

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4107272/2020 (V)**

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**Preliminary Hearing in Glasgow by CVP on  
Friday 7 May 2021**

**Employment Judge: R McPherson**

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**Ms. Julia Methven**

**Claimant  
Represented by:  
I Moretti  
Solicitor**

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**Mount Florida Medical Centre**

**First Respondent  
Represented by:  
S Healey  
Solicitor**

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**Ms. Elaine Campbell**

**Second Respondent  
-as above**

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**Ms. Janet Chapman**

**Third Respondent  
-as above**

**Ms. Angele Carruthers**

**Fourth Respondent  
-as above**

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**Ms. Naomi Mitchell**

**Fifth Respondent  
-as above**

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**Mr. Paul Gallagher**

**Sixth Respondent  
-as above**

**Ms. Louise Sheil**

**Seventh Respondent  
-as above**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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1. The Judgment of the Tribunal is that the claimant, is a disabled person in terms of section 6 of the Equality Act 2010 and was so at the relevant time.

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

**REASONS**

1. The claimant presented her claim to the Employment Tribunal on Friday 13 November 2020 alleging that she had been discriminated against because of disability and unfairly dismissed.
2. The respondent entered its response accepting that claimant dismissal but denying all the allegation.
3. The claimant asserts that she is a disabled person under section 6 of the Equality Act 2010 (EA 2010) and asserts claims of Unfair Dismissal in terms of section Employment Rights Act and disability discrimination in terms section 13 EA 2010. The dismissal is admitted, the respondent argues that it was for misconduct and dispute that it discriminated against the claimant. There is also an issue regarding the respondent's knowledge of disability.
4. This Preliminary Hearing was appointed to determine whether the claimant had a qualifying disability.
5. I heard evidence from the claimant, Dr Mitchell a GP member of the respondent practice and Ms Love the respondent practice manager and was referred an Inventory of Production prepared for the claimant which contained the Disability Impact Statement (undated but provided to the Tribunal and respondent 26 February 2021), Occupational Health Reports, Appeal Outcome letter, the claimant GP records. Those documents were supplemented by additional document email.

**Findings of Fact**

6. The claimant commenced employment with the first respondent, a medical practice on **Thursday 19 January 2015**, her employment as a Lead Practice Nurse ceased on **Wednesday 17 June 2020** when she was dismissed. The claimant had appealed the decision to dismiss which was notified as unsuccessful on **Tuesday 25 August 2020**.

7. The Claimant had received a diagnosis of recurrent depression rooted in childhood trauma, around 20 years ago.
- 5 8. On **Saturday 1 February 2003**, the claimant's GP identified that the claimant suffered a recurrent of a major depressive episode.
9. On **Wednesday 23 July 2003**, a Community Staff Nurse reported to the claimant's GP that she had been involved in the claimant's care since  
10 February 2003 and described that the claimant responded well to prescribed anti-depressant.
10. On **Tuesday 30 December 2003**, a Staff Grade Psychiatrist at Larkfield Centre, reported to the claimant's GP that she had been seen on Wednesday  
15 24 December a week after a suicide attempt, and was advised to reinstate antidepressant medication.
11. On **Monday 20 December 2004**, the claimant attended the Primary Care Division Larkfield Centre Clinic, following referral from the GP who described  
20 that the claimant had a "*long history of depression*", the attending psychiatrist reported to her GP that there had been a "*deterioration in mood*" and reported the claimant was advised to continue antidepressant medication.
12. On **Friday 18 February 2005**, the claimant attended the Primary Care  
25 Division Larkfield Centre Clinic when the attending doctor reported to her GP a diagnosis of recurrent depression.
13. The Claimant began working for the respondent on **Thursday 19 January 2015** as Lead Practice Nurse.  
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14. On **Friday 17 December 2010**, the claimant's GP identified, in document which identified "*Description: recurrent depression*" that the claimant had  
35 been "*troubled with low mood since March this year*", that the claimant "*has had problems with depression in the past which*" had responded to treatment with antidepressant, and that the claimant had "*presented to us several*

*weeks ago*” and described that the claimant had re-started the antidepressant.

- 5 15. On **Monday 7 July 2011**, the claimant attended a Primary Health Care Counsellor for one-to-one intervention as she was suffering *“low mood”*.
- 10 16. On **Friday 19 July 2019**, the claimant attended her own GP medical practice where blood pressure readings were taken. At that time, her own GP’s colleague identified a background that over the preceding 6 months the claimant had been going through a marriage breakdown, reported suffered disturbed sleep and low mood and had lost 3 stone over the preceding 3 months. The claimant was prescribed one week of medication to aid her sleep. The claimant’s GP did not identify a reoccurrence of the claimant’s previously diagnosed recurrent depression in 2010.
- 15 17. Separately in July 2019, following a two-week absence from work related to the circumstances of the marriage breakdown, the claimant met with Ms Love and indicated that she was not sleeping well for reasons related to the marriage breakdown.
- 20 18. Thereafter on **Monday 29 July 2019**, the claimant attended for a telephone meeting with a case manager within Working Health Services Scotland, as arranged by Ms Love for the purpose of occupational health support. The claimant provided with self-help recommendations including relation CD and the opportunity for a further contact which was scheduled for Wednesday 19 August 2019. No work-related adjustments were recommended. It was noted that that *“counselling is not appropriate at the moment but may consider in the future”*.
- 25 19. On **Wednesday 13 November 2019**, the respondent issued an email to the claimant which set out that the claimant had in the preceding week expressed concerns including around the team leader/mentoring role. The respondent set out that it did not accept that the claimant’s view on workload. It described that the meeting *“obviously was difficult for you, we do have*
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concerns about how best to go forward given that you are struggling and also the recent changes proposed by the health board.” It set out that the respondent may seek to “rethink our current working patterns to make life more efficient /bearable”. The respondent comments were around allocation of work and other non-work-related matters unrelated to the claimant’s previous occurrences of recurrent depression.

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20. In a meeting in the preceding week and by telephone on **Tuesday 21 January 2021** Dr Sheil, a GP in the respondent medical practice, comments on the claimant’s performance, including the claimant’s written work. The claimant was upset by Dr Sheil having expressed this view.

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21. On **Wednesday 22 January 2020**, the respondent issued an email to the claimant which set out matters around telephone discussion with Dr Shiel, a GP in the respondent medical practice on **Tuesday 21 January 2020**, and a meeting the preceding week with other Dr Shiel and Dr Gallagher another GP in the respondent medical practice. That discussion related to matters around approach to triage, the preceding week meeting related to targets including updating asthma protocols, creating another protocol and around pathways for progressing forms. The claimant had intimated in the meeting that she had not yet had time to progress those. The respondent set out that the claimant *had “acknowledged that this has been a difficult year and that”* the claimant was “*now ready to look forward. We discussed the role of your GP/occ health but you were not sure what more they could add at this time.*” The reference to a difficult year did not refer to any reoccurrence of the previous recurrent depression, it referred to matters in the claimant’s personal life.

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22. On **Thursday 30 January 2020**, the claimant attended a work meeting a meeting with Dr Mitchell, one of the partners of the respondent medical practice. Matters were raised around the claimant record of clinical engagement with two patients on Tuesday 21, Thursday 23, and Tuesday 28 January 2020 (the clinical engagement events) in consequence of which

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the claimant was advised that she faced allegations which were characterised as potentially amounting to gross misconduct.

23. The claimant who, by Thursday 30 January 2020, had been continuously attending at her work with the respondents since at least the end of August had not exhibited any manifestations of recurrent depression while at work to her colleagues in that period. The claimant was not suffering from the occurrence of recurrent depression in January 2020.
24. On **Tuesday 11 February 2020**, the claimant was advised that a referral had been made, in relation to the records of clinical engagement events, to the Nursing and Midwifery Council, the claimant's professional regulator.
25. On **Thursday 13 February 2020**, the claimant was referred to the local Ault Mental Health -Crisis Team following an overdose suicide attempt which her GP subsequent recorded as described a single major depressive episode. The Assessment by the Crisis Team identified that the claimant had "*been medicated*" on antidepressant "*with good effect however discontinued this 2 years ago*". The claimant was admitted to hospital on **Sunday 16 February 2020** for short term treatment in consequence. The Adult Mental Health reported to her GP that the claimant had described that over the preceding 8 months she had fleeting suicidal thoughts. The Adult Mental Health Team Crisis Practitioner reported to her GP, in discharge communication, that she had commenced on Diazepam short term and antidepressant, the claimant reported an increase in appetite and that she was "*no longer experiencing*" suicide ideation.
26. On **Thursday 27 February 2020**, following meeting with a doctor within the Community Mental Health Team a report was issued to the claimant's GP, headed "*Diagnosis: Depressive Episode – on Background of social stressors*". It described the attempted suicide reporting that the claimant had one further episode of suicide thoughts "*4 days ago*" which was attributed to receipt of a letter but confirmed "*Otherwise she has had no*" equivalent thoughts or any intent. It described that the claimant had reported low mood

but that had improved over the preceding 2 weeks. It was indicated that the claimant had reported *“that her sleep has always been poor only getting around 4 hours when she was working.”* It reported that the claimant was well kempt and appropriately dressed although described variable eye contact and identified an impression of *“Depressive episode and suicide attempt on background of significant social stressors”* and identified that the claimant had been anti-depressant for two weeks and advised that they continue the current dose.

10 27. The claimant’s employment with the respondent ceased on **Wednesday 17 June 2020** when she was dismissed.

15 28. On **Monday 6 July 2020**, the claimant’s GP, at the claimant’s request, provided a *“to whom it may concern”* report, that report did not refer to the claimant suffering from depression.

20 29. On **Friday 14 August 2020**, following upon a referral by the respondent in August 2020, the claimant attended telephone consultation with Occupational Health in August 2020. The report notes that the Claimant suffers from depression which was first diagnosed over 15 years. The report concluded that the claimant was likely to be regarded as having a disability under the Equality Act 2010 on account of her depression.

25 30. On **Tuesday 25 August 2020**, Dr Paul Gallagher wrote to the claimant, setting out his conclusions regard the claimant’s appeal against her dismissal setting out *“I appreciate you have been managing health difficulties for a number of years and thank you for engaging with Occupational Health recently”*. It set out that notwithstanding the occupational health report he saw *“little evidence that you were unfit to carry out the duties and responsibilities expected”* at the time of the incidents.

30 31. On **Wednesday 16 September 2020**, the claimant attended by telephone with consultant at Larkfield Mental Health Team who reported to the

claimant's GP that she had suffered from a moderate depressive episode "now resolved" noting that the claimant complained of poor sleep and prescribed a routine two-week supply of medication to aid the claimant's sleep.

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32. Following direction from the Tribunal the claimant provided Disability Impact Statement to the respondent and Tribunal on **Friday 26 February 2021**, the covering email set out that the claimant's medical records had not at that point been received and many of the dates were appropriate and from the claimant's memory.

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### Submissions

33. Both parties provided detailed written submissions.

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34. Submissions for the claimant set out that the claimant was a disabled person at all material times by reason of depression. The claimant relies upon her Disability Impact Statement in which she set out that she suffered from symptoms of depression and argues that she suffered from those symptoms throughout the relevant period. The claimant points out that as Dr Mitchell was not the claimant's GP, she was not able to offer a detailed view of the claimant's medical condition. The claimant referred to **McNicol v Balfour Beatty** [2002] IRLR 711 (**McNicol**), the EHRC Code, **J v DLA Piper UK LLP** [2010] ICR 1052 (**DLA**), **Vicary v BT** [1999] IRLR 680 (**Vicary**), **Leonard v Southern Derbyshire Chamber of Commerce** [2001] IRLR 19 (**Leonard**), **Swift v Chief Constable of Wiltshire Constabulary** [2004] ICR 909 (**Swift**), **Tesco Stores v Tennant** [2020] IRLR 363 (**Tennant**) and **Grimley v Turner & Jarvis Co Ltd** [2004] 3WLUK 747 (**Grimley**).

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35. Submissions for respondent invited the tribunal to find the claimant was not a disabled person at the relevant time. The respondent argues that the conduct which led to dismissal was the clinical engagement events (Tuesday 21, Thursday 23, and Tuesday 28 January 2020), and as such this was the "something" on which the claimant relies for the purpose of s15 EA 2010



(discrimination arising from disability). In particular the respondent “*does not accept that the on those dates that impairment had a substantial and long term adverse effect on her ability to carry out day to day activities.*” The respondent referred to para D3 of the Guidance to the Equality Act 2010.

5 The respondent also referred to **Cruikshank v VAW Motorcast Ltd** [2002] ICR 729 (Cruikshank), **Aderemi v London and South Eastern Railway Ltd** [2013] ICR 591 (**Aderemi**), **SCA Packaging v Boyle** [2009] UKHL 37 (**Boyle**), **All Answers Ltd v W** [2021] EWCA 606 (**All Answers**), **McDougall v Richmond Adult Community College** [2008] IRLR 227 (**McDougall**).

10 The respondent was critical of the claimant credibility including arguing that the claimant’s assertion that that her personal hygiene had been affected for years was in effect inconsistent with the respondent witness evidence. The respondent argues that supervision by a psychiatrist from 12 February 2020 should be disregarded in accordance with **All Answers**.

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### **Relevant Law**

36. S6 of the Equality Act provides:

#### ***Disability***

(1) *A person (P) has a disability if—*

20 (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.*

(2) *A reference to a disabled person is a reference to a person who has a disability.*

25 (3) *In relation to the protected characteristic of disability—*

(a) *a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*

*(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.*

*(4) This Act ... applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly—*

5 *(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*

*(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*

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37. Further Schedule 1 to the EA 2010 provides that:

*(1) The effect of an impairment is long-term if—*

*(a) it has lasted for at least 12 months,*

*(b) it is likely to last for at least 12 months, or*

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*(c) it is likely to last for the rest of the life of the person affected.*

*(2) 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 as continuing to have that effect if that effect is likely to recur.”*

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38. I have also had regard to the cases referred to by the parties.

### **Evidence**

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The claimant's Disability Impact Statement is broadly drawn and prepared in advance of the claimant having the benefit of the contemporaneous GP records. Where the claimant's evidence was not supported by contemporaneous entries in the GP records, I did not accept those aspects of the claimant's evidence. It was prepared in advance of the claimant having the benefit of the contemporaneous GP records.

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40. Where the claimant's evidence was contradicted by Ms Love and Dr Mitchell, I did not accept those aspects of the claimant's evidence. Dr Mitchell, appropriately, did not suggest she was able to offer expert evidence, was  
5 accepted as witness to fact only, was straightforward in her evidence as was Ms Love. Their evidence was consistent with the contemporaneous medical and occupational health documentation preceding January 2020. I would not wish these reasons to be misunderstood as implying a finding that the claimant lied. The position is simply that, having heard the evidence of those  
10 witness, I was unable to accept the accuracy of the claimant's honest, but I consider inaccurate, recall of matters at the relevant time when compared to other accounts. I consider that, in light of events subsequent to the relevant time, the claimant's recall of whether she suffered symptoms or any manifestation of recurrent depression at the relevant time has become  
15 inaccurate.

### **Discussion and Decision**

41. I had regard to the terms of s 6 of the EA 2010 which provides that person has a disability or if s/he has a physical or mental impairment which has a  
20 substantial and long-term adverse effect on her/his ability to carry out normal day to day activities. I also had regard to the cases to which I was referred. I have had regard to the relevant period itself and have also, so far as may be relevant to Schedule 1 above, had regard to the claimant's history preceding the relevant period.

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42. For the purpose of this hearing, I accept the respondent's argument that the conduct on Tuesday 21, Thursday 23 and Tuesday 28 January 2020 was the "*something*" relied upon for the purpose of the s15 EA 2010 (discrimination arising from disability).

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43. While noting events following the relevant period for context as to the claimant's recall of events at the relevant time, I have not had regard to

events occurring beyond the dates Tuesday 21, Thursday 23 and Tuesday 28 January 2020 when considering the application of s6 EA 2010.

### **Mental impairment**

5 44. The claimant has a mental impairment, she has recurrent depression, as set out in the medical records. I was entirely satisfied that this was a case for the claimant suffers from recurrent depression from time to time. There were significant impairments from which the claimant has suffered for periods of time.

### 10 **Did the impairment have a substantial effect.**

45. I am required to determine whether the claimant mental impairment has or indeed had a substantial and long-term adverse effect on her ability to carry out normal days to day activities. The term "*substantial*" is defined as "*more than minor or trivial*". The claimant's recurrent depression has manifested at times in attempted suicide. The occurrence of the claimant's recurrent depression has impacted on her ability to sleep during the period of its occurrence. I am satisfied from the evidence, taken as a whole, that claimant's ability to concentrate has also been affected at times during the periods of the occurrence of the recurrent depression. I am satisfied that, taken the evidence as a whole, the claimant's mental impairment of recurrent depression has or indeed had a substantial and long-term adverse effect on her ability to carry out normal days to day activities.

### **Were the substantial effects long term?**

46. I further considered whether the substantial effects were long term, the claimant has had recurrent depression since at least February 2003 to the end of December 2004 and has been on antidepressants from time to time. The effect of an impairment is long-term if it has lasted for at least 12 months, is likely to last at least 12 months or is likely to last long at rest of the life of the person affected.

47. The claimant had suffered from recurrence of the recurrent depression in 2005 and 2010.

48. Having regard to the evidence, including the contemporaneous records preceding January 2020 I do not accept the occurrence of recurrent depression throughout the relevant period, being Tuesday 21, Thursday 23, and Tuesday 28 January 2020. The claimant did not suffer from recurrent depression in January 2020.

49. There are provisions in the Equality Act 2010 which provides that if an impairment ceases to have a substantial adverse effect on that person's ability to carry out normal day to day activities, it is treated as continuing if the effect is likely to recur.

50. "*Likely to recur*" means it could well happen. The likelihood of recurrence should be considered taking all the circumstances of the case. Against the background that there had already been recurrence of the recurrent depression in 2005 and 2010. I am satisfied that the recurrent depression was at all relevant times likely to recur. In coming to this decision, I have not had regard to events after the relevant period which for the present hearing I accept as being Tuesday 21, Thursday 23, and Tuesday 28 January 2020.

51. In conclusion I was satisfied that the substantial adverse effects of the impairment were long term because they had lasted and were likely to last at least 12 months and further throughout relevant period the adverse effects of the impairment were likely to recur.

### **Decision**

52. The claimant is a disabled person in terms of s 6 of the Equality Act 2010. She has a mental impairment (recurrent depression) which is likely to recur and have a substantial long term adverse effect on her ability to carry out normal day to day activities. The claimant was a disabled person, by reason for her recurrent depression, which was likely to recur, at the relevant time.

**Further procedure.**

53. A further telephone case management will be appointed to consider further procedure.

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Employment Judge: Rory McPherson  
Date of Judgment: 01 July 2021  
Entered in register: 06 July 2021  
and copied to parties

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