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**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100253/2021**

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**Held on 24 January and 9 February 2022 (By CVP)**

**Employment Judge: L Doherty**

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**Ms J Donohoe**

**Claimant  
Represented by:  
Ms Tate and  
Mr Crombie -  
Student Advisors**

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**Mr A McGhee**

**First Respondent  
Represented by:  
Ms Hatch –  
Counsel**

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**Scotspeed Limited**

**Second Respondent  
Represented by:  
Ms Hatch –  
Counsel**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that;

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- (1) time should be extended under Section 123(1) (b) of the Equality Act 2013 ( the EQA) to consider the claim against the first respondent;
- (2) the claimant is a disabled person on terms of Section 6 of the EQA;
- (3) the respondents had no knowledge of the claimant's disability in terms of Section 15 (2) of the EQA.

## REASONS

1. The claimant in this case presents complaints of sex and disability discrimination under Sections 13 and 15 of the Equality Act 2013.
2. This Preliminary Hearing (PH) was fixed to consider the following issues;
  - 5 1. Time bar
  2. Disability status
  3. Knowledge disability.
3. The claimant was represented by Mr Tate and Mr Crombie, student advisers, the respondents were represented by Ms Hatch, Counsel.
- 10 4. The claimant relies upon three impairments in connection with her disability status which are hyperthyroidism, anxiety and depression, PTSD. It was made clear at the outset of the PH that she does not rely upon an eye impairment.
5. There are no concessions by respondents in connection with disability status.
- 15 6. The Tribunal heard evidence from the claimant and Mr McGhee, the first respondent. The parties lodged joint bundle of documents.

### Findings in Fact

#### Time Bar

7. The claimant, whose date of birth is the 17 /7/1964 has had two prior period of non-continuous periods of employment with the second respondents, working as a machinist working in their factory . Her last period of employment with them was for the period from 16 March 2020 until 3 September 2020, when she was dismissed.
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8. The claimant's employment came to an end in circumstances which she considered to be discriminatory; she considered her dismissal was an act of disability discrimination; she considered she had been subjected to
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discriminatory treatment during the course of her employment by Mr McGhee (the first respondent). In her PH Agenda the claimant identifies a number of allegations against the first respondent, which are said to be act of sex discrimination, the last of which is said to have occurred on 26 August 2020.

- 5 9. The claimant contacted the Strathclyde University Law Clinic ( the Law Clinic) around 2 October 2020. The Law Clinic run an Initial Advice Clinic (IAC) which is a fortnightly drop-in session staffed by volunteer solicitors or trainee solicitors. The claimant was invited to attend a zoom meeting with IAC on 4 November. The claimant was provided with advise about submitting an
- 10 ACAS early conciliation form.
10. The claimant contacted ACAS on 12 November. The claimant did not consider ACAS to be helpful to her, however they advised her about early conciliation time limits.
11. The claimant's early conciliation notification against the first respondent was
- 15 received by ACAS on 12 November and the ACAS certificate was issued on 12 December.
12. The claimant's early conciliation notification against the second respondent was received by ACAS on 18 November and the ACAS certificate was issued on 18 December
- 20 13. On 19/11/20 the claimant emailed with the Law Clinic stating;
- “Hi I did as I was advised by the lawyer and contacted ACAC who have given me a conciliator to act on my behalf. But they asked me to give a name or someone from your place that they can contact. Please can you give me this so I can forward this to them asap thanks...”*
- 25 14. The Law Clinic responded on 20/11/20 advising the claimant that she was not a client as she had only attended an IAC. They suggested that if she was looking for advice she could again attend an IAC. The claimant attended again on 28 December.

15. Advice given that the IAC did not amount to the law clinic representing the claimant.
16. The claimant submitted her claim to the Employment Tribunal on 18 January. The claim was submitted against both respondents. In error, the claimant included the early conciliation number for the second respondent twice in her ET1. This resulted in her claim against the first respondent being rejected.
17. The Law Clinic subsequently undertook to act for the claimant, and they wrote to her on 20 January confirming this. She was given an appointment with them for 21 January 2021.
18. An Application for reconsideration of this decision was lodged, and ultimately the decision to reject the claim was re-considered, and her claim against the first respondent's was deemed to have been presented on 18 February 2021.
19. At the time when she lodged her ET1 the claimant was suffering from hypothyroidism which was not well controlled. This was causing her difficulty in concentrating. The claimant found the process of dealing with ACAS and lodging a claim to be very stressful. She had no awareness of what the employment Tribunal process involved. She was also experiencing problems with her left eye when producing written documents ,which made the task of preparing an ET1 on screen difficult. She had to rely on a friend to act as a scribe for her, which caused some delay.

### **Disability Status**

20. The medical evidence before the Tribunal comprised the claimants GP report dated 18 January 2022, which stated;

*To answer your first question about what conditions you have been diagnosed with having, your medical records show a diagnosis of hypothyroidism diagnosed in 2010, and anxiety and depression diagnosed in 1996 and being an ongoing issue. The Mental Health Team acknowledge that there was an element of historical trauma behind this.*

5 *There are no ongoing investigations regarding any other possible conditions at this time. You are currently treated with oral Thyroxine for your hypothyroidism. This treatment started in 2010. This treatment is likely to be lifelong. You are also currently treated with Thiamine due to a past history of alcohol excess, although you have told me in a recent conversation that you have had no alcohol in the last eight months.*

10 *Both hypothyroidism and anxiety/depression can cause a wide range of symptoms, but your complaints recently have been related to your mind racing and feeling unsettled, but having no energy, which could be related to a combination of the two. When we spoke in December you sounded calmer and told me that you were coping better with day to day activities.*

15 *You are likely to be affected by hypothyroidism of your life, but hopefully we can control symptoms by getting the right terms same into you on a daily basis. The course of issues with anxiety and depression is harder to predict.*

21. The claimant was diagnosed with anxiety and depression in 1996. This is been an ongoing issue, and there has been an element of historical trauma behind this.
- 20 22. The claimant has tried several types of medication for depression and anxiety since her condition was diagnosed. She has not however found on any medication which she feels and works for. She was proscribed Mirtazapine in 2017, however she stopped taking this due to the fact that it caused her to gain weight, which damaged her self-esteem.
- 25 23. The claimant has not taken any medication since then for her anxiety and depression. She does however smoke cannabis on a regular basis which she considers helpful to her both physically and mentally.
- 30 24. Depression and anxiety have affected the claimant's ability to sleep , her general mood , ability to concentrate, and her energy levels . The claimant was also diagnosed with hypothyroidism in 2010. This condition and has been treated with Thyroxine since 2010, and it is likely that that this treatment will

be lifelong. Her dose of Thyroxine was lowered at some stage. As a result of her condition she has suffered fatigue, which has an impact on her ability to concentrate and her overall mood

- 5 25. The effect of her inability to concentrate is this is that she has struggled to deal with her personal business tasks, and often found conducting her personal business tasks, such as dealing with her mortgage, overwhelming.
26. On one occasion the claimant burnt her arm while cooking and did not immediately notice this because of a lack of concentration.
- 10 27. The claimant suffered a Thyroid related episode on 3 September 2021, which resulted in her calling an ambulance.
28. A member of staff telephoned the second respondents regarding the claimant on 3 September, to express concern at the prospect of working alongside the claimant, not to report that she had a thyroid episode.

### **Knowledge of Disability**

- 15 29. The claimant did not disclose she had a disability to the first or second respondents.
30. On one occasion during the lockdown period, the claimant texted the first respondent to advise she had not had a drink for 4 days, and he responded to the effect that that was well done.
- 20 31. The claimant took her medication for hyperdormism while she was at work. She kept this medication in the draw of a machine at work. The respondents did not have any difficulty with the claimant, or any staff member taking medication while at work. The respondents were unaware that the claimant took medication work.
- 25 32. For a period the respondents operated ban on mobile phones being used by staff on the factory floor. This was relaxed during the Covid lockdown period, when staff, including the claimant were allowed to have their phones with

them. Staff were always allowed to take personal telephone calls at work, either on their mobile phone, or the factory phone.

33. The first respondent does not work on the factory floor, and did not have day to responsibility for matters such as asking staff to work overtime, or taking calls from staff members who are going to be absent from work.

**Note on Evidence.**

34. In the main the Tribunal found Mr McGill to be a reasonably credible and reliable witness. There were no significant inconsistencies between his evidence and the written material before the Tribunal, and he gave his evidence in a straightforward manner.

35. Albeit the Tribunal did not find the claimant to be either credible or reliable on a number of aspects of the evidence, in particular about knowledge of disability, it did find her evidence as to the effects of her impairments of anxiety and depression, and hyperthyroidism to be reasonably credible and reliable. In reaching this conclusion the Tribunal took into account that although the claimant did embellish her evidence on a number of matters, it did not appear that she sought to exaggerate the effects of these impairments. In particular the claimant's evidence as to the effect of her impairments on her day-to-day activities, appeared to the Tribunal to be quite realistic, in that she explained that her ability to concentrate meant that she found it difficult to deal with, 'important personal stuff', citing as an example of this, her mortgage, and that she felt overwhelmed by these kinds of activity.

36. There were other aspects of the claimant's evidence however which almost entirely lacked credibility or reliability. Ms Tate accepted that the claimant's evidence on cross-examination departed from her written case on some occasions, but she submitted that the claimant was credible, on the basis that such inconsistencies were explained by the fact that she was an unrepresented party, unfamiliar with the Tribunal process, the effects of her disability. The Tribunal however formed the impression that the claimant's

lack of credibility and reliability were so material that they were not readily explained by these factors.

5 37. An example of the claimant's inconsistency , and hence lack of credibility, is to be found in that the claimant stated in her PH Agenda that one of the acts of harassment which the first respondent was guilty of was that he grabbed her crotch in what he described as an attempt to move her out of the way. On cross-examination the claimant stated that it was not her who had been the victim of this alleged act, but her daughter. She could give no plausible explanation as to why this serious allegation was framed as it was , and why her position changed.

10 38. It was in relation to the question of knowledge that the claimant's credibility was most under attack. The Tribunal found the claimant's evidence as to what she told me respondents which may have given rise to knowledge her conditions to be in the main neither credible nor believable.

15 39. In a document produced the Tribunal headed; 'Facts relating to Respondent's knowledge of disability,' the claimant set out a number of matters which she said she relied upon to support that position that the respondents were aware of her disability. She adopted this in evidence chief.

20 40. The claimant however then gave evidence in cross examination which on a number of occasions was inconsistent or contradictory to the statements which she had made in this document

25 41. The claimant stated in her written statement that she had had a conversation in around December 2018 when she confided in the first respondent, a Mr Paul Brown, a production worker, and a Mickey Docherty, manager, regarding her problems with alcoholism and abuse from her father. She said that in this conversation she made aware of her mental health issues of depression and anxiety.

30 42. In cross examination the claimant departed from the statement, stating firstly that conversation had happened in 2019, and secondly, that it had not involved either the first respondent, or Mr Mickey Docherty, ( who was not a



manager) but instead another manager by the name of Micky. In so far as making those who were party to the conversation aware of her mental health issues, her evidence on cross examination changed again from her written statement, and she that she stated her father was like 'Fritzel' and she left it at that.

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43. On the basis of this material inconsistencies, for which no convincing explanation was given, the Tribunal rejected the claimant's evidence as to the alleged discussion which had taken place about her mental health issues with her manager or co-workers.

10 44. The claimant's written statement contained something to the effect that she confided regularly in the first respondent, Mr Brown, and Mr Doherty ,about her ongoing issues until she was dismissed, in the hope that disability would be treated seriously, but instead she was met with insults.

15 45. No detail was provided at all in terms of how she confided regularly, or what she said to any of these individuals which would have given rise on their part to knowledge that she was disabled, and the Tribunal did not find the claimant's evidence on this point to be either credible or reliable.

20 46. In her written statement the claimant relied upon the fact that she kept her thyroid medication at work, and that she considered that the respondent and other members of the management team were aware of her condition as she had to take this medication regularly in their presence. She also stated that she saw the first respondent see her take the medication on the factory floor on many occasions. She said she took her medication at 11 o'clock and the first respondent was aware of this.

25 47. The claimant however accepted in cross examination that she did not have a locker, and that she kept her medication in the draw of her sewing machine. She also stated that the first respondent would have been able to watch her take the medication from a CCTV camera on which he would watch from his office and, on which she said he observed everything that happened in the  
30 factory on a daily basis.

48. The inconsistencies in the claimant's position were unexplained, and it seemed highly implausible to the Tribunal that the first respondent would, as suggested by the claimant have spent all day observing CCTV footage of the factory floor. The Tribunal therefore did not conclude that the first respondent, or anyone else, had regularly observed the claimant take medication.
49. The Tribunal did not accept that Mr McGill had compared the claimant to a contractor, implying that she was 'Fucked up', or a friend had reported her condition to the respondents on 3 September. There was no convincing evidence upon which it could reach such conclusions. The Tribunal accepted Mr Gills evidence that another member of staff had telephoned regarding the claimant on the 3 September, and that the purpose of her call was to express concern at the prospect of working alongside the claimant, not to report that she had a thyroid episode.

### Submissions

50. Both parties helpfully provided written submissions, which they supplemented with oral submissions. In the interests of brevity these are not reproduced here, but the relevant elements of the submissions are dealt with in the Tribunal's Note on Evidence and Consideration.

### Consideration

51. Section 123 of the EQA provides as follows;
- (1) *Subject to section 140B, proceedings on a complaint within Section 120 may not be brought after the end of:*
- (a) *The period of 3 months starting with the date of the act to which the complaint relates; or*
- (b) *such other period as the employment Tribunal thinks just and equitable.*
52. Conduct extending over a period is treated as done at the end of the period (Section 123(3)(a)).

53. The time limit is subject to any extension of time limits which may apply where the claimant is subject to the requirement for early conciliation and the stop the clock mechanism in s.207B ERA 1996.

54. The claimant brings the following claims;

- 5
1. Direct disability discrimination (section 13 EqA 2010);
  2. Discrimination arising from disability ( section 15 EqA 2010);
  3. Harassment on the grounds of sex ( section.26 EqA 2010)

55. In her written case the allegations are said to have taken place on the following dates;

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**(a) Allegations of Direct disability discrimination under Section 13 and 15 of the EQA;**

The claimant alleges that her dismissal on 3/9/2020 was an act of direct disability discrimination, alternatively an act of discrimination for something arising from her disability.

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**(b) Harassment allegations under Section 26 of the EQA**

The claimant alleges 5 acts of harassment in her written case ;

- (i) From June 2019 onwards she received inappropriate text messages from the first respondent, including him asking why she had been single for 12 years;
- 20 (ii) In June 2020 the first respondent sent her a by text message if she had ever had a threesome;
- (iii) In June 2020 the first respondent asked the claimant for pictures of her daughter's "arse";

(iv) In July 2020 the first respondent grabbed the claimant's crotch in what he described was an attempt to "move her out of the way" (although the nature of this allegation changed during evidence)

(v) On 26 August 2020 the first respondent said to the claimant "You know I love you" during a conversation in the office.

### **Date from which time runs**

### **Disability discrimination claims**

56. In the relation to the claims of disability discrimination the primary time-limit for the disability discrimination claims under section 13 and 15 expired on the 2 December 2020, three months from the date of dismissal.

### **Sex discrimination claims**

57. The Tribunal was satisfied that the primary time-limit for the harassment claim under Section 26 of the EQA was 25 November 2020, that being three months the date the last allegation. It did not accept the claimant's submission that the date of the last act for the purposes of the sex discrimination claim should be 3 September,( the date of dismissal) on the basis that there was an act extending over a period. There is no allegation of harassment on the grounds of sex after 26 August. Dismissal is said to be an act of discrimination on the grounds of disability, and therefore there was no act extending over a period for the purpose of the section 26 claim.

### **Claims against the second respondent**

58. Although on the face of it at odds with her written submissions , Ms Tait indicated in her oral submissions that the claim of disability discrimination were brought against second respondent, and the claim of sex discrimination was brought against the first respondent.

59. In any event, the claims against the second respondent are presented in time. The extension effected by the ACAs certificate is calculated by looking at number of days starting with the day after Day A (i.e. 19/11/20) and ending

with Day B inclusive (18/12/20) . The revised time limit expiry date falls in the period starting with Day A and ending 1 month after Day B The claim should have been be presented against the second respondent by 1 month after Day B, ( i.e. by 18/1/21), which it was.

5 **Claim against the first respondent**

60. The claimant contacted ACAS 12 November 2020, and the ACAS certificate was issued on 12 December. The revised time limit for the claim falls in the period starting with Day A ( 12/11/20) and ending 1 month after Day B (12/12/20).The claim should have been be presented by 1 month after Day B ( i.e. by 12/1/21).

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61. The claims against first respondent, on the basis of the claim presented on 18/01/21, was late by a factor of 6 days. That claim was however rejected, but allowed on reconsideration when it was deemed to have been accepted on 18 February.

15 **Extension of time**

62. The Tribunal then went on to consider if time should be extended under section 123 to consider the claim against the first respondent. The Tribunal has a wide discretion; it is entitled to take into account anything that it considers relevant. The Tribunal however keeps in mind that there is a strict application time limits in the employment Tribunal, and that the exercise of discretion is the exception and not the rule. Ms Hatch made submissions to that effect , referring the Tribunal to *Robertson v Bexely Community Centre (2003) EWCA 576* , and *Department of Constitutional Affairs v Jones [2007] EWCA Civ 894*.

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63. Ms Hatch also took the Tribunal to *Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, [2010] IRLR 327*, in support of the proposition that whether a claimant persuades the Tribunal to extend time is a question of fact

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64. Furthermore, the Tribunal reminded itself, as submitted by Ms Hatch that the burden of persuading the Tribunal to exercise its discretion rests with the claimant.

65. Ms Hatch referred to *Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278 at [9] the EAT*, HHJ Peter Clark, identified a proposition which would seem to follow from this burden of persuasion that ;

*'if the claimant advances no case to support an extension of time, plainly, he is not entitled to one'.*

66. The Tribunal considered the factors which are relevant to the exercise of its discretion. In doing so reminded itself of what was said in *British Coal Corporation v Keeble (1977) IRLR 336*. There it was suggested that the Tribunal will be assisted by considering the factors listed in Section 33 of the Limitation Act 1980. That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and have regard to all the circumstances of the case. Those circumstances are in particular the length of the delay and the reason for it; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which claimant acted once she knew the facts giving rise to the cause of action; and the steps which the claimant took to obtain the appropriate legal advice once she knew of the possibility of taking action.

67. That is not to say the Tribunal should slavishly follow a checklist approach and it must always keep in mind that it should assess all the factors in a particular case which it considers relevant ( *Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23*)]

68. The first matter the Tribunal considered was the length of the delay and the reason for it. After applying the extension effected by the issue of the ACAS certificate, the claim against the first respondent was lodged late by a factor of six day. That claim was however rejected because the incorrect ACAS

certificate number was contained in the ET1, and was deemed to have been presented on reconsideration on 18 February, which is over a month after the expiry of the time limit.

5 69. The respondents were critical of the claimant for not having taken steps to present her sex discrimination claim earlier, particularly when she had access to legal advice.

10 70. The Tribunal takes into account the fact that the claimant had access to legal advice, even if only in the form of attendance at a drop-in clinic, from a relatively early stage. She had the benefit of this when she submitted the conciliation notice to ACAS. She also spoke to ACAS , who made her aware of time limits.

15 71. However at the point when the claimant lodged her claim with the Tribunal she was unrepresented, and she had to contend with two ACAS certificates against two respondents, which were issued on different dates, and contained different conciliation numbers. The claimant was also experiencing of stress in having to deal with the Tribunal process in lodging a claim, and because of problems with her eye, she required to enlist the help of a friend to act as a scribe in submitting her ET1 .

20 72. The Tribunal notes Ms Hatch's submission to the effect that the claimant was able to work as a machinist without any difficulty which did not support the conclusion she was experiencing difficulties with her eyesight.

25 73. However, despite Ms Tate's submissions, the claimant did not rely on problems with her eyesight as an impairment giving rise to a long-term substantial adverse effect on her day-to-day abilities, but explained she had a problem with looking at the text in order to lodge the ET 1 forms, and she explained that she needed a friend to scribe for her, which caused some delay.

30 74. Notwithstanding the Tribunals overall view of the claimant's credibility generally, it considered that fact that the claimant explained the issue she had and the type of help she required with some degree of specification, gave

her position on this particular point credibility, and the Tribunal accepted her evidence on this matter.

5 75. The Tribunal was prepared to accept that it was these factors ( the fact that the claimant was unrepresented, that she had to deal with a relatively complicated process; that she was experiencing stress, and an eye problem which meant that she was reliant on the assistance of a friend in completing her ET1 application) brought about the delay in the claim being lodged.

10 76. Even taking into account the deferred acceptance of the ET1 as a result of the inclusion of the correct ACAS number when the claim was initially lodged, the cogency of the evidence is not likely to be affected by the delay. No submissions were made to the effect that it would be.

77. The claimant did take steps to obtain legal advice, and did so with some promptness , albeit she did not secure legal representation until after she had lodged her claim.

15 78. The Tribunal considered against these factors the prejudice each party would be likely to suffer as a result of time being extended, or not, under Section 123.

20 79. The prejudice is that the respondents will have to defend a claim of sex discrimination, which has been lodged out of time. It does however remain open to them to defend the claim.

80. The prejudice to the claimant is that she will be prevented from pursuing her complaint of discrimination.

25 81. Balancing all the factors present in this case, including the relative prejudice to the parties, the Tribunal was satisfied that it was the correct exercises discretion under Section 123 of the EQA to extend time to allow the claim of sex discrimination to proceed.

### **Disability Status**

82. The Tribunal began by considering the relevant legislation.



1. Section 6 of the Equality Act 2010 provides:

(1) *A person (P) is disabled 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.*

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2. Schedule 1 provides:

*PART 1*

*DETERMINATION OF DISABILITY*

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...

*2. Long-term effects*

(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*

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

(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 it is likely to recur.*

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...

*PART 2*

*The Guidance*

*Impairment*

*An impairment can be physical or mental (A.3)*

5 *It is to be determined by reference to the effect that an impairment has on that person's abilities to carry out normal day-to-day activities (A.4, with original emphasis)*

*Substantial Adverse effect*

- *More than minor or trivial (B.1)*
  - 10 • *Includes the time taken for, and way in which, an activity is carried out (B.2 & B.3)*
  - *The cumulative effect of impairments should be considered (B.4)*
  - *Account should be taken of how far a person can reasonably be expected to modify his behaviour – such as coping or avoiding strategies (B.7, with original emphasis)*
  - 15
3. *It is important to consider the things a person cannot do, or only with difficulty (B.9)*
  4. *Long term*
- 20 • *Last or likely to last 12 months having regard to the cumulative effect (See C.2)*
  - *A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period (See C.7)*

- *A person even if recovered to no longer be adversely affected may qualify as having been a disabled person for a relevant period of time if the effects lasted 12 months or more after the first occurrence, or if a recurrence happened or continued until more than 12 months after the first occurrence (A.16 and C.12)*
- *Normal Day to Day Activities Includes shopping, walking, driving and taking part in social activities (D.3)*

*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.*

- Ms Tait submitted that claimant has physical and mental impairments of
- Hypothyroidism;
- Clinical depression and anxiety
- Post-traumatic stress disorder
- Sight impairment

83. Ms Tate submitted these have a substantial and long-term adverse effects on the claimant's ability to carry out normal day-to-day activities. She referred to the disability impact statement and the claimant's evidence, about the nature of her disabilities and the effect they have on her.

84. Ms Tate referred to from the claimant's General Practitioner report (page 86 of the bundle).The claimant's GP's report confirms that the claimant suffers from hypothyroidism and anxiety with depression. Although Post Traumatic Stress Disorder is not included in the GP's report, Ms Tate submitted that historical trauma is referred to and asked the Tribunal to accept the claimant's

evidence in relation to this condition.

85. In departure from the clear position taken at the outset of the PH, to the effect that the claimant's eye issues were not relied upon as an impairment, Ms Tate made detailed submissions to the effect that the Tribunal should have regard to the claimant's sight impairment, and the effect of this.
86. The Tribunal did not consider that it was proper for it to do so. The respondents conducted this PH on the basis that sight impairment was not relied upon, there was no cross examination on this. In circumstances, where the claimant gave a clear position at the start of the PH as to the impairments relied upon, and stated that she was not relying in her sight impairment, it is not permissible for the Tribunal to take that into account at this at this stage of submissions.
87. The Tribunal was prepared to accept that the claimant had impairments of hypothyroidism, and anxiety and depression. These are the impairments evidenced by GPs report, and spoken to by the claimant. While the GP's report mentions an element of historical trauma, that was insufficient to allow the Tribunal to conclude that the claimant was suffering from an impairment of PTSD.
88. The Tribunal went on to consider if these impairments had a substantial long-term adverse effect on the claimant's ability to carry out day-to-day activities, applying the relevant legislation and guidance noted above.
89. It is important to note that the Tribunal has to assess the effect of the impairment, and whether that is substantial and long term, not whether the impairment itself is long term.
90. It is also important to keep in mind that the Tribunal is required to assess if the claimant was disabled in terms of section 6 at the relevant time, (i.e. at the time of the alleged discrimination). As pointed out by Ms Hatch, the GP report, although conforming the claimant's diagnosis, gave no information about the claimant's abilities as the relevant time.

91. The claimant's evidence about the effects of her impairments on her abilities to carry out day-to-day activities was given in fairly general terms. Ms Hatch submitted that the claimant did not give evidence as to the effects of her impairment at the relevant time, however it appeared to the Tribunal that the claimant's impact statement did refer to the impact of her impairment at the relevant time, as she refers to her the effects of her thyroid condition at the date of dismissal, and she refers to her history of depression and its effects, providing an explanation as to why she stopped taking medication for it in 2017.
92. Albeit, as submitted by Ms Hatch the claimant did not provide medical evidence to support this, and she had been ordered to produce the medical evidence on which she intended to rely, the Tribunal accepted her evidence that she had a Thyroid related episode at about the time of her dismissal, as there was medical evidence to support that the claimant had been diagnosed with Thyroid, and was on medication for it, at that time. It also accepted as credible her evidence as to why she stopped taking medication for her depression. The fact that the claimant stopped taking medication may have an impact on an assessment of her judgment or good reason, but the Tribunal did not conclude, as suggested by Ms Hatch, that it meant her depression was not serious enough to warrant medication.
93. Furthermore the medical report produced confirms that the claimant's Thyroid condition has been controlled by medication since 2010, which meant that her Thyroid was controlled by medication during the relevant period.
94. The claimant's depression, which was diagnosed in 1996, and for which she has taken no medication, and her thyroid condition, have affected her ability to sleep, her general mood, her ability to concentrate and her energy levels.
95. The effect on the claimant's ability to concentrate has meant that she has struggled to carry out her personal business tasks and has often found having to deal with personal business tasks such as the administration of her mortgage, overwhelming.

96. The other example which the claimant again about how their ability to concentrate affected day-to-day activities, was that she burned her arm while cooking, but did not notice this immediately.
97. Ms Hatch submitted that the claimants proven drug use could be the cause of the effects which she complains of, rather than her impairments.
98. The Tribunal take into account that it is the claimant who has the burden of proof. She has produced a medical report confirming her impairments and the medications she takes. She also gave evidence as to the effects of her condition , which was not incredible. The Tribunal had no evidence of the effect of the claimant's drug use, much beyond the claimant' evidence to the effect that she took cannabis for medical reasons. Against that background it was not possible to reach the conclusion the claimant had failed establish the effects of her impairment, due to the fact that she also used illegal drugs.
99. The Tribunal takes into account that in assessing the effect of an impairment, it has to disregard the effects of medication. It also takes into account during the relevant period the claimant was taking medication for her thyroid condition. This is confirmed by her GP report, which states that her condition has been controlled by medication and that this is likely to be lifelong.
100. In determining the effects of an impairment without medication, the Tribunal would need to consider how the claimants abilities had been affected at the material time, whilst on medication, and then to consider the question as to the effect which it thinks there would have been for the medication. The question is whether the actual and induced effects of the claimant's abilities to carry out day-to-day activities are clearly more than trivial.
101. The Tribunal was satisfied that even with her condition controlled by medication, the claimant suffered fatigue and difficulty concentrating. It was prepared to speculate, on the basis that the claimant's condition was controlled by medication, that she would have experienced these effects more significantly had she not been taking medication.
102. Even with her condition controlled by medication, the Tribunal considered that

the claimant's lack of ability to concentrate being affected to the extent that she struggled to conduct her personal business affairs, such as dealing with her mortgage, and often felt overwhelmed by these, was in effect which was more than trivial, and was a substantial effect. The effect of not being able to deal with personal business matters is likely to have negative and not insignificant consequences.

103. The Tribunal was also satisfied that the effect was long-term, in that the claimant's impairment of hypothyroidism had been controlled by medication for a period of more than 12 months prior to the date of dismissal.

104. The Tribunal therefore concluded that the claimant was disabled in terms of section 6 of the EQA.

### **Knowledge of Disability**

#### **Section 15 provides;**

(1) *A person (A) discriminates against a disabled person (B) if—*

(a) *A treats B unfavourably because of something arising in consequence of B's disability, and*

(b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

(2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

105. Ms Hatch referred to *Gallop v Newport City Council* (2013)EWCA Civ 1358(2014) IRLR 211:

*"For that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any*

5 *case depends also on the clarification as to their sense provided by  
Schedule 1. Counsel were further agreed that, provided the employer has  
actual or constructive knowledge of the facts constituting the employee's  
disability, the employer does not also need to know that, as a matter of law,  
the consequence of such facts is that the employee is a "disabled person"  
as defined in section 1(2).'*

106. For the reasons given above, under Note on Evidence, the Tribunal did not  
find the claimant's evidence as to the information she said she imparted to  
the first respondent, or the employees of the second respondent, in relation  
10 to her disability to be credible or reliable, and it was not satisfied first or  
second respondent had actual, or constructive knowledge the claimant's  
disability. The Tribunal was not persuaded that the claimant made any  
statements either during her employment, or that any statements were made  
by her, or on her behalf on 3 September, which would have given rise to actual  
15 or constructive knowledge of disability.

107. The Tribunal did not conclude that the text exchange between the claimant  
and the first respondents during the Lockdown period, in which she advised  
him she had not had a drink for 4 days, was sufficient to put the respondents  
on notice of the claimant's disability.

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Employment Judge: Laura Doherty  
Date of Judgment: 17 February 2022  
Entered in register: 17 February 2022  
and copied to parties

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