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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113563/2019

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Open Preliminary Hearing (OPH) Held by Cloud Video Platform (CVP) on 13
August 2021

Employment Judge - A Strain

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Ms R Quarcoo

Claimant
Represented by:
Mr D Stephenson
Barrister

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The Scottish Ministers

Respondent
Represented by:
Mr R Turnbull
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

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(1) the Claimant had a qualifying disability as defined in section 6
of **Equality Act 2010** from the period 14 November 2018 to
24 July 2019.

Background

1. The Claimant was represented by Mr D Stephenson, Barrister. She asserted (amongst others) claims of Disability Discrimination under the **Equality Act 2010 (EA 2010)**.
- 5 2. The Respondent was represented by Mr R Turnbull, Solicitor.
3. The Parties had lodged a Bundle of Documents with the Tribunal for the purposes of the Open Preliminary Hearing. The Claimant also produced a Witness Statement which was to be taken as her evidence in chief.
- 10 4. The sole issue for determination of the Tribunal at the OPH was disability status in terms of section 6 of the Equality Act 2010 (**EA 2010**). In particular, whether from the period 20 November 2018 to 23 July 2019 the Claimant was disabled under section 6 of the EA 2010.
- 15 5. The Tribunal heard evidence from the Claimant. No witnesses gave evidence for the Respondent.

Findings in Fact

6. Having heard the evidence of the Claimant and considered the documentary evidence before it the Tribunal made the following findings in fact:
 - 20 6.1 The Claimant is an experienced Civil Servant having worked in the Civil Service since 26 January 2009. She has an MBA in Finance from the University of Leicester and recently qualified as an accountant with the Chartered Institute of Management Accountant (**CIMA**).
 - 25 6.2 The Claimant was employed by the Respondent from 18 September 2017 as the Assistant Finance Business Partner on transfer from the Department for International Development. She was responsible for the High and Local Court functions.

5 6.3 In or around August 2018 the Claimant suffered from stress and anxiety with symptoms of low mood and poor concentration. She found it difficult to do everyday tasks such as preparing lunch for work at that time. The Claimant became increasingly concerned about her low mood after reading an article contained in one of the TU bulletins in September 2018.

6.4 The Claimant was afraid of the potential stigma and negative impact on her if she disclosed details of her condition.

10 6.5 Her symptoms deteriorated to the extent that she informed the Respondent of her symptoms in October 2018. At this time the Claimant found it difficult to commute to work and carry out everyday tasks, such as shopping and watching TV. Her sleep was severely affected. She lost interest in everything.

15 6.6 By 14 November 2018 the Claimant could no longer cope with life. She was anxious and was unable to concentrate. She found it difficult to read a book and follow through as it became difficult to concentrate - her mind was often all over the place. She lacked energy and mobility. She could not do everyday household chores such as the dishes, cleaning and tidying up. She had to have her husband take over cooking as well as the household chores. She had persistent general low motivation and lack of interest in everyday activities. She stopped attending regular weekly social activities due to loss of interest. She lost weight due to a loss of appetite and couldn't eat. Her weight dropped from 62kg to 53kg. She ceased regular attendance at church on Sundays due to lack of motivation. She was unable to fully concentrate during the service.

25 6.7 The Claimant consulted her GP, Dr Elizabeth Day, on 20 November 2018. The Claimant was diagnosed with anxiety and signed off work for two weeks.

6.8 The Claimant was additionally diagnosed with depression on 15 February 2019.

6.9 The Claimant's symptoms persisted and she consulted Dr Day on 4 and 15 February, 15 March, 12 April, 9 May, 6 June and 4 July (all 2019). After having been signed off work for 14 days the Claimant was then signed off for a further period of 28 days. Dr Day stated the absence on each occasion as being due to "stress at work/work stress".

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6.10 The Claimant was referred by Dr Day for Counselling Therapy and had 2 sessions with a Mental Health Advisor on 28 Feb 2019 and 7 March 2019.

6.11 Dr Day prescribed anti-depressant medication (Fluoxetine) to help the Claimant manage her symptoms of stress and anxiety. The Claimant took a 20mg capsule once a day for six months from 15 March 2019.

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6.12 Dr Day enrolled the Claimant on an Anxiety programme which she attended weekly until end of July 2019.

6.13 Ms Aitkens (the Claimant's line manager) made an Occupational Health Referral (**OHR**) on 21 March 2019. The OHR stated that the Claimant "had been placed on medication" and "was struggling to leave" her house.

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6.14 The Claimant attended for assessment by Occupational Health on 25 March 2019. An Occupational Health Report was produced dated 1 April 2019. The Report stated the following:

6.14.1 The Claimant was unlikely to meet the definition of disability under the Act.

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6.14.2 The Claimant has psychological symptoms of work stress.

6.14.3 Any impairment or effect is unlikely to last longer than 12 months.

6.14.4 Any condition is unlikely to substantially impact upon normal day to day activities.

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6.15 On 17 July 2019, Dr Day completed a “fit note” for the Claimant. Dr Day ticked the box that the Claimant “may be fit for work taking account of the following advice”. The advice specified was a “phased return to work”.

5 6.16 Dr Day produced a report dated 21 April 2020 at the Claimant’s request. It is not known what information was provided to Dr Day as to the points the report had to cover. Dr Day’s report stated the following:

10 6.16.1 the Claimant was diagnosed anxiety on 14 November 2018 and additionally diagnosed with depression on 15 February 2019. Symptoms including low mood, irritability and loss of appetite, lack of motivation, poor sleep and poor concentration were mentioned.:

15 6.16.2 “ I would agree that her ability to carry out normal day to day activities would have been adversely affected for a period of time. The above symptoms including lack of motivation and poor concentration would mean she could only carry out normal day to day activities with difficulty. I can also confirm that this effect was substantial.”

20 6.16.3 “It is possible for depression to recur and relapse, however at the time of writing there has been improvement.... and I have no reason to anticipate a recurrence of her symptoms. However should she experience similar workplace stress and bullying in the future there is certainly a likelihood that her condition would recur.”

25 6.16.4 The Claimant was treated with Fluoxetine 20mg for six months from 15/3/2019.

6.16.5 It is likely symptoms of insomnia, poor concentration, low mood and loss of appetite would have been more sever and for a long duration had she not taken medication.

6.16.6 “The substantial adverse effects started to apply on 14/11/2018 and lasted until 24/7/2019...My impression was that the main cause of depression was workplace stress.”

5 6.16.7 If the Claimant returned to work “with similar stressful working conditions her condition could recur”

6.17 The Claimant suffered from anxiety from 14 November 2018 until 24 July 2019 and additionally depression from 15 January 2019 until 24 July 2019. Her symptoms and the adverse effect on her ability to undertake normal day to day activities persisted throughout and was not minor or trivial.

10 6.18 The Claimant’s anxiety and depression was likely to recur because the circumstances that gave rise to her absence had not been dealt with and her grievances and complaints of discrimination remained unresolved.

15 6.19 When the Claimant returned to work on 24 July 2019 she met with and discussed her working arrangements with Mark Howells, the Director of Finance, who was now her Line Manager. Mr Howells told the Claimant that her working arrangements would be changed after six weeks. She challenged the new arrangement (to work in Edinburgh 5 days instead of the usual 3 days) and considered it as a breach of contract. This caused her further anxiety

20 **The Relevant Law**

Disability Discrimination

7. The starting point for a Tribunal is whether or not a Claimant has a qualifying disability under section 6 of the EA 2010. Section 6 provides:

Disability

25 (1) A person (P) 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.

8. The onus of proof of impairment is upon the Claimant on the balance of probabilities.

5 *Impairment*

9. ***Royal Bank of Scotland v Morris UKEAT/0436/10*** at paragraph 63 and 55 the EAT emphasised the importance of expert medical evidence for the existence or not of a mental impairment where an alleged disability takes the form of “depression or (similar) a cognate medical impairment.”
10 Further, that “the issues will often be too subtle to allow [the Tribunal] to make proper findings without expert assistance.”

10. In the case of ***J v DLA Piper UK LLP UKEAT/0263/09*** paragraph 42 noted that the distinction between symptoms of mood and anxiety caused by clinical depression and those that derive from a ‘medicalisation of work problems’ or ‘adverse life events’.
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11. In ***Herry v Dudley Metropolitan Council and Governing Body of Hillcrest School UKEAT/0101/16*** at paragraph 56 the EAT noted:
“Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person’s
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character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess."

Long-term effect

12. Schedule 1 paragraph 2.(1) of the EA 2010 provides:

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

Substantial Adverse Effect

13. Substantial means more than minor or trivial (***Goodwin v The Patent Office [1999] IRLR 4 EAT***). If an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur (Schedule 1, paragraph 2.(2) of EA 2010). Likely to recur is interpreted as "could well happen" (*The Guidance on the Equality Act 2010* (published by the UK Government)). It is not assessed on the balance of probabilities.

Normal day to day activities

14. The focus of the EA 2010 is things that the Claimant either cannot do or can only do with difficulty, rather than on the things the Claimant can do. *The Guidance on the Equality Act 2010* (published by the UK Government) states at page 34 "in general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the

telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.”

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15. ***Aderemi v London and South Eastern Railway Ltd [2013] ICR 591 EAT***, Langstaff P said, “It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial.”
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16. A tribunal considering the question of disability should ensure that each step is considered separately and sequentially and that tribunals and courts should give a purposive construction to the legislation, which is designed to confer protection rather than restrict it ***Goodwin***.
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17. A tribunal should look forward from the date of the alleged discriminatory act in considering whether the adverse effect was likely to last at least 12 months or recur. The position must be considered looking forward as at that date because likelihood is not something to be determined with the benefit of hindsight (***Parnaby v Leicester City Council UKEAT/0025/19/BA***).

Submissions

18. Both Parties provided written submissions which they supplemented orally.

Discussion and Decision

5 *Disability*

19. The Tribunal considered whether or not the Claimant had a disability as defined in section 6 of EA 2010.
20. In this regard the Tribunal adopted and followed the approach in **Goodwin** that each step has to be considered separately and sequentially, and, that tribunals and courts should give a purposive construction to the legislation, which is designed to confer protection rather than restrict it.
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21. The Tribunal also noted that the Claimant's evidence was largely unchallenged by the Respondent. The thrust of the Respondent's argument was to the effect that the OH Report should be preferred over the Medical Report from Dr Day on the following basis:
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“I submit that the occupational health report should be preferred to determine disability status. This is for the following reasons.

20 Firstly, the occupational health report is giving its view at the time of the relevant period – the time the alleged acts of discrimination are committed or have already been committed. And that's the time that matters for the Tribunal. Whereas, the GP is talking with the benefit of knowing what happened subsequently. And this Tribunal cannot be confident that the GP does not have that in mind when commenting about the past. The Tribunal cannot be confident that that has in some way subconsciously coloured the GP's view as to what was really the case at the relevant period. We haven't heard from the GP. The GP's view is clearly not saying: at the time of the relevant period, this is likely the situation. The GP's view is in hindsight.

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30 Secondly, the occupational health report is prepared by an entirely independent expert who does not have and could not be influenced by an ongoing professional relationship with the Claimant like the Claimant had with the GP. Generally, I think it's fair to say that on top of their professional obligations, GPs have a loyalty towards their patients and are driven by the patient's

needs, demands and wants as the service user. So compared to the occupational health physician, I submit the GP here is on the balance of probabilities, less independent.

5 Thirdly, the report is from a specialist in occupational health, in other words – the precise issues specifically designed to help determine disability status for employers. It was by a professional person whose discipline was obviously relevant to a consideration of the Claimant’s circumstances and condition i.e. work related stress. I think it would be within the Tribunal’s knowledge that GPs generally are not trained to answer these specific and legal questions relating to employment and work. If it’s not within the Tribunal’s knowledge, we have certainly heard no evidence that this particular GP had any training in this area or knowledge and experience of 10 the Respondent’s business or area of work – which is relevant to determine the cause of the issues the Claimant experienced and how long they are likely to last. Whereas these are questions that an occupational health physician advises on, typically on a weekly basis – that is their job. I think in all likelihood, the occupational health physician is in a better position here in that respect.

15 Fourthly, we do not know the context to the GP letter and how the questions were framed and what the information that was provided to lead to those conclusions in the letter. What we do know is that the GP says in her letter, “I would agree” and “I can also confirm” when talking about the adverse effect and whether it was substantial or not. We don’t know who the GP is agreeing with, probably the Claimant because the letter is addressed to her and her evidence is 20 that she contacted her GP (paragraph 22 of her written statement). Contrast that with the occupational health report where we know what questions were asked because we can see that in the report and the referral (Page 141 of the bundle). We can see the chain of events and timing of the occupational health opinion. We can see that the Claimant was consulted about the occupational health report at a meeting on 23 May 2019. There, the Claimant was given an opportunity to comment on the report. There’s no evidence that she disputed anything in the 25 report. We can see that she was advised that it was possible to make a second referral to occupational health, but she didn’t take it up. On 11 July 2019, we can see that she was invited to a second long-term absence meeting to discuss similar matters and given a further opportunity to challenge the occupational health advice but the Claimant did not engage with that.

30 So, in contrast to the report, for the GP letter, we are only seeing part of the story. There is uncertainty as to the background behind the instruction of the GP letter in circumstances where at least it seems in some respects the GP is being steered to a particular position. And I go back to my first reason of the influence of a GP and patient relationship and the quite legitimate desire to keep that strong and ongoing.”

35 22. The Tribunal did not accept the Respondent’s argument that the OH Report should be preferred over the Medical Report prepared by Dr Day. The Tribunal accepted the OH Report for what it was – a report detailing

the OH Physician's views at the time of assessment (25 March 2019). This included views on whether or not the Claimant had a disability under the EA 2010 (which is a mixed question of fact and law for the Tribunal to determine).

- 5 23. In so far as there was any conflict between the two reports the Tribunal preferred and accepted the Medical Report of Dr Day for the following reasons:
- a. The Claimant had consulted with Dr Day since the onset of her condition and throughout;
 - 10 b. Dr Day had regular contact with the Claimant throughout the relevant period;
 - c. Dr Day's Report was framed with the benefit of her knowledge and experience of the Claimant, her symptoms, her medication and treatment over the relevant period;
 - 15 d. The OH Report was a snap shot of the Claimant's symptoms and condition as at the date of the assessment (25 March 2019).

Impairment

24. The Tribunal considered and accepted the Claimant's evidence as to her impairment and also that of Dr Day. Dr Day's medical opinion was that
20 the Claimant suffered from anxiety and depression over the relevant period. Although the depression was not diagnosed until 15 February 2019.
25. The Tribunal did not accept the Respondent's submissions (founding on **Herry**) that anxiety and depression in the circumstances were merely
25 descriptors of the symptoms and a reaction to adverse consequences.
26. The Tribunal did not accept the Respondent's submission that the Claimant was not suffering from a "condition" over the relevant period. It was submitted:

Did this person have a condition at the relevant time that caused vulnerable symptoms? No they didn't. She did experience those symptoms and that is because, according to her, taking her case at its highest, she was a victim of direct race discrimination, harassment and bullying at work, and according to her GP as soon as that stops, the symptoms stopped. No Tribunal could find that someone having anxiety and depression from racist discriminatory behaviour but recovers when that behaviour stops is a disabled person. And that is the case even if that person was likely or could well be placed in other racist, discriminatory or bullying situations in the future, or perceive that they were, where they suffer the same healthy negative impacts. Those feelings and the impact of it are quite normal in a situation where it is caused by what she believes to be racist and bullying.

27. The Tribunal find that the Claimant suffered a mental impairment of anxiety and depression over the relevant period. This finding was consistent with the medical evidence before the Tribunal and with the evidence of the Claimant.

Long-term effect

28. The Respondent submitted that "whether the Tribunal prefers the occupational health report over the GP letter, the GP is not saying anything inconsistent with the occupational health report in terms of long-term effect or that she meets the definition of disability under the Act. The GP is completely silent on whether she does meet the definition under the Act and so the occupational health report can fill in that gap. 24. The GP is clear at least when the letter says: "I have no reason to anticipate a recurrence of her symptoms". The general meaning of the word "anticipate" is "regarding something as probable", "expected" and "predicted". Therefore, the GP letter is essentially saying what the occupational health report said in that symptoms were unlikely to last 12 months or more. They are saying the same thing – that it is not a recurring condition. Yes, there is disagreement on the severity of the symptoms but whether they are long lasting, they are saying the same thing."

29. The Tribunal (as above) considered and accepted the Claimant's evidence as to the long-term effect of her impairment and also that of Dr Day. Dr Day's medical opinion was that the Claimant suffered from anxiety and depression over the relevant period and that there was a
5 likelihood her condition would recur "should she experience similar workplace stress and bullying in the future".

30. The Claimant's evidence was that her depression was likely to recur because the circumstances that gave rise to her absence had not been dealt with. This taken together with Dr Day's opinion meant that the
10 circumstances subsisted which meant there was a likelihood her condition would recur.

31. Likely to recur is interpreted as "could well happen" (*The Guidance on the Equality Act 2010* (published by the UK Government)). It is not assessed on the balance of probabilities.

15 32. The Tribunal accordingly concluded that the Claimant's impairment was of long-term effect as it was likely to recur.

Substantial Adverse Effect on normal day to day activities

33. The Tribunal accepted the Claimant's evidence as to the impact upon her ability to perform normal day to day activities and tasks as defined in the
20 **Guidance**. Further, that she felt anxious, was unable to concentrate, found it difficult reading books; had difficulty sleeping, lacked energy and mobility and lost interest in everyday activities. This was also supported by Dr Day's report " *I would agree that her ability to carry out normal day to day activities would have been adversely affected for a period of time. The above symptoms including lack of motivation and poor concentration would mean she could only carry out normal day to day activities with difficulty. I can also confirm that this effect was substantial.*"

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The Tribunal accepted that the adverse effect was more than minor or trivial and was in fact substantial (following **Goodwin v The Patent**
30 **Office**).

The Tribunal also accepted Dr Day's evidence in her report which clearly stated her view that "The substantial adverse effects started to apply on 14/11/2018 and lasted until 24/7/2019."

- 5 34. In the circumstances the Tribunal conclude that the Claimant had a qualifying disability as defined in section 6 of EA 2010 from the period 14 November 2018 to 24 July 2019.

10 Employment Judge: Alan Strain
Date of Judgment: 01 September 2021
Entered in register: 15 September 2021
and copied to parties