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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102314/2020

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Preliminary Hearing Held by Cloud Video Platform (CVP) on 10 June 2021

Employment Judge M Sangster

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Mr J Bolger

**Claimant
In person**

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Pointmedia Creative Limited

**Respondent
Represented by
Ms Alexander
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was a disabled person, for the purposes of section 6(1) of the Equality Act 2010, at the relevant time

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REASONS

Introduction

1. This was a preliminary hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.

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2. The preliminary hearing was to determine whether the claimant was a disabled person, for the purposes of section 6 of the Equality Act 2010 (**EqA**), at the relevant time. The relevant time was the date of his resignation, namely 3 February 2020. In his ET1 form, the claimant stated that he was a disabled person by reason of 'depression and related conditions'. In his impact statement he referred to himself as having 'depression, anxiety and poor mental health.'
3. The claimant gave evidence at the preliminary hearing. A joint bundle of documents was lodged in advance of the preliminary hearing, extending to 200 pages.

Findings in fact

4. The Tribunal found the following facts, relevant issues to be determined, to be admitted or proven.
5. In around September 2014, the claimant started to believe he had cancer. The claimant's GP referred him for numerous tests, which demonstrated that he did not in fact have cancer.
6. Despite this, the claimant continued to believe that he may have cancer and to worry that he may die of cancer. In/around June 2017, the claimant was referred for cognitive behavioural therapy (CBT). This was an eight-week course which he successfully completed. This provided the claimant with a number of coping mechanisms, which he deployed when he started to develop intrusive thoughts. He was also shown a number of videos online, which he could view to assist him, when he started to develop intrusive thoughts. He viewed these on a regular basis (every couple of days) thereafter.
7. Notwithstanding this he continued to have intrusive thoughts about cancer and his symptoms intensified. By the end of 2017, the claimant was continuously worried about having cancer and dying from cancer, to the point of paranoia. He was unable to sleep properly as a result of continuous worry. Lack of sleep meant he was tired during the day and that, coupled with continuous worry during the day, meant he was regularly unable to concentrate or focus on tasks

and conversations. His mood was very low. He would regularly become tearful at work, but would go to the toilet and cry there, to avoid crying in front of colleagues. This occurred approximately every other day.

5 8. On 19 January 2018, the claimant was prescribed propranolol, a beta-blocker, to try to alleviate his anxiety. On 23 January 2018, the claimant was also prescribed the anti-depressant diazepam. He continued to take diazepam until 4 April 2018, when he was instead prescribed an alternative anti-depressant, citalopram. His dosage was 20mg per day at that point.

10 9. The claimant continued to take both propranolol and citalopram throughout 2018 and 2019. These helped to alleviate, but not eradicate, his symptoms. He continued to suffer from intrusive thoughts in relation to his health and these continue to impact on his ability to sleep, thereby impacting his ability to focus and concentrate during the day. He continued to have tearful episodes, albeit not as frequently. In September 2018, and again in January 2019, the claimant
15 was prescribed sleeping tablets.

10. During the course of 2019, the claimant's marriage broke down and his contact with his children was limited. His symptoms escalated, his mood became extremely low and, by the end of 2019, he had developed suicidal thoughts. On 5 November 2019, the claimant's prescription for citalopram was increased
20 to 30mg per day. That continued until after the claimant's employment with the respondent terminated.

11. Were he not taking prescribed medication in the period from January 2018 to the date his employment terminated, the claimant would have had very severe anxiety and panic attacks during that period. His mood would have been
25 extremely low continuously. He would have been continuously worried and scared about his health and, in particular, dying of cancer. His sleep would have been significantly disturbed. His ability to focus and concentrate would have been significantly impaired. It is very likely he would have developed suicidal thoughts.

Relevant law

Disability Status

12. Section 6(1) EqA provides:

'A person (P) has a disability if —

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- (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.'*

13. Schedule 1 of the EqA contains supplementary provisions in relation to the determination of disability. Paragraph 2 states:

10 *'2(1) The effect of an impairment is long-term if-*

- (a) it has lasted 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 life of the person affected.'*

14. Paragraph 5 states

- 15 *'5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –*
- (a) measures are being taken to treat or correct it; and*
 - (b) but for that, it would be likely to have that effect.'*

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15. The *'Guidance on matters to be taken into account in determining questions relating to the definition of disability'* (the **Guidance**) does not itself impose legal obligations, but the Tribunal must take it into account where relevant (Schedule one, Part two, paragraph 12 EqA).

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16. The Guidance at paragraph A8 states *'It is not necessary to consider how an impairment is caused... What is important to consider is the effect of an impairment, not its cause.'*

5 17. The Guidance at paragraph B1 deals with the meaning of *'substantial adverse effect'* and provides:

'The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.'

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18. Paragraphs B4 and B5 provide that:

'An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effect on more than one activity, when taken together, could result in an overall substantial adverse effect.'

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For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of day-to-day activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.'

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19. Paragraph B1 should be read in conjunction with Section D of the Guidance 15, which considers what is meant by *'normal day-to-day activities'*.

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20. Paragraph D2 states that it is not possible to provide an exhaustive list of day-to-day activities.

21. Paragraph D3 Provides that:

'In general, day-to-day activities are things that 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.'

22. D16 provides that normal day-to-day activities include activities that are required to maintain personal well-being. It provides that account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, or personal hygiene.

23. The Equality and Human Rights Commission: Code of Practice on Employment (2011) at Appendix 1, sets out further guidance on the meaning of disability. It states at paragraph 7 that

'There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause.'

24. At paragraph 16 it states:

'Someone with impairment may be receiving medical or other treatment which alleviates or removes the effects (although not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if the substantial adverse effects are not likely to occur even if the treatment stops (that is, the impairment has been cured).'

25. In *Goodwin v Patent Office* [1999] IRLR 4, the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are:

- 5 a. Does the person have a physical or mental impairment?
- b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
- c. Is that effect substantial?
- d. Is that effect long-term?

10 26. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability.

Submissions

15 27. The respondent's submission, in summary, was that the claimant had failed to demonstrate that any of the 4 elements were satisfied at the relevant time. It cannot be held therefore that the claimant was a disabled person at the relevant time. The first mention of the word 'depression' in the claimant's medical records post-dated his dismissal. It therefore appears that he was not medically diagnosed with depression until 25 February 2020.

20 28. The claimant submitted that he had been taking anti-depressants for over 2 years. That, in itself, demonstrated that his condition was long term. His condition has a huge impact on his daily life.

Decision

29. The Tribunal firstly considered whether the claimant had demonstrated a mental impairment. The Tribunal accept that, by the end of 2017 at least, the claimant had a mental impairment which continued until the termination of his employment. The claimant's symptoms of anxiety, low mood (whether formally diagnosed as depression or not at the relevant time) and paranoia were not a reaction to adverse circumstances. They, cumulatively, amounted to a mental impairment.

30. The Tribunal then considered whether the impairment had an adverse effect on the claimant's ability to carry out normal day-to-day activities. The Tribunal found that it did. The claimant was unable to sleep properly as a result of continuous worry. Lack of sleep meant he was tired during the day and that, coupled with continual intrusive thoughts during the day, meant he was regularly unable to concentrate or focus on tasks and conversations. His mood was very low. He would regularly become tearful at work.

31. The Tribunal then considered whether that adverse effect was substantial. The Tribunal was mindful that, in considering that question, any medical or other treatment should be discounted and the impairment should be taken to have the effect it would have had without such treatment. In this case, that meant that the prescription medication taken by the claimant, namely propranolol and citalopram, should be discounted. The claimant gave uncontested evidence, which was accepted by the Tribunal, that were he not taking prescribed medication in the period from January 2018 to the date his employment terminated, he would have had very severe anxiety and panic attacks. His mood would have been extremely low continuously. He would have been continuously worried and scared about his health and, in particular, dying of cancer. His sleep would have been significantly disturbed. His ability to focus and concentrate would have been significantly impaired. It is very likely he would have developed suicidal thoughts.

32. In the circumstances the Tribunal was satisfied that the adverse effects on the claimant's ability to carry out day to day activities were, from the end of 2017 to February 2020, substantial. They were not minor or trivial.

5 33. Finally, the Tribunal considered whether the effect was long term. By 3 February 2020, the claimant had been suffering from these substantial adverse effects on his ability to carry out day to day activities since at least the end of 2017, a period of over 2 years. The effects of the mental impairment were accordingly, by that stage, long-term.

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34. In light of the above, the Tribunal concluded that the claimant has demonstrated that he was a disabled person, for the purposes of s6(1) EqA, at the relevant time.

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Employment Judge: Mel Sangster
Date of Judgment: 14 June 2021
Entered in register: 28 June 2021
20 and copied to parties