



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4110859/2021**

5

**Held via Cloud Video Platform on 29 March 2022**

**Employment Judge S MacLean**

10 **Mr R Dickie**

**Claimant  
In Person**

15

**Scottish Fire & Rescue Service**

**Respondent  
Represented by:  
Ms M Macdonald -  
Solicitor**

20

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that the claimant was not a disabled person between 1 July 2019 to 26 June 2021 in terms of section 6 of the Equality Act 2010.

25

**REASONS**

**Introduction**

30

1. This preliminary hearing was conducted remotely by Cloud Video Platform to determine the issue of disability status under section 6 of the Equality Act 2010 (EqA).
2. The claimant alleges that he was subjected to unlawful disability discrimination from around July 2019 when he was referred to occupational health to around 26 June 2021 when he confirmed his resignation from his employment with the respondent.

35

**The Issues**

3. The issues that I had to determine were:

- 5 a. Did the claimant have a physical or mental impairment? The claimant asserts that he had a mental health issues from around 2019. The respondent does not accept that the claimant had a mental impairment.
- b. If so did the impairment cause a substantial adverse effect on the claimant's ability to carry out normal day to day activities?
- 10 c. Is the effect long-term in that it has lasted twelve months; is likely to last for at least 12 months or is likely to last the rest of the life of the person affected?

**The Law**

- 15 4. Section 6 of the EqA defines disability as a physical or mental impairment which has a substantial long-term adverse effect on an individual's ability to carry out normal day to day activities.
5. Section 212(1) of the EqA provides that "substantial" means more than minor or trivial.
- 20 6. Schedule 1 of the EqA gives further details on the determination of liability. For example, paragraphs 2(1) provides the effects of an impairment is long-term if that impairment has lasted at least 12 months, is likely to last at least 12 months or is likely to last the rest of the life of the person affected. Paragraph (2)(2) provides that if an impairment ceases to have a substantial adverse effect on the person's ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if that effect is likely to
- 25 reoccur. Paragraph (5) provides that 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 taken to correct it and but for that it would likely to have that effect.

7. Account must be given to the guidance on matters to be taken into account in determining the question relating to the definition of disability (2011) (the Guidance) and the Equality and Human Rights Commissioners Code of Practice of Employment (the Code).

5 **The Evidence**

8. The claimant gave evidence of his own account. He referred to documents in the joint set of productions. Ms Macdonald who represented the respondent cross examined him. The claimant was in my view a credible and reliable witness.

10 **The Facts**

9. I have set out facts as found that are essential to my reasons or to an understanding of the important facts of the evidence about the issues that I had to determine.

10. The claimant is 41 years old. He lives alone having separated from his wife. He has a son, aged eight (approximately) for whom he cares at weekends. His wife and son live about a quarter of a mile from the claimant's home. The claimant and his son would go cycling and camping. The claimant was a member of a golf club where he played golf and socialised when not caring for his son. The claimant regularly visited his parents' home during the week for dinner.

11. The claimant has a full-time job, approximately 47 and a half hours per week including travel (his primary employment) as a digger operator/labourer. He also worked part-time with the respondent as a retained firefighter from 28 February 2013 (operational duties). In this capacity he had to provide availability within which he could be contacted to respond to incidents and attend weekly drill night for training and skills maintenance. Since April 2017 he was contracted to provide 80 hours of availability.

12. Around January 2019, the claimant's father died aged 65 after a three month period in hospital. The claimant had difficulty sleeping. He would go to bed, fall asleep for a couple of hours then wake up. He had difficulty getting back

to sleep. The claimant felt tired during the day. He took energy drinks, caffeine and smoked cigarettes to keep awake. He would doze off in the van while at his primary employment. The claimant stopped exercising and socialising. He avoided visiting his mother as he found being at the family home upsetting.

5 The claimant continued to see his son at weekends. The claimant's meals predominantly consisted of convenience food and takeaways. He gained around two and a half stones in weight.

13. Around April/May 2019, the claimant realised that he had gained significant weight. He started exercising. He walked the dog. The claimant continued to work.

10

14. Around July 2019 the claimant was referred by the respondent to occupational health and was asked to complete a stress questionnaire.

15. Over the summer 2019 the claimant felt better. His personal life improved. He returned to playing golf.

15 16. In early October 2019 the claimant "hit the floor". The claimant felt under increasing demand from his primary employment. He was working long hours because he had to support his family.

17. Around 3 October 2019, the claimant completed a stress questionnaire at the respondent's request. The claimant considered that he was under personal stress. He was uncharacteristically irritable.

20

18. On his mother's advice the claimant consulted his general practitioner on 11 October 2019. The claimant was diagnosed as having symptoms of stress. He was prescribed a strong antihistamine to assist him sleep. The medication made the claimant drowsy. The claimant was advised by his general practitioner to take two weeks' sick leave from his primary employment and operational duties which he did. The claimant felt that the treatment was good.

25

19. The claimant returned to work at his primary employment after the period of sick leave. Due to being on medication he did not operate machinery. He undertook labouring activities.

20. The respondent had an occupational health review with the claimant on 28 October 2019. The claimant was recorded as saying that he had ongoing personal stressors. He found it difficult managing time due to his primary employment and travel time. He remained absent from his operational duties.
- 5 21. The claimant continued on his medication although he did not take it at weekends when he was looking after his son as the claimant was concerned that something might happen if he was drowsy while his son was in his care.
22. Around November 2019 the claimant was paid off from his primary employment. He found new primary employment working similar hours.
- 10 23. On 27 November 2019 the respondent had an occupational health review with the claimant. He said that he had been dealing with a number of personal and domestic issues. He remained absent from his operational duties.
24. The claimant found December 2019 challenging given it was the anniversary of his father's death and other family members were ill. Other than spend time with his son the claimant did little socialising.
- 15 25. Around January 2020, the claimant decided that he needed to "get his life back". While it was unlikely that there would be any addictive effect from the medication that he was prescribed the claimant decided that he would not take it during the week so that he could return to operating the digger rather than labouring. The claimant took medication at weekends or in evenings when he was not seeing his son or operating the digger.
- 20 26. The respondent had an occupational health review with the claimant on 10 February 2020. He continued to suffer from symptoms of stress. He had another family bereavement and his mother was hospitalised. He continued to deal with personal and domestic issues. The claimant said that he did not have "the concentration levels for his operational role". He remained absent from his operational duties.
- 25 27. The claimant continued to have symptoms of stress. He contacted a counselling service for rehabilitation but this was put on hold due to the pandemic. The respondent had an occupational health review with the
- 30

claimant on 24 March 2020. He said that he continued to suffer from symptoms of stress. He was dealing with personal and domestic issues and did not have the concentrations levels for his operational role. The claimant expressed the view that unless his primary employment changed or the hours of his operational role reduced he was unlikely to return as he was unable to achieve a work life balance.

5 28. From 23 March to June 2020 the claimant was on furlough from his primary employment. During this period, the claimant's mental health improved along with exercise, healthy eating and ongoing engagement with his son with whom he assisted with home schooling.

ID 29. The claimant returned to his primary employment in June 2020. While his mood was up and down, he was able to carry out shopping, maintain his garden, look after his son and his home. While the claimant did not return to golfing, he continued to exercise.

15 30. The respondent had an occupational health review with the claimant on 22 June 2020 when the claimant reported that his while his symptoms of stress continued they were improving. He was attending counselling service for rehabilitation. He reiterated his comments about work/life balance.

20 31. The claimant changed the arrangements for access to his son. He cared for his son two nights during the week and alternate weekends. The claimant adjusted his medication accordingly.

25 32. The respondent had an occupational health review with the claimant on 18 August 2020. The claimant said that he continued to have symptoms of stress but they were improving. The counselling sessions were helping him improve resilience. This improvement continued and at an occupational health review on 3 November 2020 the claimant said that he had reduced his medication. It was anticipated that there would be an improvement in his symptoms. He remained unfit for operational duties.

30 33. The claimant continued to work in his primary employment throughout the second lockdown from December 2020 to April 2021. He assisted his wife

who has a disability with shopping and shared custody of his son. He continued to look after and exercise the dog. The claimant sometimes had good days and bad days. His counselling sessions were interrupted. He continued with his medication when it was appropriate for him to do so: when  
5 he was not seeing his son or operating a digger. He hoped that his medication would be reduced.

34. By 5 March 2021 the claimant reported to the respondent at an occupational health review that his symptoms had improved. He continued to find the counselling sessions beneficial. He remained absent from his operational  
10 duties.

35. The claimant wrote to the respondent in April 2021 resigning from his operational duties. He was still working in his primary employment.

36. The claimant's symptoms have been generally up and down. He continues to see his son. He goes walking and biking. He no longer plays golf. The claimant  
15 has remained on medication.

37. The Tribunal received the ET1 claim form on 18 August 2021. The claimant refers to personal circumstances and how he began to "struggle with mental health issues caused in part by the breakdown of his marriage and the consequent fighting to see his son, the death of his father and grandfather in  
20 a relatively short space of time". The ET1 claim form does not refer to the claimant's ability to carry out normal day to day activities. The ET3 response confirms that the claimant was absent from his operational duties but he remained working in his primary employment. The respondent understood the reason for his absence was his difficulty in managing competing priorities.

## 25 Submissions

38. The parties made oral submissions.

39. I carefully considered the submissions during my deliberations. I have dealt with points made in submissions while setting out the facts; the law and the application of the law to those facts. It should not be taken that a point was

overlooked, or facts ignored because the fact or submission is not part of the reasons in the way that it was presented to me by a party.

### Discussion and Deliberation

- 5 40. The claimant was in my view a credible and reliable witness. He gave his evidence candidly. He was referred to the occupational health reports which he accepted accurately recorded what he said to the Health and Wellbeing Practitioner at the time.
- 10 41. I did not understand the respondent to be suggesting that the claimant was not genuinely suffering from symptoms of stress during the relevant period but that this was a reaction to difficult circumstances and the competing demands on his time rather than a mental impairment.
- 15 42. I referred to the issues that I had to determine. While there was a step approach of questions posed sequentially, Miss Macdonald reminded me of the observations of the EAT in *J v DLA Piper UK LLP* 2010 UKEAT 0263 that it was good practice for Tribunals to state their conclusions separately on the questions of impairment and adverse effect and in respect of the latter findings on substantially and long term effect in reaching those conclusions I need not feel compelled to proceed by ridged consecutive stages. Specifically as in this case where the existence of the impairment is disputed it would make sense to start with findings about whether the claimant's ability to carry out normal day to day activities is adversely affected on a long term basis and then to consider the question of impairment in light of those activities.
- 20 43. The claimant asserted that he had a mental impairment (stress). He referred to his general practitioner's records mentioning his symptoms of stress and being provided medication to assist with allowing him to sleep. The burden of proving that he is a disabled person rests with the claimant.
- 25 44. Miss Macdonald said that the medical evidence was of little assistance. While the claimant was absent from his operational duties that did not necessarily mean that he was disabled for the purposes of the EqA. The stress in itself did not constitute a disability. The ET1 claim form (which has not been
- 30



amended), the general practitioner's records and the occupational health records do not comment on the claimant's abilities or restrictions in carrying out normal day to day activities. She referred me to the case of *Kapadia v London Borough of Lambeth* [2000] ECWZ Civ B1. Miss Macdonald and the case of *Herry v Dudley Metropolitan Council* 2007 ICR 610 and the need to examine medical evidence with great care.

45. In the circumstances of this case I considered first the claimant's evidence about his ability to carry out normal day to day activities. Before January 2019 there was no evidence of any difficulties. From January 2019 the claimant said that he was able to care for his son at weekend s/during the night on a weekdays, go camping, shop for himself and his wife, take the dog for a walk and with the exception of two weeks' sick leave engage work at his primary employment. The claimant stopped playing golf and going to the golf club. I did not understand the claimant to be incapable of or have difficulty playing golf but rather that in early 2019 he was demotivated to do so then did not return to the activity when restrictions permitted him to do so preferring alternative exercise. He did not enjoy visiting his family home after his father's death. The claimant did not say that there were any day to day activities that he could not do. He did say that from January 2019 he had difficulty sleeping.

46. The medical evidence makes little reference to restrictions on the claimant's day to day activities. The general practitioner's records note in October 2019 that the claimant had insomnia for which he was prescribed medication. The occupational health reviews in February and March 2020 refer to the claimant not having "the concentration levels for his operation role". There was no mention of the claimant not having the concentration levels to carry any day to day activities nor did the claimant give any examples of this in his evidence.

47. I also noted that while the claimant "hit the floor" in October 2019, he started "getting his life back" in January 2020. While from October 2019 the claimant was on medication to help him sleep, he did not take medication when his son was staying with him to avoid feeling drowsy. From January 2020 he chose not to take medication every day so that he could operate the digger. This adjustment did not seem to make any difference to the claimant's sleep. He

subsequently referred to seeking to reduce his medication as his symptoms of stress improved. While the claimant found counselling beneficial there were periods when this was unavailable due to the pandemic restrictions yet the claimant was not significantly impacted and he continued to report an improvement in his symptoms of stress.

5

48. I accepted that the claimant has had symptoms of stress throughout the relevant period. There were however significant periods where the intensity of the stress symptoms was less and he had relative good health where he was able to enjoy family life, attend his primary employment and participate in day-to-day activities. The claimant appeared to be motivated, enjoy work and spending time with his son.

10

49. While there were times particularly between October 2019 and March 2020 when the claimant had difficulty sleeping, concentrating and was not enjoying social and family events I was not satisfied on the evidence before me that the claimant's symptoms of stress caused an adverse effect in his ability to carry out normal day to day activities that were substantial and long term.

15

50. I appreciated that stress of itself is not a mental illness or disability. I accepted that initially the claimant's stress was related to a close family bereavement and matrimonial issues. I understand that the situation was exacerbated because of the claimant's primary employment which was particularly demanding in terms of his time coupled with his desire to reduce his commitment to the respondent and his unhappiness with the respondent's position on that. There was no evidence to suggest that the claimant's stress related to a pre-existing medical condition. While he had insomnia there was no evidence that the stress had led to feelings of anxiety or depression or had exacerbated any other mental or physical conditions.

20

25

51. I considered that while the claimant had difficulty meeting all the competing demands on his time and his absences from operational duties were genuine, I was not satisfied with regard to my conclusion about the claimant's ability to carry out normal day to day activities that his symptoms of stress amounted a mental impairment.

30

52. In the circumstances the claimant failed to meet the test required in order to satisfy the definition of being a disabled person within section 6 of the Equality Act 2010.

5 Employment Judge: Shona MacLean  
Date of Judgment: 07 April 2022  
Entered in register: 11 April 2022  
and copied to parties

10