

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104733/2017

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Held in Glasgow on 24 April 2018

Employment Judge: Lucy Wiseman

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Mr Donald Reid

**Claimant
Represented by:
In Person**

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City Property (Glasgow) LLP

**Respondent
Represented by:
Ms B Robertson
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The Tribunal decided the claimant is a disabled person in terms of section 6 of the Equality Act, and that he became so on the 24 March 2016.

REASONS

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1. The claimant presented a claim to the Employment Tribunal on 24 September 2017 alleging he had been unfairly dismissed, subjected to detriment and dismissal on the grounds of making projected disclosures and discrimination because of the protected characteristic of disability.

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2. The respondent entered a response admitting it had dismissed the claimant for reasons of capability on the grounds of ill health, but denying the dismissal had been unfair and denying the reason for the dismissal

was because the claimant made protected disclosures. The respondent further denied the complaints of discrimination.

3. A case management Preliminary Hearing was arranged and took place on
5 the 1 December 2017. The Employment Judge at that Hearing directed a Preliminary Hearing be arranged to determine whether the claimant was a disabled person in terms of the Equality Act.

4. The Hearing today is to determine whether the claimant is a disabled person
10 in terms of section 6 of the Equality Act. The respondent, following the Hearing on the 1 December, conceded the claimant was a disabled person at the time of his dismissal on the 4 May 2017. The respondent subsequently conceded the claimant was a disabled person from 24 March 2017 (that is, one year after diagnosis). At the commencement of the Hearing today, the
15 respondent conceded the claimant was a disabled person from the 10 January 2017.

5. The claimant was diagnosed with depression in March 2016 and he
20 considered himself a disabled person from that time. Accordingly, the issue for the Tribunal to determine today is whether the claimant was a disabled person in terms of the Equality Act from March 2016, or any later date in the period March 2016 to January 2017.

6. I heard evidence from the claimant, Ms Pauline Barclay, Managing Director,
25 and Ms Caroline Yates, HR Manager with Glasgow City Council. I was also referred to a number of documents. I, on the basis of the evidence before me, made the following material findings of fact.

Findings of fact

- 5 7. The claimant was employed by the respondent from the 31 January 2011 until the 4 May 2017. The claimant was employed as Head of Operations.
8. The claimant was aware, in late 2015, that he was struggling mentally to cope. He did not realise how bad things had become until he was on a skiing holiday and contemplated skiing off the edge of the mountain.
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9. The claimant consulted his GP on the 24 March 2016 and was diagnosed with major depression. He was placed on the antidepressant Citralopram and signed off as unfit for work.
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10. The claimant, at this time, felt completely numb. He struggled to get out of bed and on days when he stayed in bed, he would lie for hours going over the same thoughts. He wanted to go to sleep and not wake up.
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11. The claimant, on days when he did get out of bed, did not want to leave the house. The thought of meeting a friend for coffee brought on a panic attack, with a racing heart, chest pain and nausea.
12. The claimant felt low, worthless and his confidence both personally and professionally was at an all time low. The claimant played field hockey, and stopped this in early 2016.
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13. The claimant started to feel the benefit of the medication, which was increased by his GP to the maximum dosage. He also took part in a 6 week course at Hairmyres Hospital to try to help set daily targets to break the cycle of depression.
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14. The claimant was signed off by his GP as unfit for work from 24 March 2016 until 15 August 2016 when his GP confirmed he was fit to return to work on a phased basis. The claimant was looking forward to returning to work but felt apprehensive about it.
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15. The claimant struggled with the return to work and became unfit for work again on the 8 September.
16. The respondent obtained occupational health reports on the 13 July 2016 (page 52) and 27 September 2016 (page 58). The report in July included an Opinion that the claimant would be well enough to return back to work as planned, with some initial restrictions in place, as his symptoms had improved sufficiently to allow him to attempt this. The report referred to “workplace issues” which were a stressor, and suggested these be discussed with the claimant.
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17. The report in September again noted both personal and workplace issues being experienced by the claimant. It was noted “*he does seem to have issues regarding the conflict which he sees in following professional best practice, when the “political” demand is to act otherwise. He does find this difficult to manage he also alludes to a poor working relationship with his line manager, who he feels undermines him, and lacks understanding when he raises concerns about professional issues.*” The report confirmed the claimant described classic anxiety and depressive symptoms including social withdrawal and sleep disturbance.
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18. The report gave the Opinion that the claimant was suffering from the cumulative effects of having stressors out with and within work, and that the combination had proven to be too much. The report noted the issues with the line manager would have to be addressed in a manner where the claimant felt supported rather than criticised for his feelings on the matter. The report concluded the claimant was some time away from returning to his full role and
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responsibilities, but the current situation was a reaction to circumstances rather than an underlying mental health issue which was likely to recur.

- 5 19. The claimant continues to be on the highest dosage of anti-depressant medication. His condition has improved and he is able to participate in sporting and social activities. However, these activities leave him “exhausted”.

Notes on the evidence

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20. I found the claimant to be a credible and reliable witness. He was able to explain in clear terms the effect the impairment had on his ability to carry out day-to-day activities. One of the key points made by the claimant was that the stressors included workplace issues which required to be resolved in order to assist his recovery. The claimant noted the occupational health reports referred to these issues and suggested mediation as a way to resolve matters. This had not happened and the claimant believed the phased return to work broke down when workplace issues were not resolved and he could not cope with this.

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21. Ms Barclay and Ms Yates spoke to procedures and their involvement with the claimant. The main thrust of their evidence was that, based on the occupational health reports they believed the claimant could return to work if the adjustments were put in place.

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Claimant's submissions

22. The claimant invited me to have regard to the agenda he had completed for the Preliminary Hearing in December, when he had set out an explanation of the impact of his condition on his ability to carry out normal day to day activities. The claimant felt the respondent had tried to avoid dealing with the workplace issues and this had exacerbated and prolonged his condition.

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Respondent's submissions

5 23. Ms Robertson noted the respondent conceded the claimant was a disabled person from 10 January 2017. Ms Robertson referred to the case of **Royal Bank of Scotland v Morris EAT/0436/10** where the importance of medical expert evidence had been emphasised.

10 24. Ms Robertson referred to the definition of "long term" and submitted the occupational health reports of July and September had not indicated the condition was likely to be long term. The expectation was that the phased return to work would be a short term measure and that the claimant would thereafter return to full duties.

15 25. The claimant did return to work on a phased return for one month during August/September and therefore the impairment could not have been likely to last 12 months as at the time of the phased return. Similarly, the claimant was offered alternative employment on the 9 January 2017 and therefore it
20 was not likely the impairment would last 12 months.

26. Ms Robertson invited the Tribunal to accept the claimant was a disabled person from the 10 January 2017, and not prior to this date. Accordingly, the claim of harassment should be struck out.

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Discussion and Decision

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

28. The term “long term” is defined in Schedule 1 of the Equality Act where it provides that 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

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

29. The questions I have to determine are: (i) did the claimant have a physical or mental impairment; (ii) did the impairment affect the claimant’s ability to carry out normal day to day activities; (iii) was the adverse condition substantial and (iv) was the adverse condition long term.

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30. There was no dispute regarding the fact the claimant has a mental impairment. He was diagnosed with depression on the 24 March 2016 and continues to take medication for that condition.

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31. I accepted the claimant’s evidence regarding the affect this impairment had on his ability to carry out normal day-to-day activities. The claimant referred me to the Agenda he completed for the Preliminary Hearing in December, and it is helpful to set out his explanation of the impact of the condition. He stated:

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“Frequent and extended spells of mental and physical exhaustion, lethargic and disinterested in life, unmotivated, self-destructive, pre-occupied with feelings of low self-esteem, self-worth and even suicidal at times. Extremely anxious and have difficulty getting motivated to get out of bed and dressed, wishing to just pull up the covers over my head go to sleep and never wake up. Episodes of extreme adverse reactions/panic attacks with chest pains/palpitations and acute feelings of nausea in social and professional situations. Withdrawn and non-communicative.”

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32. I considered the claimant's impairment had an adverse impact on the normal day-to-day activities of getting up out of bed, going out, socialising and participating in sport. I further considered the adverse impact was substantial: I accepted the claimant's evidence that he stayed in bed for days, did not to
5 leave the house and stopped participating in sport.
33. I acknowledged the claimant's condition has improved in as much as he was fit to return to work on a phased basis for one month (August to September 2016) and he has now returned to participating in sport and socialising.
10 However, Schedule 1, regulation 5 of the Equality Act makes clear that 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 measures are being taken to treat or correct it and but for that, it would be likely to have that effect. The term "measures" includes medical treatment. This means that
15 in assessing whether there is a substantial adverse effect on the person's ability to carry out normal day-to-day activities, any medical treatment which reduces or extinguishes the effects of the impairment should be ignored.
34. I accepted the claimant's evidence that the medication he takes, together with
20 the therapy he has received, have helped him to manage the depression and allow him to start making a recovery. I considered, having regard to the fact (a) the claimant has been on medication since March 2016, (b) he has been prescribed the maximum dose since July/August 2016, and (c) that he continues to take that dosage, that if the medical treatment was ignored, the
25 adverse effect of the impairment would continue to be substantial. I reached that conclusion having had regard to the "major depression" diagnosed by the GP and the fact this would be unlikely to have improved without medication.
35. I, in conclusion, was satisfied the claimant's impairment had a substantial
30 adverse effect on his ability to carry out normal day-to-day activities, and that it continued and continues to do so.

36. I next considered whether the substantial adverse effect of the impairment on the claimant's ability to carry out normal day-to-day activities was long term. The definition of long term is set out above. There was no dispute regarding the fact the effect of the impairment has lasted for at least 12 months (from
5 March 2016 when it was diagnosed). I asked myself whether it was likely, as at March 2016, to last at least 12 months.

37. I, in considering this matter, had regard to the occupational health reports (July and September 2016) which advised the stressors for the claimant's
10 condition were both personal and work issues. I acknowledge the respondent took from the occupational health reports that the claimant was going to be fit to return to work and that this was a reactive depression and not an underlying mental health issue.

15 38. I had regard to the fact the workplace issues were a key factor for the claimant and that it was his position that unless and until they were resolved, they would continue to have an impact on his wellbeing.

39. I concluded from the above points that the length/speed of the claimant's
20 recovery was directly linked to resolution of the workplace issues.

40. I next had regard to the fact the claimant recovered sufficiently to return to work on a phased basis in August 2016. The workplace issues were not addressed and the claimant went off again on the 8 September.

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41. I, in considering whether it was likely, as at March 2016, the impairment would last at least 12 months acknowledged the occupational health reports did not indicate the impairment would be lengthy, however I considered that given the severity of the claimant's impairment, the fact it was 5 months before a phased
30 return could be contemplated, the fact there were both personal and workplace issues to resolve and the fact the claimant was placed on the maximum dose of anti-depressant medication that it was likely, as at March 2016, that the impairment would last at least 12 months.

42. I decided, having had regard to all of the above factors, that the claimant is a disabled person in terms of the Equality Act, and that he became so on 24 March 2016.

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43. This case will now proceed to a case management Preliminary Hearing in order to (a) ensure the claim being brought by the claimant is sufficiently clear and (b) make arrangements for hearing the case.

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Employment Judge: Lucy Wiseman
Date of Judgment: 08 May 2018
Entered in register: 10 May 2018
and copied to parties

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