



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Roberts

Respondent: Infiled EM International Ltd

REASONS

Pursuant to Appellant's request following promulgation of Judgment

1. The Claimant commenced employment with the Respondent as an Executive Assistant on 24 September 2018. She commenced maternity leave on 19 August 2019 shortly before the birth of her daughter. She returned to work on 1 June 2020. She tendered her resignation from her employment with the Respondent on 14 September 2020. The effective date of termination of her employment following that resignation was 11 October 2020.
2. The Claimant initially pursued claims of sex discrimination relating to her pregnancy and maternity against the Respondent. She subsequently issued further proceedings alleging disability discrimination comprising claims of direct and indirect discrimination, failing to make reasonable adjustments, victimisation and harassment. These proceedings have been consolidated by the Employment Tribunal. The liability hearing will commence on 6 June 2022. The Tribunal listed a Preliminary Hearing to determine whether the Claimant was at the relevant time a disabled person within the meaning of s.6 Equality Act 2010 ("the EqA").
3. There was an agreed Bundle of Documents (Exhibit R1) which included an Impact Statement by the Claimant (Exhibit C1) and relevant GP notes. The Tribunal also received oral evidence from the Claimant. Mr Dempsey submitted written submissions (Exhibit R2) and Mr Brooks also provided written submissions to the Tribunal (Exhibit C2). The Tribunal was limited to considering the preliminary issue as to whether the Claimant was disabled at the relevant time. The parties agreed that the relevant time was the period from her return to work on 1 June 2020 to the termination of her employment on 11 October 2020. The Tribunal made the following findings of fact relevant to that issue.
4. The Claimant states that she has suffered from two mental impairments which are postnatal depression, since the birth of her daughter in August 2019, and anxiety and depression (including low moods) since approximately November 2019 when she started to worry about going back to work after completing her maternity leave.

5. Her evidence is that these mental impairments changed her life. She says that they impacted on her relationships and friendships and how she interacts with others. She also says it affected how she slept how often and what, she ate, her memory and her concentration. She also indicates that she considered self-harm, including suicide, and endured long periods of being tearful and feeling helpless and hopeless. She describes her self-care as poor. She suffered from a lack of energy and low self-esteem.
6. Mr Dempsey asked the Claimant to particularise the general descriptions she had given to the Tribunal. The Claimant told Mr Dempsey that at times she had not wanted to go out with her daughter, go shopping or take her dog for a walk. She had not accepted that she had any problems until November 2019 but even after that she had been able to look after her daughter and had been doing really well and found it stressful at work after her return.
7. The Tribunal was assisted by considering the Claimant's GP records. They record that the Claimant contacted her surgery on 28 November 2019. She stated that she was feeling depressed and anxious. At the appointment that was made for her during what is described as a long consultation she informed her GP she had been feeling low and overwhelmed for the last few days and that in the last week had not been sleeping well. The surgery note states, inter alia, as follows:

"Not breastfeeding and feels guilt about this. Some dark thoughts but no plan or intent to harm herself. Supportive mum. Had started worrying about going back to work in June. Trying to lose weight. Lots of pressure she is putting on herself... discussed sleep hygiene and also support. ... may be just lack of sleep causing dip in mood. Given Promethazine to aid sleep. ... "

8. The Claimant did not attend on her GP again until 7 January 2020. The surgery note states, inter alia, as follows:

"Thought she was doing really well, and has been feeling low for about a week. Moved daughter in to her cot and this has caused some anxiety. Not sleeping since she moved her daughter into her own room. ... reassure that this should improve. Sleep deprivation is causing heightened anxiety and now worried about returning to work. Reports that she is due to go back in June. Feels she will not be able to do this. ... agreed some Promethazine to aid sleep as this helped in the past. Supportive chat. Review next week as postnatal. May be able to access IAPT as a priority."

There was a further attendance at the surgery on the following week on 15 January. The notes of that meeting have been redacted by the Appellant. The Tribunal has received no evidence as to what was discussed during that consultation.

9. The Claimant did not attend on her GP again until 10 June 2020. She had returned to work on 1 June 2020. The surgery note states that the Claimant is obviously low but not currently actively suicidal. She attended at the

surgery again two days later when the difficulty is diagnosed as mild postnatal depression. There is a further attendance recorded at the surgery on 17 June. This states that by then the Appellant had undertaken an assessment that had been arranged by the surgery and that the assessment had advised Sertraline medication due to the ongoing situation and the Claimant's low mood.

10. The Claimant was signed off work for two weeks to enable her to start the recommended medication and to undertake a review of her position before she returned to work. The fit note confirms that it had been issued for postnatal depression and states, inter alia as follows:

"Clearly mood is low and likely continue PND".

There was a further consultation at the surgery on 30 June when mild postnatal depression was still diagnosed. The GP's note states that the Claimant expressed continuing anxiety about returning to work and also informed her GP that she and her family were considering a number of options one of which was moving house.

11. A fit note was subsequently issued for a further two weeks' sick leave to enable the medication to become effective and to give the Claimant time to consider the options under consideration by her and her family. She attended the surgery again on 14 July for what was described as *"supportive chat and really good improvement"*. A reference is also made to *"odd bad days but these are manageable"*. The diagnosis remained mild postnatal depression. The Claimant stated that she was *"not feeling too bad at the moment"*. The note also records: *"Feels medication has started to kick in. Has had a couple of bad days but generally okay"*. The Claimant returned to work on the following day (15 July).
12. The Claimant's next attendance at the surgery was on 11 August 2020. The surgery note indicates a conversation with a doctor largely relating to work issues and records that the doctor suggested to the Claimant that the CAB might be able to offer advice to her. The diagnosis recorded by the doctor is mild postnatal depression which is described as an ongoing episode. There is a further attendance at the surgery on 18 August. A part of the surgery note is redacted. This attendance results in a fit note being issued for 14 days and medication was increased because of a two week history of worsening low mood with a background of depression which the doctor attributed to deteriorating work relationships. The diagnosis at this consultation is recorded as "low mood". The Sertraline medication was increased from 50 mg to 100 mg.
13. The Claimant attended the surgery again on 27 August. Her problem is diagnosed as *"mixed anxiety and depressive disorder"*. The surgery note records an extensive discussion as to her position at work. The Claimant was subsequently sent a list of support services. There was a further attendance at the surgery by the Claimant on 1 September when there was a further extensive discussion about the Claimant's position at work. The note describes the Claimant as *"still very anxious and low"*. The Claimant was

signed off from work for one month with the diagnosis of "anxiety and depression".

14. When the Claimant attended the surgery again on 29 September 2020 the diagnosis remained one of mixed anxiety and depressive disorder. The surgery note records that the Claimant felt a lot better for having given in her resignation. It also confirms that the Claimant was taking annual leave for the last few days of her employment. The surgery note states, inter alia, as follows: "*Generally mental health is better and dad is helping with correspondence with current employer*". This note has also been redacted in places by the Claimant. These are the facts which the Tribunal has found.

The Law

15. The EqA defines a "disabled person" as a person who has a "disability" (**s.6(2)**). A person has a disability if he or she has "a physical or mental impairment" which has a "substantial and long-term adverse effect on his or her ability to carry out day-to-day activities" (**s.6(1)**). The burden of proof is on a claimant to show that he or she satisfies this definition. This definition is the starting point for establishing the meaning of "disability". However, it is not the only source that must be considered.
16. The supplementary provisions for determining whether a person has a disability are found in **Part 1 of Schedule 1 to the EqA**. In addition, the Government has issued "**Guidance on Matters to be taken into account in determining questions relating to the definition of disability (2011)**" under **s.6(5) EqA**. This Guidance does not impose any legal obligations in itself but courts and tribunals must take account of it where relevant. Finally, the Equality and Human Rights Commission ("EHRC") has published a Code of Practice on Employment ("the EHRC Employment Code") that has some bearing on the meaning of disability under the EqA. The Code does not impose legal obligations the tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in relevant proceedings.
17. There is no statutory definition of either a "physical impairment" or a "mental impairment" and nor is there any definition in The Guidance or the EHRC Employment Code. The Court of Appeal has held that impairment should bear its ordinary and natural meaning. The Court has stated: "it is left to the good sense of the tribunal to make a decision in each case and whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects".
18. It is generally accepted that the term is meant to have a broad application and Part A3 of The Guidance tends to support this view. This states that in many cases there will be no dispute as to whether a person has an impairment, adding that any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition. It is the degree to which a person is affected by a particular impairment that in most cases will determine whether that person is afforded the protection of the EqA.

19. The impairment must have a "substantial adverse effect" on the person's ability to carry out normal day-to-day activities. Substantial is defined in **s.212(1) EqA** as meaning "more than minor or trivial". **Appendix 1** to the **EHRC Employment Code** provides guidance on the meaning of "substantial". It states:

"The requirement that and effect must be substantial reflects the general understanding of a disability's limitation going beyond the normal differences in ability which might exist among people. Account should also be taken of where a person avoids doing things which, for example, causes pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation"

20. In **Goodwin v Patent Office 1999 ICR 302 EAT**, the EAT said that, of the four component parts to the definition of a disability in what was then the **Disability Discrimination Act 1998**, judging whether the effects of a condition are substantial is the most difficult. In its explanation of the requirements the EAT stated, inter alia, as follows:

"What the Act is concerned with is an impairment on the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the act which is the focus of attention but rather the ability to do (or not to do) the acts. Experience shows that disabled persons often adjust their lives in circumstances to enable them to cope for themselves".

21. When determining whether the person meets the definition of disability under the EqA, The Guidance emphasises that it is important to focus on what an individual cannot do or could only do with difficulty rather than on the things that he or she can do. As the EAT also pointed out in the **Goodwin** case, even though a claimant may be able to perform a lot of activities, the impairment may still have a substantial adverse effect on other activities, with the result that a claimant is quite probably to be regarded as meeting the statutory definition of disability. Equally, where a person can carry out an act, but only with great difficulty, that person's ability has been impaired. The **Goodwin** case also provided Tribunals with guidance on the approach to adopt when applying the provisions of the previous act. It is established that this guidance remains equally relevant today in interpreting the meaning of **s.6 EqA**. The EAT said that the words used to define disability require a tribunal to look at the evidence by reference to four questions as follows:

- Did the Claimant have a mental and/or physical impairment?
- Did the impairment affect the Claimant's ability to carry out normal day-to-day activities?
- Was the adverse condition substantial?
- Was the adverse condition long term?

These four questions are to be considered sequentially rather than together.

22. The time at which to assess the disability (that is whether there is a physical or mental impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act. The question of whether the effect of an impairment has lasted, or is likely to last, at least 12 months as at the time of the alleged discriminatory act / acts should be assessed by reference to the facts and circumstances existing at the date of the alleged acts. Therefore, the issue of how long an impairment is likely to last should be determined at the date of the discriminatory act and not the date of the tribunal hearing. (**Richmond Adult Community College the McDougall 2008 ICR 431 CA**). Paragraph C4 of **The Guidance** stresses that anything that occurs after the date of the discriminatory act will not be relevant. The relevant date in this is 11 October 2020.

Consideration and conclusions

23. The Claimant's daughter was born on 24 August 2019. It has not been disputed by the Claimant that there was no diagnosis of postnatal depression when she attended on her GP on 28 November and 7 and 15 January 2020. The surgery notes in respect of those consultations which are summarised above are self-explanatory. The Tribunal notes that there is an indication in the surgery notes of the consultation on 7 January that postnatal depression was to be considered on 15 January. The Claimant redacted the surgery notes of that meeting. The Tribunal has received no evidence as to what was discussed at this consultation. There has been no evidence that a diagnosis of postnatal depression was made at that meeting.
24. After the consultation on 15 January there is a long gap before the Claimant attends on her GP again on 10 June 2020 which is after she had returned to work at the Respondent. Her difficulties at work are discussed with her GP at that consultation. Two days later the Claimant's GP concludes that she is suffering from mild postnatal depression.
25. The Claimant complains, and makes general assertions, about a number of difficulties which she encountered shortly after the birth of her daughter. However, of those it is only her difficulties sleep deprivation, some aspects of her daughter's care, her fear of return to work and, subsequently, her reported difficulties after doing so, and then overall anxiety arising from her attendance at work that are referred to in her GP's notes.
26. The Claimant was still suffering from mild postnatal depression on 11 August. However, her GP's notes indicate that the issue which was giving rise to substantial stress for the Claimant was whatever was happening at work and her concerns in respect of that. Mild postnatal depression was described as an ongoing episode, but the surgery notes for indicate that the predominate issue giving rise to the Claimant's stress at that time was how she described the situation at work. The Claimant was issued with a further fit note on 1 September for anxiety and depression. When she had attended at the surgery four days previously she had been diagnosed with *"mixed anxiety and depressive disorder"*.

27. There had been further discussion of the position at work and the Claimant submitted her resignation with notice (expiring on 11 October 2020) on 14 September. When she attended on her GP on 29 September the diagnosis remained one of mixed anxiety and depression. The Claimant told her GP that tendering her resignation had improved her mood and her GP concluded that her mental health had improved as a result of taking that step. The Claimant did not return to work after 1 September.
28. The Claimant was not given a clinical diagnosis that she was suffering from postnatal depression until 12 June 2020. The medical evidence before the Tribunal does not support her claim that she suffered from postnatal depression from the birth of her daughter or from anxiety and depression from November 2019. She gave evidence to the Tribunal of the adverse effect of her alleged impairments on her ability to undertake day-to-day activities in very general terms. The Tribunal has had the benefit of considering the GP's notes which provide details of the concerns the Claimant raised with her doctor at the relevant time. These confirm that the Claimant was not referring to any adverse effects on her relationships and friendships, her diet, her memory or her concentration or about the care of her daughter. They also show that a continuing stressor for the Claimant during the consultations was anxiety about her return to work which became a more pronounced, and obviously very significant, difficulty for her after her return to work.
29. The diagnosis of postnatal depression made in June 2020 establishes that the Claimant was suffering from a mental impairment from late May / early June of that year. Her doctor had prescribed medication to aid sleep in January 2020 and the notes indicate that she had been given such a prescription at some time in the past. There is no indication for how long that medication continued but when she attended her GP on the next occasion about five months later new medication is prescribed for her low mood. The overall impact of postnatal depression, low mood, anxiety and depression on her day-to-day activities is far from clear on the evidence placed before the Tribunal. The Claimant's evidence falls far short of establishing that the impairment had a substantial adverse effect on her day-to-day activities.
30. By 29 September the major stressor of attending work had been removed and the GP's note indicates that she has benefitted from that and that the prognosis for her is improving. The mental impairment had been present for just under five months. Even if the adverse effect had been substantial, which the Tribunal has concluded it was not, the next question is whether it was likely to last at least twelve months.

This has to be determined by the Tribunal from what had happened up to 11 October 2020 and what was known to those concerned by that time. The Tribunal concludes that, on the facts it has found, and the relevant circumstances at the relevant time, together with the prognosis and treatment provided by the Claimant's GP up to that time the mental impairment was not

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likely to last at least twelve months, that is, until the end of May/June 2021. This means that, applying the relevant analysis which the Tribunal has explained above the Claimant was not disabled at the relevant time. This determination of the Preliminary Issue referred to the Tribunal means that the Claimant's claims of disability discrimination must be dismissed. The remaining claims in these proceedings will be considered at the full hearing for which a date has already been fixed and directions given.

Employment Judge Craft
Date: 15 March 2022

Reasons sent to parties: 30 March 2022

FOR THE TRIBUNAL OFFICE