



5

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111557/2019 (V)

Heard on 30 July 2020

10

Employment Judge Lucy Wiseman

15

Mrs M Greenwood

**Claimant
In Person**

20

Independent Living Support

**Respondent
Represented by:
Mr D James
Solicitor**

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Tribunal decided the claimant is a disabled person in terms of section 6 of the Equality Act and was so at the relevant time. The respondent conceded they had constructive knowledge the claimant was a disabled person at the relevant time.

30

REASONS

35

2. The claimant presented a claim to the Employment Tribunal on 11 October 2019 alleging she had been discriminated against because of disability and wrongfully dismissed.
3. The respondent entered a response denying the allegations.

4. A case management Preliminary Hearing took place on 30 January 2020 and the Note issued following that hearing set out details of the complaints of direct discrimination; failure to make reasonable adjustments; discrimination arising from disability; harassment and wrongful dismissal.
- 5
5. The respondent did not concede the claimant was a disabled person in terms of section 6 of the Equality Act, and the claimant was ordered to produce a disability impact statement and relevant medical records for the respondent to consider.
- 10
6. A further case management Preliminary Hearing took place on 15 June at which the respondent confirmed they sought a Preliminary Hearing to determine the issue of whether the claimant was a disabled person at the material time.
- 15
7. The hearing today is a Preliminary Hearing to determine whether the claimant is a disabled person in terms of section 6 of the Equality Act and if so whether she was so disabled at the material time; and whether the respondent knew (or could reasonably have been expected to know) the claimant had a disability.
- 20
8. I heard evidence from the claimant and was referred to the claimant's medical records and the disability impact statement which had been prepared. I made the following material findings of fact.
- 25

Findings of fact

9. The claimant commenced employment with the respondent in August 2017 as a tenancy support worker.
- 30
10. The claimant's employment ended on 26 July 2019.

11. The claimant has anxiety and depression which is rooted in childhood trauma. The claimant first approached her GP in 2010 because of suicidal thoughts, panic attacks and fainting. The claimant was prescribed antidepressants.
- 5 12. The claimant's anxiety and depression is ongoing and she continues to take antidepressant medication (Sertraline) and Diazepam when required. She also takes sleeping tablets.
- 10 13. The claimant does not sleep well and she struggles to concentrate. She could read a book but her ability to do this is dependent on how she is feeling or, as she described "what is in [her] head".
- 15 14. The claimant has low self-esteem, struggles with emotion, struggles to process things, can't cope and doesn't deal well with things. The claimant gave an example of an adverse comment being made, which most people would hear at level 8, whereas she would hear it at level 188. This in turn impacts on how she copes with, and deals with it.
- 20 15. The claimant had a relationship which culminated in her partner moving to live with her and her daughter. The claimant viewed this as a positive because it provided financial and emotional support. The claimant asked her GP, at this time (August 2018), to reduce her medication.
- 25 16. The claimant did reduce her medication but by June 2019 the claimant's condition had deteriorated significantly and it culminated in her taking an overdose. The claimant immediately made herself sick and contacted her GP for support. The claimant's antidepressant medication was increased. The claimant's relationship broke down.
- 30 17. The claimant has suicidal thoughts (termed intrusive thoughts) on an almost constant basis but (with the exception of the incident referred to above) has never acted on them and is certain she never will because of her family.

18. The claimant struggles with her condition every day. The depression is reactive. There are periods of calm when the claimant feels able to cope, but stress exacerbates her condition and builds up to leave the claimant feeling she cannot cope.
- 5
19. The claimant was signed off sick from work in June 2019. The Fit Note cited the reason for absence as “stress due to being bullied at work”.
20. The claimant had a discussion with her manager in June 2019 regarding her mental health and noted that in a previous appraisal a comment had been noted referring to concern regarding her mental wellbeing.
- 10

Respondent’s submissions

21. Mr James submitted the adverse effects described by the claimant were not supported by the medical records. For example, the claimant had referred to taking an overdose in June 2019, but the medical records did not reference this. In fact the records note “no suicidality”. This impacted on the credibility of the claimant.
- 15
22. Mr James noted the reference by the claimant to fainting and panic attacks was historic with the former having been in 2011 and the latter in 2013.
- 20
23. Mr James submitted the adverse effects had not been long term in circumstances where the claimant’s condition had improved and she had asked to reduce her medication. The claimant’s life was more stable and there was a “better period” between August 2018 and June 2019. This, it was submitted, broke the substantial adverse effect of the impairment.
- 25
24. The claimant had not, as at the time of dismissal, been suffering from the impairment albeit she had low moods. The Fit Note referred to stress and not to the impairment of anxiety and depression. It was submitted that at the material time the claimant had not been suffering from anxiety and depression. This was borne out by the medical records.
- 30

25. Mr James referred to the cases of **McDougall v Richmond Adult Community College 2007 ICR 1567** and **SCA Packaging v Boyle 2009 ICR 1056**.

5

26. Mr James invited the Tribunal to find the claimant was not a disabled person at the material time. He confirmed however that if the tribunal decided the claimant was a disabled person at the material time, the respondent's position was that they did not have actual knowledge of the disability, but had constructive knowledge of it through the supervision meetings.

10

Claimant's submissions

27. Mrs Greenwood submitted there was nothing black and white regarding her mental health. She had tried very hard to overcome her anxiety and depression, and had undertaken Cognitive Behavioural Therapy, counselling and help from a psychologist. The claimant believed her anxiety and depression had been exacerbated by her manager. The claimant was not "fine" but she had a job to do: she had cried regularly in the office.

15

20 28. The claimant described that she struggled with her condition every day.

Discussion and Decision

29. I had regard firstly to the terms of section 6 of the Equality Act which provides that a person has a disability if s/he has a physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day to day activities. I also had regard to the two cases to which I was referred.

25

Mental Impairment

30 30. The claimant has a mental impairment: she has anxiety and depression. Mr James sought to draw a distinction between stress and anxiety/depression on

30

the basis the claimant had, in June 2019, been signed off with stress. I could not, in the circumstances of this case, accept that distinction. I was entirely satisfied this was a case where the claimant has anxiety and depression. They were impairments from which she has suffered for many years (at least since
5 2010), and are ongoing. This was not a case where the claimant ceased having anxiety and depression and instead had stress.

31. The claimant described in her evidence that her anxiety and depression were exacerbated by stress, and so whilst stress may have been the reason for her
10 absence in June 2019, it was the exacerbation of her anxiety and depression which caused difficulties for the claimant. I accepted the claimant's evidence that stress, anxiety and depression "all blend together".

Did the impairment have a substantial adverse effect

15 32. I must determine whether the claimant's mental impairment had a substantial and long term adverse effect on her ability to carry out normal day to day activities. The term "substantial" is defined as meaning "more than minor or trivial". I found the claimant to be a credible witness and I accepted her description of her condition and the impact it has on her ability to carry out
20 normal day to day activities. I could not accept Mr James' submission that an issue of credibility arose from the fact the medical record for June 2019 did not refer to an overdose and stated "no suicidality". The claimant made it clear that notwithstanding what had happened, and albeit she had suicidal thoughts every day, she did not intend to act on the suicidal thoughts and had made
25 this clear to the GP, and this is why "no suicidality" had been recorded.

33. I understood and accepted the claimant struggles every day to cope with her condition: the claimant described a situation whereby she has periods of calm and stability where she can cope, but stress impacts on her ability to cope
30 and this builds to a position where she feels overwhelmed and unable to deal with things. I was satisfied the claimant's condition has a substantial adverse effect on every aspect of her life. The claimant's ability to carry out normal day

to day activities – for example, reading a book – is entirely dependent on how the claimant is coping with her condition on that day.

34. The claimant's ability to concentrate is also substantially adversely effected.
- 5 The claimant described "really having to focus" to try to calm suicidal thoughts and everything else going on inside her head. She struggled to concentrate and focus on a constant and continuing basis.

Were the substantial adverse effects long term

- 10 35. I next considered whether the substantial adverse effects were long term. The claimant has had anxiety and depression at least since 2010, and she has been on antidepressant medication since then. The effect of an impairment is "long term" if 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.

15

36. Mr James invited the Tribunal to find the effects of the claimant's impairment were not long term because there had been a period between August 2018 and June 2019 when there had been a break in the effects of the impairment. I could not accept Mr James' submission for two reasons: firstly, I
- 20 acknowledged the medical records indicated that in October 2018 the claimant told her GP that her life was more stable and that she felt ready to come off her antidepressants. The GP recommended she could start reducing her dosage slowly, from 150 mg per day to 100 mg per day for a month, then 50mg for a month and then taking it for alternate days for a month. There was
- 25 no evidence to suggest whether the claimant had followed that plan for reduction: in fact the claimant only ever in her evidence spoke of reducing her medication. This was supported by the fact the medical records refer in June 2019 to the claimant not being keen to "increase" her medication. I inferred from this that the claimant had not stopped her medication. I could not,
- 30 however, agree that simply because the claimant felt in a calmer period and able to reduce her medication this meant the impairment was not still having a substantial adverse effect on her ability to carry out normal day to day activities. I say this because it was clear from the claimant's evidence that she

had been taught various coping strategies, for example cognitive behavioural therapy, to help her cope. Further, there was no evidence to suggest how the claimant had felt at this time and when things started to build up again to having to increase her medication again in June 2019.

5

37. Secondly, there are provisions in the Equality Act which provide that 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 treated as continuing to have that effect if the effect is likely to recur. "Likely to recur" means that it could well happen. The likelihood of recurrence should be considered taking all the circumstances of the case into account. The facts of this case demonstrated that albeit the claimant tried to reduce her medication in October 2018, she required to increase it again by June 2019 because there had been a recurrence of the effects of the impairment. I accordingly was satisfied that even if there was a cessation of substantial adverse effect in or about October 2018, the substantial adverse effects of the impairment were likely to recur.

10

15

20

38. I, in conclusion, was satisfied the substantial adverse effects of the impairment were long term because they have lasted, and are likely to last, for at least twelve months.

Effect of treatment

25

30

39. The Equality Act provides that an impairment is to be treated as having a substantial adverse effect on the person's ability to carry out normal day to day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard "likely" means "could well happen". This means that when assessing whether there is a substantial adverse effect on the person's ability to carry our normal day to day activities, any medical treatment which reduces or extinguishes the effects of the impairment should be ignored.

40. The claimant confirmed she had not, since having been prescribed anti-depressant medication, come off that medication. The claimant was unsure

what would happen if she did come off the medication but drew on her experience of having reduced it, where she ended up not being able to cope, not behaving “nicely” and taking an overdose.

- 5 41. I considered, having regard to the claimant’s evidence, that if the claimant was not taking medication, the effects of her condition would become more severe and would certainly be a substantial adverse effect on her ability to carry out normal day to day activities.

10 **Decision**

42. I decided the claimant is a disabled person in terms of section 6 of the Equality Act. She has a mental impairment (anxiety and depression) which has a substantial long-term adverse effect on her ability to carry out normal day to day activities. I further decided the claimant was a disabled person at the
15 relevant time.

43. I noted the respondent’s position that if I decided the claimant was a disabled person at the relevant time, they would concede they had constructive knowledge of the disability.

20

Further Procedure

44. The respondent’s representative has a period of 7 days from receipt of this Judgment, to clarify whether they would be interested in participating in Judicial Mediation.

25

Employment Judge: Lucy Wiseman
Date of Judgment: 05 August 2020
Entered in register: 05 August 2020
and copied to parties

30