



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4112379/2021**

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**Held via cloud video platform on 23 May 2022**

**Employment Judge S MacLean**

10 **Ms Fyrrarie Johnstone**

**Claimant  
Represented by:  
Mr B Allen -  
Friend**

15 **Piranha Pedi Ltd**

**Respondent  
Represented by:  
Mr S Wilson -  
Solicitor**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 The judgment of the Employment Tribunal is that the claimant was not a disabled person within the meaning of section 6 of the Equality Act 2010 at the relevant time.

### **REASONS**

#### **Introduction**

1. This is a claim of disability discrimination, unfair dismissal and other  
25 payments. The respondent concedes that the claimant's grandfather was diagnosed with cancer when the claimant's employment terminated on 23 September 2021; and he was disabled in terms of the Equality Act 2010 (the EqA) at the relevant. There is a preliminary issue over whether the claimant was disabled within the definition of section 6 of the EqA at the relevant time  
30 and that this was to be determined as a preliminary issue at this hearing.

2. I received an electronic file of documents (the productions) from the respondent which included the claimant's medical records since December 2011. No productions were produced by the claimant. It was agreed that the claimant's disability impact statement sent to the respondent and the Tribunal  
35 on 18 February 2022 would be added to the productions.

3. The claimant gave oral evidence. The representatives made oral submissions.

### Relevant law

4. Section 6 of the EqA provides the definition of disability as follows:
  - 5 “(1) A person (P) has a disability 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.”
5. Section 212(1) of the EqA provides that substantial means more than minor or trivial.
- 10 6. Schedule 1 of the EqA gives further details on the determination of a disability. For example, schedule 1 paragraph 2 (i) provides that the effect of an impairment is long-term if it has lasted for at least 12 months and is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.
- 15 7. Paragraph 5 provides that an impairment is to be treated as having a substantial adverse effect on the ability of a person concerned to carry out normal day to day activities if measures are being taken to correct it and but for that, it would be likely to have that effect.
8. The Tribunal must take into account statutory guidance on the definition of disability (2011) which stresses that it is important to consider the things that a person cannot do or can only do with difficulty (B9). This is not offset by things that the person can do.
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9. Day to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed and preparing food, walking, travelling and social activities. This includes work related activities such as interacting with colleagues, using the computer, driving and keeping to a timetable (guidance D2 to D7).
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10. The time at which to assess the disability (whether there is an impairment which has a substantial adverse effect on normal day to day activities) is the

date of the alleged discriminatory act (*Cruickshank v VAW Motorcast* [2002] IRLR 24). This is also the material time when determining. The evidence of the extent of someone's capabilities some months after the act of discrimination may be relevant where there is no suggestion that the condition has improved meantime.

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11. Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (though not the impairment) in such cases the treatment is ignored and the impairment is taken to have the effect it would have without such treatment. This does not apply if the substantial adverse effects are not likely to recur even if the treatment stops (that is the impairment has been cured).

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### Issues

12. The Tribunal had to determine the following issues:

(i) Did the claimant have an impairment?

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(ii) If so, did that impairment have an adverse effect on her ability to carry out normal day to day activities?

(iii) If so, was that effect substantial (as in more than minor or trivial)?

(iv) If so, was the effect long-term?

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(v) If the impairment had ceased to have a substantial adverse effect, at the relevant time, was the substantial adverse effect likely to recur?

13. The parties agreed that the material time for any disability is 23 September 2021 when the claimant's employment terminated.

### Findings in fact

14. The Tribunal makes the following findings in fact.

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15. The claimant was born in January 1991. She has a son born in December 2010 and a daughter born in February 2017. The claimant is a single parent.

16. In 2015 the claimant attended her doctor reporting anxiety which she had experience for a few years but said it was worsening. She had a low mood. The claimant was reluctant to be prescribed antidepressants. In June 2015 she was prescribed antidepressant medication for 28 days.
- 5 17. Following the birth of her daughter in 2017 the claimant was prescribed antidepressant medication from February 2017 until May 2017 when the dose was increased. In September 2019, the claimant indicated that she wished to come off her medication but was advised by her doctor not to do so.
18. The claimant started working for the respondent on 15 October 2017 as a  
10 beauty therapist. The claimant drove to work. She would give lift to colleagues. She was a good timekeeper. The claimant was conscientious and highly regarded by her work colleagues and her clients.
19. In late 2017 the claimant lost her tenancy. She and her children moved to the  
15 claimant's grandfather's flat. The claimant was sleeping in a room which her children.
20. In January 2018, the claimant had a lot of stressors particularly in relation to  
accommodation. She had been prescribed diazepam which she used intermittently. She stopped taking diazepam as she did not find it helpful. Her consultant recommended that she change antidepressant medication. The  
20 claimant was prescribed another antidepressant from March 2018.
21. In March 2020, the claimant indicated that her mood was stable and felt  
slightly better. The claimant's anxiety increased towards the end of 2020 due to ongoing legal issues with her ex-partner.
22. The claimant changed doctor in February 2021 following a complaint about  
25 her previous doctor wishing to review her antidepressants before providing a repeat prescription.
23. In May 2021, the claimant's father became unwell. He underwent surgery and a period of recovery.

24. In May 2021 the claimant consulted her new doctor. She reported feeling a lot better but the housing situation was a problem. She felt stressed and anxiety could still be a problem. It was agreed that she would continue on the medication until her life was more settled. The claimant reported that she had been managing to work and found this helpful.
25. While living with her grandfather, the claimant's children attended a local primary school and nursery which is at the same locality. The claimant would be awakened by her grandfather. She would get ready for work then help her daughter to get ready for nursery. The claimant's grandfather assisted her in taking her son to school. The claimant would walk her daughter to nursery and would from time to time interact with teachers. The claimant's grandfather has a dog which the claimant would take for walks from time to time. The claimant does not like to use public transport. She would do so when essential but usually drove and would offer a lift to friends and colleagues. The claimant did not attend like to attend shops on her own. She would go to Braehead Shopping Centre with friends and colleagues. The claimant would go to local shops in the town centre near her work but rarely socialised. The claimant attended work on time. The claimant assisted her grandfather with the chores such as vacuuming although he did most of the day to day cleaning. Most of the cooking was done by the claimant's grandfather as the claimant was not considered to be a good cook. He would also prepare pack lunches for the claimant and the children. The claimant spent time with her grandfather creating a plot of flowers in the garden for her daughter. She found the structure of work helpful.
26. The claimant decided to come off her antidepressant medication around July 2021. The claimant continued to order prescriptions just in case
27. The claimant's grandfather was admitted to hospital on 23 September 2021. Following the claimant's grandfather's death, the claimant has not been coping, struggling to sleep and not eating well.
28. The claimant resumed her antidepressant medication on 17 September 2021. The claimant has had multiple social issues over many years. Her

condition has worsened significantly since her grandfather unexpected illness and sudden death in late October 2021.

### Observation on evidence

29. The claimant was understandably very emotional when giving evidence. The  
5 evidence supports the fact that she had multiple social issues over many years.
30. Over the past four years, the claimant has been living with her grandfather who provided valuable support to her and her children.
31. Her medical records note under “active problems” - 26 May 2021 that the  
10 claimant has anxiety with depression. Her dedication to her work and the structure that this provided may have to her may have led in the underreporting of her condition while employed by the respondent. The claimant has been on antidepressants medication for some time. Despite her doctor seeking to review this with her the claimant appeared either reluctant  
15 or too busy to do so. Nonetheless she unilaterally came off the medication around July 2021 without medical advice.

### Decision

32. The test is a functional and not medical test directed at what a claimant cannot  
20 or can no longer do at a practical level. “Impairment” bears its ordinary and natural meaning and may result from an illness or consistent with an illness. Disability may include someone who is not in fact disabled if, without the medical treatment, they are in fact receiving, they would suffer that disability.
33. The burden of proving disability lies with the claimant. My assessment of her  
25 situation must be taken at the time at which she says the claim arose. It is therefore not relevant to consider the diagnosis or treatment the claimant has received since 23 September 2021 except if necessary in the context of the long term effect.

*Did the claimant have an impairment?*

34. Dealing first with the issue of impairment, I did not understand there to be a dispute that the claimant had been medically diagnosed with anxiety and depression for which she took medication. I was satisfied that the claimant had  
5 a mental impairment.

*Did that impairment have an adverse effect on her ability to carry out normal day to day activities?*

35. I next considered the effect of that impairment on the claimant's day to day activities. The terms of the statutory guidance indicates that I must focus not  
10 on what the claimant could do but what she could not do or only do with difficulty.

36. In determining whether the claimant's impairment had a substantial effect on her ability to carry out normal day to day activities, I had to consider the effect of medical treatment which in this case was antidepressant medication.

15 37. I first considered how the claimant's abilities had been affected at the material time whilst on medication and then addressed my mind to the difficult question as to the effects which I think there would have been but for the medication. The question is then whether the actual and deducted effects on the claimant's abilities to carry out normal day to day activities were more than  
20 trivial.

38. The claimant was able travel to work by car or if essential by public transport and undertake work tasks which included interacting with colleagues and clients. The claimant was able to dress herself and her daughter. She cared for her children and occasionally walked the dog. She was able to do house  
25 work (vacuuming). I also note that she had difficulty in going to shops or using public transport. However she did do these things when accompanied by friends and colleagues. She would attend shops on her own at lunchtime while at work. The claimant did not do much cooking. However this seemed to be related to her not being good at rather than her actual ability to cook.

39. I then considered how the claimant's difficulties would be if she was not on medication. There is nothing particularly surprising in the proposition that a person diagnosed as suffering from anxiety and depression who is taking a dosage of antidepressants would suffer a serious effect on her ability to carry out normal day to day activities if treatment was stopped. However, that proposition could be challenged.
40. The claimant's assertion was that it would have a serious effect. I needed to have reliable evidence in order to make findings of deductive effects. There were periods when the claimant decided on her own volition to come off her medication most notably between July and 17 September 2021. While she mentioned what seemed to be withdrawal effects there was no evidence about what difference there was in her ability to carry out normal day to day activities when not on medication. The claimant's evidence about her ability to do day to day activities did not appear to change between July and 17 September 2021. That was all the evidence that was provided to me.
41. In the absence of medical evidence, there was no arguable case that the deductive effect of discontinuance of her medication would have a substantial adverse effect on her day to day activities. There was insufficient evidence to determine how the claimant would be without her medication.
42. In these circumstances I was not convinced on the evidence before me that the actual and deducted effects on the claimant's abilities to carry out normal day to day activities were more than trivial.

*Was the substantial adverse effect long term?*

43. Having come to that conclusion while the claimant had a long term diagnosis of anxiety and depression there was not enough evidence for me to conclude that there was a substantial adverse effect and it was long term.
44. I therefore decided that the claimant was not a disabled person. in terms of section 6 of the Equality Act 2010 at the relevant time.



**Further procedure**

45. As the claimant still has a claim of associated disability discrimination and unfair dismissal. The case should be listed for a telephone case management to discuss the issues to be determined in the associated disability discrimination claim; to list the case for a final hearing; to make orders about exchanging documents; and the preparation of a file of documents for the final hearing.

Employment Judge: Shona MacLean  
Date of Judgment: 25 May 2022  
Entered in register: 26 May 2022  
and copied to parties