



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss T Andrew

**Respondent:** Parkcare Homes (No2) Limited

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**Heard at:** Midlands West Employment Tribunal (by CVP)

**On:** 22 February 2021 and in chambers on 24 February 2021

**Before:** Employment Judge Kelly (sitting alone)

### Appearances

For the claimant: Mr Tween, lay representative

For the respondent: Mr Wallace of counsel

## RESERVED JUDGMENT

The judgment of the tribunal is that:

The claimant did not have a disability for the purposes of the Equality Act 2010 (EQA) at the relevant time. The claimant's claim for disability discrimination is dismissed.

## REASONS

1. This has been a remote hearing which has been not objected to by the parties. The form of remote hearing was Video: V. A face to face hearing was not held because it was not practicable and no-one requested it.
2. This was a preliminary hearing to determine the issue of whether the claimant had a disability for the purposes of the Equality Act 2010 at the relevant time. The relevant time was agreed at the start of the hearing to be November 2019 to January 2020. The medical condition relied on by the claimant was anxiety.

3. The documents that we were referred to are in a bundle of 69 pages, the contents of which we have referred to where relevant. We heard oral evidence from the claimant, who was cross examined on it.

**Relevant facts**

4. We make the following as the relevant findings of fact in respect of the issue to be determined.
5. The claimant suffered anxiety after and because of an event in July 2015. There were incidents at work which upset the claimant on 2 January, 9 January and 14 January 2019 and resulted in the claimant suffering what she categorised as panic attacks and anxiety. The claimant started suffering anxiety again in November 2019 because of a disciplinary process.
6. The claimant took medication for anxiety, Propranolol, in 2015, and then not again until January 2019 when she took it for one or two months. She was prescribed a 28 day course of Propranolol on 20 Nov 2019. There is no evidence in the claimant's GP notes that the claimant continued taking medication after the end of that course. It was the claimant's verbal evidence, which we accept, that she had taken medication continuously since then, albeit that the dose was reduced when the medication was listed as a repeat medication. The claimant could not say when the medication became subject to a repeat prescription.
7. The claimant confirmed that she did not suffer anxiety from after her anxiety episode ended in 2015 until January 2019.
8. In April 2018, the claimant underwent some kind of occupational health review on her recruitment. No health concerns were identified and she did not require any adjustments in the workplace. The claimant confirmed that she did not envisage a circumstance in which the anxiety she suffered in 2015 would return.
9. In January 2019, the claimant wrote to the respondent that she had suffered with anxiety and depression for a few years, had taken anti depressants for a period of time in the past and had been prescribed anxiety medication to take as and when needed. We note that there was no evidence before us that the claimant had taken anti depressants, as opposed to Propranolol for anxiety, and that it was not the claimant's case in the hearing that she had done so or that she suffered from depression as opposed to anxiety.
10. The claimant had no need to consult her GP in relation to anxiety between January 2019 and November 2019. The claimant agreed that, in early 2019, her GP told her she did not need further treatment for anxiety.
11. We were referred to a report from the respondent's occupational health of 26 Feb 2019 which stated that the claimant reported overall general good health and that, since January, there had been three incidents which led her to suffer anxiety symptoms. She had seen her GP and been prescribed medication. She stated she had suffered anxiety in the past about two years previously. (We note that there was no other evidence of this presented in the hearing). She was fit for work with adjustments for three months to lower the risk of provoking anxiety symptoms.

In the opinion of the writer, it was unlikely that she had a disability under the EQA. There were no plans to review the case.

12. The claimant produced a letter from her GP of 11 Dec 2020 which stated that he had seen the claimant intermittently since July 2015 concerning anxiety which seemed to start when she witnessed a sexual assault. She was seen in September 2015. She was seen in January 2019 after an incident at work. She was seen in November 2019. The letter did not comment on whether the claimant had an underlying medical condition.
13. The claimant's GP notes made available to us were limited to the period November to December 2019. They show that she consulted her GP on:
  - 13.1. 11 Nov 2019 with 'anxiety states' and was issued with a fit note to 18 Nov 2019. The history recorded by the GP included that the claimant was very upset as she was told she had a disciplinary hearing. The GP commented that she should try Propranolol which she had in January 2019.
  - 13.2. 20 Nov 20219 with 'anxiety states' and was issued with a fit note to 25 Nov 2019. She was prescribed a 28 day course of Propranolol. The history recorded by the GP included that the claimant was awaiting the outcome of a meeting at work.
  - 13.3. 26 Nov 2019 with 'anxiety states' and was issued with a fit note to 3 Dec 2019. The history recorded by the GP included that the claimant was appealing a decision at work. There is no record that she was prescribed medication for the anxiety state.
  - 13.4. 3 Dec 2019 with 'anxiety states' and she was issued with a fit note to 24 Dec 2019. There is no record that she was prescribed medication.
14. The claimant provided an impact statement which said that she had suffered anxiety since at least July 2015. Together with evidence she gave in the hearing, the salient points made were:
  - 14.1. She said that higher level anxiety episodes made her withdrawn with difficulty communicating adequately and difficulty sleeping. She found it difficult to be alone in new places. She avoided using public transport unaccompanied and crowds. This was from the end of January 2019 to date.
  - 14.2. The difficulty sleeping meant that she had difficulty working her 12 hour shift and impacted on her anxiety levels. This was from the end of January 2019 to date.
  - 14.3. In November 2019, when facing disciplinary proceedings at work, she had virtually no sex life and did not want to socialise. She did not leave the house unless accompanied.
  - 14.4. Since then, she is anxious about meeting former colleagues and clients in her locality and avoids going where she may meet them.

- 14.5. The claimant started working in a restaurant in February 2020. However, she only worked there for couple of weeks before being furloughed and as the restaurant was closed for refurbishment, she attended for training but not serving customers. She did not report any problems with working at the restaurant and had not anticipated any when she applied for the job.
- 14.6. She later started university and was accompanied by her partner initially to the classroom door and then to the campus and her partner waited for her in a car, to which the claimant returned during breaks rather than socialising.
15. The claimant underwent a disciplinary process which began in November 2019. She was dismissed at the end of January 2020.

### Relevant law

16. Section 6(1) EQA sets out the statutory definition of disability: a physical or mental impairment which has a substantial and long-term adverse effect on the employee's ability to carry out normal day-to-day activities. We will use 'SAE' below to mean a substantial effect on the employee's ability to carry out normal day-to-day activities.
17. Section 212(1) EQA defines 'substantial' as 'more than minor or trivial'.
18. This is supplemented by Schedule 1 Part 1 EQA 'Determination of Disability' which says:
- 18.1. The effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected.
- 18.2. 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.
- 18.3. 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.
- 18.4. "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.
19. When considering disability, the tribunal must take the statutory guidance, "Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability" ("Guidance"). Guidance is also found in the EHRC Employment Code.
20. The Guidance says that:
- 20.1. (C3) 'likely' means 'it could well happen';

- 20.2. (C4) In assessing the likelihood of an effect lasting for 12 months, account should be taken of circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood.
- 20.3. (C6) A woman has two discrete episodes of depression within a ten-month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she experiences a bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the 12-month period. However, if there was evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond the 12-month period, she would satisfy the long term requirement.
21. The respondent provided the following cases: *J v DLA Piper UK* [2010] IRLR 936, *Dunham v Ashford Windows* [2005] IRLR 608, *Paterson v Commissioner of Police of the Metropolis* [2007] IRLR 763, *SCA Packaging Ltd v Boyle* [2009] UKHL 37, [2009] IRLR 746, *McDougall v Richmond Adult Community College* [2008] EWCA Civ 4, [2008] IRLR 227.
22. In the EAT case of *J v DLA Piper*:
- 22.1. The claimant suffered an episode of depression in 2005/2006 when she was off work for four months. She then suffered an episode of depression in 2007. The question was whether she had a disability in 2008.
- 22.2. The EAT held that the distinction between mental illness known as 'clinical depression' and depression as a reaction to adverse circumstances is routinely made by clinicians and should in principle be recognised for the purposes of the Disability Discrimination Act (under which this case was heard). The EAT commented that it is a common sense observation that reactions to adverse circumstances are not normally long-lived. It said that it cannot be assumed that depression is likely to recur and is therefore long-term. The EAT looked, as an example, at a woman who suffers several short episodes of depression over a five year period which have a SAE, but between episodes, she is symptom free. 'In such a case, it may be appropriate, though the question would require medical evidence, to regard her as suffering from a mental impairment throughout the period in question... She could invoke para 2(2) of Schedule 1 (provided that she could show that the effects were 'likely' to recur).'
23. *McDougall v Richmond Adult Community College* emphasises that, where a prediction is required, it is the evidence available at the time of the act complained of that must be considered.
24. The burden of proof lies on the claimant to demonstrate that she has a disability under EQA.

## Submissions

25. The respondent submitted a written skeleton argument and made oral submissions. The claimant made oral submissions.
26. The respondent essentially contested both that the claimant's condition had a SAE and also that it was long term.

## Conclusions

### Substantial adverse effect

27. The claimant had a mental impairment in 2015 requiring the prescribing of medication. She did not give any evidence of any SAE suffered in 2015. Therefore, we cannot find her medical condition amounted to a disability as at that date.
28. Turning to the claimant's evidence in relation to 2019. We consider that she had an impairment in January and possibly February 2019 and in November and December 2019 (and also January 2020) which required her to be prescribed medication.
29. With regard to January and possibly February 2019, we do not consider that the difficulty in sleeping and stated difficulty it caused with working a 12 hour shift amounts to a substantial adverse effect as most people may have difficulty completing a 12 hour shift. However, we consider that a difficulty in being alone in new places, avoiding using public transport unaccompanied and avoiding crowds does represent a SAE and that the claimant's condition had a SAE on her at this time.
30. With regard to November 2019 to January 2020, we have some doubt that a virtual lack of sex life is an SAE as it is quite often the case for any particular person to virtually lack a sex life. Avoiding socialising and not wanting to leave the house unless accompanied do represent an SAE as do the stated difficulty in being alone in new places, avoiding using public transport unaccompanied and avoiding crowds. Therefore, the claimant's condition had a SAE on her at this time.

### Was this effect long term?

31. Even had we found that the claimant's medical condition in 2015 had a SAE (which we have not), we would not have found that her condition amounted to a disability at that time as she provided no evidence that, at that time, the condition was or could well be long term. In 2015, she took Propranolol for a limited period of time, which did not run into 2016. We consider that it was, at that time, a one off short lived reaction to adverse circumstances with no underlying medical condition, as described in DLA Piper UK.
32. There was no impairment from the end of 2015 to the start of 2019 as shown by the fact that the claimant did not consult her GP regarding anxiety or take medication for it during this period.

33. We do not accept that the claimant suffered a SAE from the end of January 2019 to date, as she claimed. This is not born out by the medical evidence. Her GP did not see her in relation to anxiety or prescribe medication for that condition after January 2019 and before November 2019. The claimant's evidence was that she took Propranolol for one or two months from January 2019 and then stopped. We consider that this shows that the SAE lasted a very limited time of one or two months at most. The fact that she was not seen again by her GP after January 2019 is indicative of the fact that her GP did not consider that her condition could well be anything other than short lived. Again, this episode of ill health appears to be a one off, short lived reaction to adverse circumstances with no underlying medical condition.
34. As per the guidance in *DLA Piper*, she could nevertheless have had an underlying mental impairment during all of 2019, but that question would require medical evidence. The tribunal does not have the medical evidence to show there was an underlying mental impairment during all of 2019. The claimant's GP letter merely lists the intermittent consultations with the claimant in 2015, January 2019, and at the end of 2019, but it does not say that there was an underlying medical condition. We do not consider that the claimant has made out a case that she had an underlying mental impairment during January to November 2019. Therefore, she cannot rely on this period to say that the SAE should be viewed as long term.
35. Therefore, by the time we come to November 2019, we are starting afresh with a new episode of ill health and the claimant is not assisted in her case by being able to link it to the previous episode to say that it was long term. The claimant may, however, still be able to show that she was suffering from a long-term impairment if she can show that, in November 2019 (or December 2019 or January 2020), when she suffered anxiety again, it could well be that the impairment would last for at least 12 months or it would recur.
36. We do not consider that the claimant has produced medical evidence to demonstrate that she had an underlying impairment as at November 2019 to January 2020 (or even the latter part of that period) which could well have lasted at least 12 months or recurred, as opposed to a reaction to adverse circumstances, that is the disciplinary process which began in November 2019 and resulted in her dismissal at the end of January 2020. Disciplinary processes are stressful and prone to make the affected employee anxious. There is nothing to indicate that the impairment would be expected to continue for months after the dismissal or recur. We do not know when the GP made Propranolol available on a repeat prescription, but, even if this were in December 2019, it would be an unsubstantiated leap from that fact to conclude that the GP thought that the impairment could well last 12 months or recur or to conclude that ourselves. There is no medical evidence to show that the anxiety episode was anything more than a reaction to adverse circumstances or that it could well last for 12 months or recur.
37. We consider that this approach, while consistent with guidance in *DLA Piper* is also consistent with C6 of the Guidance. This makes it clear that there must be evidence that the episodes are part of an underlying condition which is likely to recur beyond the 12 month period. No such evidence was presented to us.

38. We do not take into account what happened to the claimant's condition after January 2020 because this is not relevant to the question of the likelihood of the impairment being long term at the time of the acts of alleged discrimination.

39. Therefore, we find that the claimant did not have a disability for the purposes of the Equality Act 2010 (EQA) at the relevant time.

**Employment Judge Kelly**

**24 February 2021**