



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4106871/2020**

**Preliminary Hearing held by Cloud Video Platform (CVP) on 30 September  
2021**

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**Employment Judge: R Sorrell**

**Miss H Mitchell**

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**Claimant  
In Person**

**Idverde Limited**

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**Respondent  
Represented by:  
Ms J Smeaton  
Counsel**

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**PRELIMINARY HEARING**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is that :

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- (i) the claimant was a disabled person in respect of her sarcoidosis impairment for the purposes of the Equality Act 2010;
- (ii) the claimant was not a disabled person in respect of her anxiety impairment for the purposes of the Equality Act 2010.

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## REASONS

### Introduction

1 The claimant lodged claims for constructive unfair dismissal and disability  
discrimination under sections 15, 19 and 20 of the Equality Act 2010 on 28  
5 October 2020.

2 A case management Preliminary Hearing was held by telephone on 15  
January 2021. At that Hearing, it was agreed that it was appropriate to fix a  
one day Preliminary Hearing to consider disability status which is disputed by  
the respondent. This Hearing was therefore scheduled for that purpose.

10 3 The Hearing took place remotely. It was a virtual hearing held by way of the  
Cloud Video Platform.

4 As the claimant was a litigant in person I explained the purpose and procedure  
for the Hearing and that in the event I determined the claimant was not  
disabled within the definition of section 6 of the Equality Act, the Tribunal  
15 would not have jurisdiction to consider the disability discrimination claim  
further. I also explained the requirement for the Tribunal to adhere to the  
Overriding Objective to deal with cases justly and fairly and to ensure parties  
are on an equal footing.

5 A joint bundle of productions was lodged by the claimant (JB), together with  
20 a separate bundle of appendices and her witness statement (WS). The  
respondent also lodged a skeleton argument.

### Findings in Fact

The following facts are found to be proven or admitted;

6 The claimant's date of birth is 8 December 1984.

25 7 The claimant commenced employment with the respondent as a receptionist  
on 1 June 2017 and subsequently became an Assistant Business

Development Manager, which involved the preparation, writing and submission of tender bids.

8 The claimant's employment with the respondent terminated on 24 September  
2020. At the date of termination, she worked 40 hours per week and her gross  
5 salary was £30,000 per annum.

9 In May 2015 the claimant was diagnosed with a physical impairment known  
as sarcoidosis. This is an autoimmune disorder which enlarged the lymph  
nodes in her chest and formed granulomas in her lungs, causing inflammation  
in her lungs and eyes. There is no cure for it. It can be managed with  
10 medication and it can lie dormant. (Paragraph 1 of WS & JB page 59)

10 The claimant experienced symptoms of extreme breathlessness, wheezing,  
coughing fits, heart palpitations and severe fatigue. This affected every aspect  
of her normal life. She found it difficult to walk any distance at all without  
becoming breathless and having to rest. Although she continued to work and  
15 take care of her children, she was completely exhausted all of the time which  
made doing any activity such as housework, work, and shopping extremely  
difficult. Brain fog was an everyday occurrence. (Paragraph 2 of WS & JB  
pages 59 & 63)

11 The claimant was prescribed a high dose of oral steroids for a period of  
20 approximately 18 months and had regular follow-up care with a respiratory  
physician. The steroids eased her symptoms but caused side effects of  
insomnia, anxiety and extreme weight gain and she was in a constant state  
of exhaustion. (JB pages 59 & 63 & Paragraph 3 of WS)

12 Since the steroids treatment stopped at the end of 2016, the sarcoidosis has  
25 been well controlled and the claimant has had no further flare ups. She  
continues to have annual check-ups. (JB page 63)

13 Due to her sarcoidosis, the claimant was identified by the NHS as someone  
at risk of severe illness if she catches Coronavirus. She was accordingly  
advised by the Chief Medical Officer of the Scottish Government on 14 April

2020 and 8 June 2020 to shield until at least the end of July 2020. (JB pages 59,61 & 67-68)

14 The claimant has suffered from anxiety intermittently for years. She was first diagnosed with anxiety in 2001 after the birth of her first son. Her anxiety levels began to rise in October 2019 which she attributed to an increase in her workload. Her symptoms included feeling on edge, insomnia, low mood, overthinking, despair and fear. (JB pages 59, 60, 63 & Paragraphs 13 & 14 of WS)

15 She consulted her GP in November 2019 and advised him that she was finding her anxiety and feelings of panic particularly bad in busy or crowded spaces and sometimes whilst at work. As she had previously tried cognitive behaviour therapy which had little benefit, her GP prescribed her with Citalopram, an anti-depressant medication. This medication did not suit her and in February 2020 her GP prescribed her Sertraline instead and signed her off work for two weeks in order for her to adjust to it. (JB pages 60, 63 & Paragraph 22 of WS)

16 Her anxiety affected her ability to concentrate and focus on work tasks which meant it took her longer to complete them, which in turn would increase her fear of not meeting deadlines. She struggled to switch off her thoughts, especially at night and often suffered insomnia or panic attacks which led to her feeling exhausted. She was also struggling with every day tasks and felt very emotional. She regularly felt like she was suffocating. She couldn't interact with other people and became a partial recluse. At home she would sit with the television on in the background and do nothing. She did just enough for her children to make sure they were okay. (JB page 60 & Paragraphs 14 &16 of WS)

17 The claimant consulted her GP in July 2020 as she was having intermittent breathlessness. She was referred back to a respiratory consultant for tests in case it was due to her sarcoidosis flaring. Although it was found not to be due to that, her respiratory consultant said that she felt there may be anxiety involved in her feeling breathless. (JB pages 63-64)

18 She again consulted her GP in August 2020 as she felt an increasing amount  
of anxiety at the prospect of returning to work after shielding due to her  
sarcoidosis. She was not sleeping and had very little appetite. Her GP  
increased her medication dosage and referred her for counselling. She was  
5 signed off from work for two weeks. (JB pages 61 & 64)

19 On 27 August 2020 the claimant tendered her resignation. She did not return  
to work and served a period of garden leave. Her anxiety and effects of it  
thereafter eased and she has not consulted her GP further about it. She  
stopped taking her anti-depressant medication in April 2021.

10 20 On 7 September 2020 the claimant commenced new employment as a Bid  
Manager for a construction company and works 40 hours per week.

### **Respondent's Submissions**

21 Ms Smeaton submitted on behalf of the respondent that it was accepted the  
claimant has suffered from sarcoidosis in the past and that it was a physical  
15 impairment. However, it was not accepted that the claimant suffered from that  
impairment at the material time or that the thresholds of substantial adverse  
effect or long term have been met. At the earlier Preliminary Hearing the  
claimant was ordered to provide medical evidence, yet, we only have a letter  
from Dr Rennick. (JB pps.57 & 63-64) There are no GP records or evidence  
20 from Consultants treating the claimant at the time in spite of the hearing being  
postponed in March 2021. That goes to assessing effects in 2015.

22 The claimant has accepted that she was not suffering this impairment during  
her employment. Paragraph 2 of her witness statement sets out the significant  
effects of her impairment. This is inconsistent with the GP's evidence and  
25 there is no other evidence to consider.

23 The claimant was diagnosed with this impairment in 2015 and treated until  
2016. It is not suggested she remains on that treatment. There is no evidence  
that this impairment is likely to recur and the last flare up was in 2015. The  
test under section 6 of the Equality Act 2010 is not met at the material time. If

the Tribunal considers the test was met in the past this should be made clear as it will have implications regarding the disability discrimination claim.

24 The respondent accepted that the claimant's anxiety is an impairment and has been a pre-existing condition since 2001. However, it does not meet the thresholds of substantial adverse effect or long term. The respondent considered that this impairment falls within the scenario described in *J v DLA Piper UK LLP* [2010] ICR 1052, EAT in that many people suffer from anxiety and it is distinct from depression. The only medical evidence in this regard is the letter from Dr Rennick. Although the claimant has said an effect of this impairment was overthinking things, she was still able to work and work long days without any adjustments. The impairment was not long term or likely to be in terms of the relevant date of October 2019 as the claimant left her employment in September 2020 and started a new job.

#### 15 **Claimant's Submissions**

25 The Claimant submitted that she does have sarcoidosis. Although it hasn't flared up since her treatment ended in 2016, she did feel she was being put in a position when she was asked to return to work in August 2020. Sarcoidosis had a severe adverse effect on her life and it was a horrific time for her, so she does not agree with what the respondent has said in that respect. She needed medication for her anxiety in October 2019. She started a new job very quickly after leaving the respondent as she was told she had to leave sooner than she thought. She does not have anxiety now. She accepted she could have provided more medical evidence than she has and was given time to do so.

#### **Relevant Law**

26 Section 6 of the Equality Act 2010 provides a definition of "disability" as follows:

- (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.

27 Section 212(1) of the Equality Act provides that "substantial" means more  
5 than minor or trivial.

28 Schedule 1 of the Equality Act gives further details on the determination of  
disability. For example, Schedule 1 para 2(1) provides that 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  
10 affected. In accordance with **McDougall v Richmond Adult Community  
College 2008 ICR 431, CA** this issue is required to be determined at the time  
of the alleged discrimination.

29 Section 6 (4) of the Equality Act 2010 and Paragraph 9 of Schedule 1 to the  
Act contain the provisions on past disabilities. The effect of these provisions  
15 is to extend the protection afforded to those with current disabilities to those  
who have had a disability in the past if discrimination is alleged in connection  
with that disability, even if they have since recovered or the effects have  
become less than substantial.

30 Para 2(2) of Schedule 1 provides that if an impairment ceases to have a  
substantial adverse effect, it is to be treated as continuing to have that effect  
20 if that effect is likely to recur. **In SCA Packaging Ltd v Boyle** [2009] UKHL  
37, the House of Lords ruled that "likely to" in this context means "could well  
happen" rather than "more likely than not".

31 Para (5) provides that an impairment is to be treated as having a substantial  
25 adverse effect on the ability of the person concerned to carry out normal day  
to day activities if measures are being taken to correct it and but for that, it  
would be likely to have that effect.

32 The Tribunal must take into account Statutory Guidance on the definition of  
Disability (2011) which stresses that it is important to consider the things that

a person cannot do, or can only do with difficulty (B9). This is not offset by things that the person can do. This is also confirmed in ***Aderemi v London and South Eastern Railway Ltd*** [2013] ICR 391. Day to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This includes work related activities such as interacting with colleagues, using a computer, driving and keeping to a timetable. (Guidance D2 – D7) In accordance with ***Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT***, the time at which to assess the effect is the date or period in which the alleged discrimination occurred.

33 The EAT observed in ***Royal Bank of Scotland plc v Morris*** EAT 0436/10 that in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance.

15 **Issues to be determined**

34 The Tribunal identified the following issues as requiring to be determined:-

(i) Did the claimant's physical impairment have an adverse effect on the claimant's ability to carry out normal day to day activities?

20 (ii) If so, was that effect substantial (as in more than minor or trivial)?

(iii) If so, was the effect long term?

(iv) If the impairment had ceased to have a substantial adverse effect at the relevant time, was the substantial adverse effect likely to recur?

25 (v) Did the claimant's mental impairment have an adverse effect on the claimant's ability to carry out normal day to day activities?

(vi) If so, was that effect substantial (as in more than minor or trivial)?

(vii) If so, was the effect long term?



- (viii) If the impairment had ceased to have a substantial adverse effect at the relevant time, was the substantial adverse effect likely to recur?

**Conclusion**

35 I found the claimant gave clear evidence and an honest account of events as  
5 she remembered them.

36 I first considered whether the claimant's sarcoidosis impairment fell within the  
definition of disability under section 6 of the Equality Act 2010.

37 In doing so, I have noted the claimant accepted that she was not suffering  
10 from the effects of this impairment at the material time; that is from October  
2019 until her employment terminated in September 2020. I have therefore  
considered whether this impairment amounts to a past disability in  
accordance with section 6 (4) of the Equality Act 2010.

38 I have further noted the respondent has accepted the claimant suffered from  
sarcoidosis in 2015-16 and that it was a physical impairment.

15 39 In terms of the effect of this impairment on the claimant's day to day activities  
from May 2015 until December 2016, it was not in dispute that she continued  
to work and take care of her children. However, I accepted that she struggled  
to walk without becoming breathless and that she was constantly exhausted  
which meant she had difficulty doing any activities such as housework, work  
20 and shopping.

40 On the basis of the evidence given to me by the claimant, I accepted that  
during this period, her impairment had a substantial effect; that is more than  
minor or trivial, on her day to day activities as described above.

41 In reaching this view, I was not persuaded by the respondent's submission  
25 that the claimant's evidence was inconsistent with her GP, Dr Rennick's  
evidence in this respect. This is because whilst Dr Rennick did refer to the  
claimant's symptoms of breathlessness and fatigue in his report of 11  
February 2021, he did not in fact describe the effect of these or any other

symptoms the claimant suffered as a result of this impairment. (JB pages 63-4)

42 In any event, I am required to consider the effect of the claimant's condition  
without medication. This is difficult to assess in the absence of any medical  
5 evidence in this regard. However, on the basis that the claimant was required  
to take high doses of oral steroid for a period of approximately 18 months in  
order to control but not cure the impairment, I am satisfied that without the  
medication, the impairment would have had a more serious effect on her  
ability to carry out normal day to day activities and that would have been  
10 substantial.

43 As the substantial adverse effect of the impairment started in May 2015 and  
continued until December 2016, which is a period in excess of 12 months, I  
found that the effect was long term.

44 For these reasons, I found that the claimant's sarcoidosis impairment  
15 amounted to a past disability as defined under section 6 (4) of the Equality  
Act 2010.

45 I then proceeded to consider whether the claimant's anxiety impairment fell  
within the definition of disability under section 6 of the Equality Act 2010.

46 In doing so, I have noted that the respondent has accepted the claimant's  
20 anxiety is an impairment and has been a pre-existing condition since 2001.

47 In terms of the effect of this impairment on the claimant's day to day activities  
from October 2019 until her employment ended in September 2020, I  
accepted that her impairment affected her ability to focus on work tasks and  
that her overthinking, insomnia and panic attacks led to her feeling exhausted  
and very emotional, which meant she had difficulty doing activities such as  
25 shopping, housework and engaging in social interaction. I have further noted  
that the claimant was signed off from work by her GP due to this impairment  
on two separate occasions during this period.

48 On the basis of the evidence given to me by the claimant, I accepted that during this period, her impairment had a substantial effect; that is more than minor or trivial, on her day to day activities as described above.

49 I am required to consider the effect of the claimant's condition without  
5 medication. Again, this is difficult to assess in the absence of any medical evidence in this regard. However, on the basis that the claimant was required to take anti-depressant medication from November 2019 until her employment ended in September 2020 in order to manage the impairment, I am satisfied that without the medication, the impairment would have had a  
10 more serious effect on her ability to carry out normal day to day activities and that would have been substantial.

50 As noted above, I considered that the substantial adverse effect of the impairment on the claimant started in October 2019 and continued until her employment ended in September 2020. As this is not a period of 12 months,  
15 I am required to determine whether it was likely to last for 12 months; that is until October 2020.

51 I found that there was insufficient evidence to reach a conclusion that the effect of the impairment was likely to last for 12 months. This is because the claimant was clear in her evidence that even though she did not stop taking  
20 her anti-depressant medication until April 2021, the effects of this impairment eased after she left her employment. Whilst her actual termination date of employment was 24 September 2020, she did not return to work after she tendered her resignation on 27 August 2020. I have further noted that she commenced new full time employment on 7 September 2020.

25 52 In reaching this view, I have had regard to the comments made by the EAT in ***Royal Bank of Scotland plc (“supra”)***, because I am hampered by a lack of medical evidence in this respect, which the claimant acknowledged in her submissions and accepted she had been given time to provide.

53 Although it was not in dispute that the claimant has suffered from anxiety  
intermittently for years, in the absence of medical evidence and with regard  
to **Royal Bank of Scotland plc (“supra”)**, I have also not been able to reach  
a conclusion that it is likely there would be a recurrence of the effect of this  
5 impairment.

54 As such, I considered that the effect of the impairment was not long term.

55 For these reasons, I found that the claimant’s anxiety impairment did not fall  
within the definition of a disability under section 6 of the Equality Act 2010.

56 In conclusion, I found that the claimant did have a disability in respect of her  
10 sarcoidosis condition and therefore the disability discrimination claim can  
proceed on that basis.

#### **Further Procedure**

57 The claimant shall provide the additional information set out in the Note of the  
Preliminary Hearing held on 15 January 2021 and the respondent shall  
15 answer within the timescales specified (Paragraphs 2-20, JB pages 54-57)

Employment Judge: Rosie Sorrell  
Date of Judgment: 01 November 2021  
20 Entered in register: 03 November 2021  
and copied to parties