



EMPLOYMENT TRIBUNALS (SCOTLAND)

5 Case No: 4102176/2018 Held at Glasgow on 8 January 2019

Employment Judge Shona MacLean

10 Miss G Young

Claimant
In Person

15 GC Group Limited

Respondent
Represented by:
Mr S Maguire
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that between 30 October 2014 and 15 December 2017 the claimant was disabled for the purposes of Section 6(1) of the Equality Act 2010.

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REASONS

1. Following a preliminary hearing for case management the claimant agreed to a medical expert being jointly instructed to provide a medical report. Unfortunately, agreement could not be reached on the terms of the letter of instruction. As the parties reached an impasse and disability status was
30 disputed this preliminary hearing was fixed to determine whether the claimant was disabled in terms section 6 of the Equality Act 2010 (the EqA).

. The claimant represented herself and gave evidence on her own account. Mr Maguire represented the respondent.

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3. The parties produced a joint set of documents which included a report from Dr Jeremy Stirling, Consultant Psychiatrist, One Private Healthcare prepared on 11 December 2018 following a consultation with the claimant on 5 December 2018.

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4. The claimant explained that in late November 2018 she sent an email to One Private Healthcare asking for an appointment for a medical report *“to assist the Employment Tribunal in determining the question of whether or not I am “disabled” within the meaning the Equality Act 2010.”* Mr Maguire helpfully provided a copy of the email that the claimant sent to One Private Healthcare. It did not set out the relevant period during which the Employment Tribunal was assessing if the claimant was disabled in terms of the Equality Act 2010 (the EqA) nor did it provide any guidance about the matters to be considered in relation to determining questions relating to the definition of disability under the EqA. The claimant candidly said that as the organisation was proposed by the respondent she assumed that the medical expert preparing the report would know what was required.

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5. The parties said that the relevant period was 30 October 2014 to 15 December 2017. There was no issue that the claimant had a mental impairment. Mr Maguire said that the issue was whether or not in the relevant period there was a substantial adverse effect on the claimant. In his submissions Mr Maguire did not argue that the mental impairment was not long term as defined by the EqA.

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6. The Tribunal made the following findings in fact in relation to the issue that it had to determine.

Findings in Fact

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7. The claimant was highly motivated, conscientious and enjoyed working hard and being busy and active.

8. Before the respondent employed the claimant full time she provided accountancy services to the respondent and other clients on a freelance basis.
- 5 9. From around 2009 the claimant has cared for her niece who has learning disabilities and physical health problems. The claimant successfully managed her work and caring responsibilities.
- 10 10. The claimant's brother passed away suddenly in 2013 from heart problems. The claimant continued to work and function as usual. She had the ability to compartmentalise home and work.
- 15 11. Around July 2014 the claimant noticed that she felt increasingly tired but unable to sleep. She cried without reason and felt angry and aggressive. Her family asked her to consult her general practitioner. The claimant did not do so.
- 20 12. The claimant thought the feelings would pass but she started having suicidal thoughts. The claimant contacted social work as she was overwhelmed at home. Her niece was put into respite for a short period.
- 25 13. At the end of October 2014, the claimant had a major outburst at work. The claimant attended her general practitioner on 30 October 2014. The claimant was diagnosed with depression and started Sertraline medication. The claimant was provided with a sick line.
14. The claimant was absent from work. She slept most of the day; she was not motivated to get out of bed or deal with personal hygiene.
- 30 15. ~~The claimant returned to work in November 2014. She felt better having been~~ off work. She continued Sertraline medication.

16. At Christmas, the claimant's sister looked after her niece to give the claimant "space". The claimant's house was unkempt. Mail was piling up unopened. If she watched television she had no recollection of what she was watching. She was tired but could not sleep.
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17. The claimant was forgetting appointments relating to her niece and was not looking after her own care. Carers were engaged to help the claimant's niece get ready in the morning. The claimant was finding it difficult to cope at home. She arranged for shopping to be delivered and employed a cleaner as the housework was neglected, and the ironing was piling up.
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18. While the claimant continued to work she found that she was easily distracted and had difficulty concentrating. She forgot passwords and bank codes.
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19. Around April 2015 the claimant consulted her general practitioner who increased the dosage of the anti-depressant medication.
20. Afterwards the claimant felt that she had decreasing episodes of hopelessness, but her mood swings were more severe. She oscillated from "going at 110 miles per hours" to "coping with nothing".
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21. Around April 2016 the claimant asked her general practitioner to further increase in her dosage of the anti-depressant medication. The claimant was advised that she was on the maximum dosage that her general practitioner was content to prescribe.
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22. The claimant continued to have severe mood swings. She had short periods of elated mood when she was energised but there were also periods of low mood when she would cry for no reason. During these periods of low mood, she would be lethargic and demotivated. She struggled to get out of bed. The claimant did not want to go outside or swimming with her niece and she would sit and stare into space.
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23. From around March 2017 onwards the claimant's low mood intensified. She lost interest in all activities; her motivation to carry out every-day tasks such as housework, personal care and looking after her niece was reduced; she had memory difficulties and poor concentration which was compounded by insomnia which affected her performance.
24. The claimant was signed off from work on 14 July 2017. She remained sick absent until her employment terminated on 15 December 2017.
- io 25. The claimant remains on medication. Without this treatment, her symptoms would have been worse in terms of symptom severity. There is an increased risk of relapse given her previous history of depression.
26. Her condition causes mental impairment which has been present since October 2014. It has fluctuated in intensity with no clear sustained period of being symptom free. It has had a long-term effect on her ability to carry out normal day to day activities.

Observation on the Witness and Conflicting Evidence

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27. The Tribunal considered that the claimant gave her evidence in an open helpful manner. In the Tribunal's view she was a credible and reliable witness.
28. There was little conflicting evidence. The claimant accepted that she attended work from mid-November 2014 until 14 July 2017 when she raised a grievance. Her position, which was not challenged, was that in so doing her ability to function and deal with her home, personal care and her niece were significantly affected. Also, her ability to perform at work deteriorated with her lack of concentration and tiredness.
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29. Mr Maguire challenged the claimant about her failure to provide Dr Stirling with her general practice medical records after May 2017 and the fact that the medical report focusses on the period from March 2017. The claimant said

that she provided the medical information which she understood was to be provided when a joint report was to be prepared. She answered questions posed by Dr Stirling.

5 30. The Tribunal considered that given the nature of the email instruction to Dr Stirling this was understandable particularly as the complaint to the Employment Tribunal relates to events between March 2017 and December 2017.

10 31. The Tribunal considered that when giving evidence about the effect of her condition since it was diagnosed in October 2014 the claimant did so in an understated manner. She did not appear to be giving the answer which she thought was correct. She candidly accepted that she had good days and bad days and her ability to concentrate and be motivated fluctuated in intensity.

15 **Submissions**

The Claimant

32. The claimant said that for the past four years she had never been free of symptoms. While the medication that she had been taking since October 2014 alleviated the symptoms, they did not go away. The symptoms affected every part of her day. She acknowledged that the situation was at its most difficult from July 2017, but it has always fluctuated and she needs to be on medication.

33. In obtaining the medical report the claimant had sought to assist the Tribunal and did not deliberately omit information but relied on Dr Stirling being aware of what he required to ask.

The Respondent

34. The respondent concurred with the medical report that had been produced. Although Dr Stirling said that the claimant disability it focussed from March 2017 onwards. However, that disability to did not meet the requirements under

section 6(1) of the EqA because up until March 2017 the impact on the claimant's day to day activities were not substantial was not accepted that there was no issue regarding the claimant having a mental impairment.

The Law

5 35. Section 6(1) of the EqA provides that a person has a disability if he or she has a "physical or mental impairment" which has a "substantial and long-term effect on his or her ability to carry out normal day to day activities". The burden of proof is on the claimant to show that she falls within the definition.

36. Section 212(2) defines substantial as meaning more than minor or trivial.

10 37. Schedule 1 to the EqA, paragraph 12(1) provides that a tribunal must consider such guidance as it thinks is relevant. The Tribunal referred to Guidance on matters to be taken into account in determining questions related to the definition of disability (2011) (the Guidance).

Deliberations

15 38. The issue the Tribunal had to determine was whether the claimant had a physical or mental impairment which had a substantial and long term adverse effect on her ability to carry out normal day to day activities.

39. The material time for establishing disability (i.e. whether there is an impairment which has a substantial and long-term adverse effect on normal day to day activities) is the date of the alleged discriminatory acts(s)). This is also the
20 material time when established whether the impairment has a long-term effect.

40. While the parties said that the relevant period was October 2014 to December 2017 the claim form contained no allegations of alleged discriminatory acts before March 2017. The Tribunal considered that the relevant period was
25 March 2017 to December 2017.

41. The Tribunal found that the date upon which the claimant began to suffer a mental impairment which might constitute a disability in terms of the EqA was 27 October 2014. The Tribunal move on to consider whether the mental

impairment had an adverse effect on the claimant's ability to carry out normal day to day activities and if so whether the adverse effect upon the claimant's ability was substantial.

5 42. The Tribunal noted that the fact that a person can carry out activities does not mean that their ability to carry them out has not been impaired. To constitute an adverse effect, it is not the doing of the acts that it is the focus of attention but rather the ability to do (or not do) the acts.

10 43. The Tribunal considered that it was appropriate to take account of the Guidance and the way in which the claimant carried out some normal day to day activities. The Tribunal considered its findings.

15 44. From October 2014, the claimant was struggling to care for her niece and needed respite and support from family. The house was unkempt. The claimant did not deal with household administration and chores. She arranged for carers for her niece and employed a cleaner. The claimant was easily distracted and forgetful.

20 45. When the claimant's medication was increased in April 2015 there was an improvement but the effects of her mental impairment on her normal day to day activities did not cease. They were on going and fluctuated. She had good days and bad days. On the latter, the claimant struggled to get out of bed; she did not want to go outside or swimming with her niece. The claimant would sit and stare into space.

25 46. Between March and December 2017, the claimant lost interest in all activities; her motivation to carry out every-day tasks such as housework, personal care and looking after her niece was reduced; she had memory difficulties and poor concentration which was compounded by insomnia which affected her performance. She was unfit to attend work from 14 July 2017.

47. On taking account of what the claimant could not do or could only do with difficulty the Tribunal concluded that there was an adverse effect on the claimant's ability to carry out normal day to day activities.

48. The Tribunal then considered if the adverse effect was substantial in that it was more than a minor or trivial effect. The claimant attended work except for a two-week period in October/November 2014 from July 2017. The claimant had re-organise the care of her niece by obtaining relief and additional support,
5 she needed to obtain support to ensure that the housework was undertaken and food was available. Her motivation and ability to undertake household administration, personal care and participate in swimming and walking with her niece fluctuated. The Tribunal considered that the mental impairment has a substantial effect on the claimant.

10 49. The Tribunal considered whether the substantial adverse effects could be described as long term at the relevant time: when the claimant had suffered the alleged acts of unlawful discrimination which were the subject of her present claim. From October 2014, the claimant has been taking medication that from time to time alleviated some of the effects of her mental impairment
15 but without this medication the effects would have been worse. While the substantial adverse effect on the claimant's ability to carry out normal day to day activities fluctuated there was no evidence to suggest that the adverse effects ceased but in any event given her history and the recurrence of the substantial adverse effects in March 2017 the Tribunal considered the
20 substantial adverse from October 2014 should be treated as continuing. The Tribunal considered that at the relevant time the substantial adverse effects could be described as long term.

50. The Tribunal concluded that between 30 October 2014 and 15 December 2017 the claimant was disabled in terms of Section 6(1) of the EqA.

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30 **Employment Judge: S Maclean**
Date of Judgment: 15 January 2019
Entered in register: 16 January 2019
and copied to parties