own behalf, and Mr McCormack appeared for the respondent. The claimant gave evidence on his own account, and parties presented to the Tribunal a joint bundle of productions to which reference was made in the course of the PH. The respondent called Paul Hastie as a witness.
7. Based on the evidence led and information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

8. The claimant, whose date of birth is 18 January 1979, commenced employment with the respondent as café manager on 6 May 2019, and worked continuously until his employment ended on 30 March 2020.

5 9. When the claimant was appointed, he submitted a form “Staff & Volunteer Basic Information” (53) in which he set out his personal details and emergency contact. In answer to the question “Do you consider yourself to have a disability?”, the claimant answered “No”.

10 10. The claimant produced a letter from his GP, Dr A Aitchison of the Family Medical Group, dated 18 November 2020 (84):

“I can confirm that Mr McLennan is currently a patient of the Family Medical Group.

15 *He initially consulted with one of my colleagues on the 21st February 2020 due to symptoms of anxiety and depression. At this point, he described the symptoms as having been present for 3 months and it was agreed he would re-start Citalopram 20mg.*

His current prescription includes Citalopram 20mg, once daily. I note that he was previously on this medication, which was commenced in 2015 before stopping in early 2019.

20 *Of note, from Mr McLennan’s records I can see that symptoms of anxiety and depression have been present since 2006.*

Since his initial appointment in February of 2020, Stephen has consulted with doctors here at the practice on 4 occasions to review his mental health and medication.

25 *Should you require any further specific information regarding Mr McLennan’s medical records, I would be grateful if you could put this to us in writing with the patient’s consent.”*

11. Citalopram is an anti-depressant drug prescribed for the claimant by his GP. He stopped taking this drug, as he habitually has when feeling better. He described it in evidence as “not a medication for life but it does help a great deal”.
- 5 12. In early 2019, the claimant described his circumstances as difficult – he had “a lot going on in my personal life”. He decided that it was better to stop taking it for a time as it fluctuated his mood.
- 10 13. The claimant gave evidence (supported by the terms of his Disability Impact Statement (96)) that he has suffered from periods of depression and anxiety which was recognised in 2006. He described the symptoms of his condition as feelings of despair, alienation, isolation, low mood, confusion, fatigue, insomnia and anxiety. He believed that these symptoms affected his ability to concentrate, organise tasks in a fast and efficient manner, led sometimes to frustration and anger, damaged his self-esteem and his ability to build
15 friendships.
- 20 14. He said that his mental health worsened in 2012 owing to a murder case relating to his father’s death, and it became difficult for him to leave the house, attend to personal hygiene or cook (a skill for which he was trained and employed). He said that he became suicidal. His health improved for a period of time, but in 2018 a relationship breakdown contributed to a deterioration in his condition. He recommenced medication, and became sole carer for his young daughter. He began to suffer panic attacks. At that time, his employer was very supportive, and in time, in early 2019, he was able to pause his medication as his condition had improved.
- 25 15. When he commenced employment with the respondent, he was responsible for the café which they ran, in a centre used for a number of other activities. There was one other employee, and it was left to the claimant (a trained chef) to start the café up from scratch, including cooking and establishing processes and procedures within the kitchen. He believed that on some
30 days the job became more stressful and affected his mental health. He became particularly anxious when facing new processes or changes within

the workplace, or if he suffered negative reactions from other people there, especially if these issues were not resolved quickly.

5 16. On 21 February 2020, the claimant attended his GP, and was provided with a medical certificate (82) advising that he was not fit for work owing to “debility”, for a period of 2 weeks. On 17 March 2020, he received a further medical certificate (83) repeating that he was unfit for work and advising him not to attend until 1 April 2020, again on the grounds of debility. He recommended Citalopram 20mg in February 2020, though he was of the view that the medication did not have a significant beneficial effect upon
10 him.

17. In his evidence, the claimant described three occasions on which he suffered extreme anxiety in February 2020, at work. At one point, he said he believed he was having a heart attack. Mr Hastie’s evidence was that he recalled one occasion when the claimant was allowed to leave early owing
15 to the heat in the kitchen, but did not agree that the claimant had ever told him that he was having a heart attack. He said that such an incident would have been well documented, had it happened.

18. He said that he had a conversation with the café supervisor (though it is not entirely clear when that was) in she told him that she was suffering
20 from mental health issues at the time; and he responded that he had suffered from depression and anxiety in the past. Mr Hastie was present during this discussion and his recollection was that the supervisor was suffering from depression and anxiety, and that the claimant had said that he had “been there when suffering with personal issues in the past”, but that
25 there was no further discussion about the claimant’s current mental health at that time.

19. The claimant met with Kirsty, the CEO, and Ruth, the Finance Director, for a 6 month review of the café (71). They thanked him for his hard work over
30 the previous 6 months, recognising that they were on a learning curve. The claimant did not raise any issues about his mental health or general health at this meeting.

20. On 5 August 2019, the claimant met with Mr Hastie, his manager, for a 3 month probationary review. Mr Hastie prepared a note in advance of that meeting, in order that he had a “script” to which to adhere. That note was produced at 74. It is not a minute of that meeting but an indication of what it was that Mr Hastie intended to say. Mr Hastie did rely upon the note and used it as the basis of what he had to say to the claimant. No other person was present at that meeting.

21. Mr Hastie was concerned that he had received “numerous complaints surrounding your behaviour”, and that this brought into question whether the claimant was in the right role. Mr Hastie noted that *“I understand you’ve had some pretty difficult personal issues to deal with recently and just like anyone else I hope you know you’re in an environment that supports its staff in those situations. However, it doesn’t excuse bringing a poor attitude to work.. Outside the senior management team you are, by considerable margin, the highest paid member of staff. You need to be championing your project with enthusiasm when VIP visitors are being introduced.”*

22. He confirmed to the claimant that his probation period was to be extended for a further 6 months.

23. Mr Hastie was adamant that the claimant did not raise any issue relating to his mental health or depression and anxiety, during the course of that meeting or before then. The claimant’s evidence (set out in his Disability Impact Statement at 97) was that he had revealed to Mr Hastie that he suffered from periods of depression and anxiety and this may have been affecting his behaviour along with personal issues which he had discussed with him on occasions. He also said that Mr Hastie was aware of the difficulties he was having in relation to his daughter, and that he had told Mr Hastie that he was seeking advice from an Advice Centre in Dundee in order to assist him with these matters.

24. Mr Hastie was aware that the claimant was having some personal problems in relation to the custody of his daughter, and what he perceived to be his former partner making life difficult for him, but at no stage could he recall the

claimant saying that he was suffering from depression and anxiety, nor that he was, for example, struggling to sleep.

25. He considered that the complaints which were made about the claimant related to his attitude and behaviour, and did not indicate that he was
5 struggling with his mental health.

26. Mr Hastie understood the reference to “debility” to be, according to an HR company he consulted, a reference to “general feebleness and inability to do something”, but that he did not draw from that that the claimant had a condition of depression and anxiety.

10 27. On 27 November 2019, the respondent’s Board met, and minutes of that meeting (heavily redacted) were produced (75ff). Under the heading “The Café”, it was noted that there was a relatively lengthy discussion about the role of the claimant, in which concern was highlighted that the claimant was
15 “not the right fit for the role” of Café Manager. It was noted that the claimant had been witnessed with regard to this tone and body language when he was under stress in the kitchen, though the note does not disclose what was seen.

28. The claimant was referred to Dundee Independent Advocacy Support (DIAS), (115), by Mary Sneddon, who worked in a unit at the respondent’s
20 organisation. In that referral it was noted that the claimant had “mental health issues”, and next to that note the word “depression” was completed in handwriting.

29. According to the notes kept by DIAS, the claimant was seen by Lesley Russell there on 14 February 2020 (119). Ms Russell helped the claimant
25 with his discussions with Social Work, his solicitors and the respondent. There were a number of contacts noted on the records until 29 May 2020.

30. The claimant’s evidence is that when he resumes medication after some time off it, it can take up to 4 to 6 weeks to reduce the extreme panic attacks which he suffers. He thought that while he was not 100% certain that he
30 had told Mr Hastie that he was suffering from depression and anxiety in

January 2020, he probably had, and indeed had told him so on a number of occasions.

31. On 10 June 2020, the claimant had a telephone consultation with his GP, Dr Caroline Sloss, which was recorded on the GP records (99):

5 *"Has been asked by ACAS whether he has a disability. Discussed definition as physical or ***** condition which has a substantial and long term (>12 months) effect on daily living. Only been off work since February so prob doesn't fulfil criteria at present. Sleep has been better. Does have good days and bad days. Difficult at present as not able to see people,*
10 *everything dealt with over the phone."*

Submissions

32. For the respondent, Mr McCormack submitted that the claimant has the onus of proving that he was at the material time a person disabled within the meaning of the Equality Act 2010.

15 33. He argued that on the evidence there is insufficient material available to say that there is a mental impairment meeting the definition, or that it was substantial. Anxiety and depression can amount to a disability, but the evidence is such that he was able to carry out normal day to day activities, including looking after his 4 year old daughter. It was noted that he was
20 unable to leave his house or do certain other simple things in 2012, but that this has not recurred, particularly during his employment with the respondent.

34. He was able to attend work regularly and carry out his duties as a cook throughout his employment with the respondent. There is no substantial
25 adverse effect upon the claimant's ability to carry out normal day to day activities. Although there is a further explanation from his GP, the note in the GP records dated 10 June 2020 (99) is significant.

35. Although Mr McCormack acknowledged that the GP opinion is only one part of the evidence, the absence of the GP in this hearing meant that the

respondent was unable to cross-examine her and thus obtain a clearer understanding of what she meant. It is not clear what “debility” means.

36. With regard to the question of knowledge, he submitted that this came down to which witness the Tribunal chose to believe. Mr Hastie denied that he had been told that the claimant was depressed or that he was suffering from anxiety. He invited me to prefer the evidence of Mr Hastie to that of the claimant. The claimant was very certain about an unnoted conversation but was unable to be so certain about what was said in later meetings to Mr Hastie. There is nothing in the documents provided that informs the respondent of the claimant having a disability, and nothing there that could have raised the inference that the respondent should have been aware of this.

37. He invited the Tribunal to find that the claimant has not met the test of disability, nor has he demonstrated that the respondent knew or ought reasonably to have known that he was suffering from a disability.

38. The claimant chose to add no submission but asked to rely upon his evidence.

Discussion and Decision

39. The first issue before me is whether the claimant was, at the material time, a disabled person within the meaning of section 6 of the Equality Act 2010, that is, whether he had a physical or mental impairment which had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

40. In this case, the claimant relies upon depression and anxiety as a disability. There is no doubt that this amounts to a mental impairment (and there does not appear to be any dispute by the respondent as to this point).

41. “Substantial” is defined in section 212(1) of the 2010 Act as meaning “more than minor or trivial”. It is useful, in this context, to consider what the claimant could have done had he not suffered from the impairment demonstrated in the evidence, and compare that to what he is able to do in

light of his impairment, notwithstanding the medication upon which he depends.

42. In this case, the evidence shows, in my judgment, that the claimant has suffered from anxiety and depression at different times, and to different degrees, over a period of years. It is plain that in 2012 his mental health was not good, and that at that point he was, for example, unable to leave the house. Between then and the material period, during which he was employed by the respondent, it is not clear that the claimant consistently suffered in such a way as to have a substantial, adverse effect on his ability to carry out normal day to day activities.

43. He was able to attend work every day he required to until February 2020 when he was signed off sick due to "debility". It is regrettable that this word, which is broadly defined as meaning weakness, usually due to illness, has gained widespread use in the workplace, when it conveys little of any practical value either to the employer or to the Tribunal as to what problem the claimant is actually suffering from.

44. The claimant's evidence was that he was undergoing a lengthy period of anxiety and depression during his employment with the respondent, provoked by some personal difficulties relating to the custody of and care for his young daughter. He referred to three occasions when he required to leave the workplace suddenly due to acute anxiety. He described an inability to sleep, a sense of "paranoia" about his colleagues and how they viewed him, a low mood and generalised feelings of depression. He attended his GP and was prescribed medication in February 2020.

45. In my judgment, the claimant's evidence was credible, and was supported by the medical evidence which he provided to the Tribunal. The GP letter summarising his condition confirmed that when he attended the practice in February 2020 he was prescribed Citalopram 20mg daily, an anti-depressant which he had been prescribed before but had stopped taking in February 2019. There is no doubt, in my judgment, that the claimant was suffering in February 2020 from a condition which amounted to a mental

impairment which had a substantial adverse effect upon his ability to carry out normal day-to-day activities, namely depression and anxiety.

5 46. The only question which remains, then, in determining whether or not he was disabled for the purposes of section 6 is whether that condition was a long term condition. The GP confirmed in the letter produced to the Tribunal that in February 2020 the claimant had reported that he had been suffering from depression and anxiety for a period of 3 months prior to that consultation. While his condition fluctuated over the years, it is plain that from February 2020 until the GP report was written in November 2020 he
10 had attended at the practice on 4 occasions to consult about this condition.

15 47. This is a finely-balanced matter, in my view. I consider that the evidence does demonstrate that for a period of time from February 2020 the claimant was suffering from a condition which at that point had not lasted for more than one year, in its current phase, but which had a likelihood of recurrence and continuation which would mean that it would last for more than one year. The claimant remains on Citalopram 20mg to the date of the hearing, which was more than one year from the date of his present diagnosis.

48. As a result, I am persuaded that the claimant has suffered from a disability at the material time within the meaning of section 6 of the Equality Act 2020.

20 49. The second issue which I require to address, then, is whether the respondent knew or ought reasonably to have known that the claimant was suffering from such a condition.

25 50. Mr McCormack submitted that this comes down to a choice of whether I accept the evidence of the claimant or of Mr Hastie. I do not consider that it is quite as straightforward as that.

51. While I considered the claimant to be credible, I saw no reason to doubt the evidence of Mr Hastie either. There were differences between their evidence, and those primarily related to the following assertions by the claimant:

- that he had told Mr Hastie, albeit indirectly, in a conversation with his supervisor that he was suffering from, or had suffered from, depression and anxiety;
- that he had told Mr Hastie in a number of conversations after that
5 that he was suffering from, or had suffered from, depression and anxiety; and
- that on 3 occasions in February 2020 the claimant required to be allowed to leave the workplace due to difficulties which he was suffering with his mental health.

10 52. Mr Hastie said that he did not recollect being told by the claimant, in the conversation involving the supervisor, that he himself had suffered from depression and anxiety. I found Mr Hastie believable in this. It was clear that this was a conversation which, while taking place in Mr Hastie's presence, did not actively involve him but was between the claimant and his
15 supervisor. I consider that Mr Hastie, if he had been told that the claimant was suffering from depression and anxiety, would have been alert to that fact, given the nature of the workplace which he was managing. It is my conclusion that the claimant did not specifically say that he was currently suffering from depression and anxiety, that he may have said that he had
20 suffered from it in the past but that he did not specifically alert Mr Hastie to a current problem.

53. Mr Hastie also said that he did not have several conversations in which the claimant made clear his mental health difficulties. He was aware that the claimant was undergoing some personal stresses, particularly relating to his
25 daughter, but in my judgment, the evidence does not persuade me that the claimant translated this into an express statement to Mr Hastie that he was suffering from depression and anxiety as a result.

54. It should be borne in mind that the claimant, when joining the respondent's employment, did not refer to his depression when given the opportunity to do so, and indeed confirmed that he was not suffering from any disability.
30

55. I did not accept the claimant's assertion that the respondent was aware that he needed to leave the workplace on 3 occasions due to mental health difficulties. On his own evidence, one of those occasions related to his belief that he was having a heart attack. While Mr Hastie did not recall that (and I concluded that he would have recalled it as very unusual had it been said), that does not amount to evidence that the respondent should have known that he was, on that occasion, demonstrating symptoms of a mental impairment. A potential heart attack is a physical impairment, not a mental impairment, and there was no evidence presented to me to suggest that it was. Mr Hastie recalled that there was an occasion when he had asked to leave early because it was so hot in the kitchen, and he had agreed to allow him to do so.

56. I have therefore concluded that the respondent was not aware that the claimant was suffering from a disability at the time of his employment with them. Mr Hastie did not know that the claimant was suffering from depression and anxiety (nor that he had done so for some years); when he went off sick, the reason was given as "debility", which in my judgment does not convey to an employer that the claimant was suffering from depression and anxiety; when he joined the respondent he had told them that he was not suffering from a disability; and his own GP, knowing the entire background and being aware of his medical history both recent and over a longer period, gave the view in June 2020 that he did not meet the definition of disability within the 2010 Act at that point. I am therefore reluctant to conclude that the respondent knew or ought to have known that he was suffering from a disability at the material time.

57. I gave some consideration to the fact that the suggestion that the claimant should seek assistance from DIAS seems to have come from Mary Sneddon, who had some connection (though it is not clear what) to the Circle, and thus it might be thought that her understanding of the claimant's condition of depression may have meant that the respondent did know that he was suffering from a disability. I have concluded that it is simply unclear from the evidence I heard to draw that connection, but that even if the respondent were aware that the claimant was suffering from depression and

anxiety, it would not be in the interests of justice to impute to them the knowledge that that amounted to a disability when the claimant's own GP, understanding the full extent of the claimant's condition, was unable to reach that conclusion in June 2020.

5 58. Accordingly, with some hesitation, I have reached the conclusion that the respondent did not know, nor ought they reasonably be taken to have known, that the claimant was a disabled person at the time of his employment with them.

10

15 **Employment Judge: M A Macleod**
Date of Judgment: 22 June 2021
Date sent to parties: 23 June 2021