



EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4100323/2020 Preliminary Hearing (Open) by Cloud Video Platform
on 28 April 2022**

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Employment Judge: M A Macleod

Danielle Graham

**Claimant
Represented by
Mr A Watt
Solicitor**

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**Starfish 9 Limited trading as
Starfish Construction**

**Respondent
Represented by
Mr G Cunningham
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the claimant has failed to prove that she was, at the material time, a disabled person within the meaning of section 6 of the Equality Act 2010; and therefore, that the claimant's claim of disability discrimination is dismissed for want of jurisdiction.

REASONS

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- 1. The claimant presented a claim to the Employment Tribunal in which she complained that she had been unfairly dismissed and discriminated against on the grounds of sex and disability.**

2. The respondent submitted an ET3 to the Tribunal, in which they resisted all claims made by the claimant, and in particular, for the purposes of this Hearing, denied that the claimant was at the material time a person disabled within the meaning of section 6 of the Equality Act 2010.
- 5 3. A Preliminary Hearing (Open) was listed to take place by CVP on 28 and 29 April 2022. As it turned out, the Hearing concluded within the first day, 28 April 2022.
4. The claimant appeared and was represented by her solicitor, Mr A Watt. The respondent was represented by Ms Macdonald, solicitor.
- 10 5. A bundle of productions was produced to the Tribunal in electronic form, to which access was had by all parties, and which was shared on screen during the course of the Hearing.
6. The claimant gave evidence on her own account.
7. At the outset of the Hearing, Mr Watt, appearing for the claimant, applied to
15 postpone or adjourn the Hearing. He explained that he had only recently been instructed to appear at the Hearing for the claimant, and that he was double-booked, having a commitment to attend a Law Society of Scotland Collaborative Training course. He proposed that the Hearing be postponed, or alternatively be commenced and then adjourned at 11.30am until
20 11.30am on 29 April 2022, to take account not only of the training course but also of a court appearance to which he was already committed on that date.
8. The application was opposed by Ms Macdonald. She pointed out that the
25 application had been made twice in advance of the Hearing, and refused, and that no new reasons were given on which to grant the application now. She submitted that the commitment to the Tribunal took precedence over personal professional arrangements.
9. I determined the matter immediately. While I was sympathetic to the
30 claimant's solicitor in the predicament in which he found himself, I noted that the Hearing had been listed for some time, and that his two previous

applications for postponement had been refused on the same grounds. No new information had been presented to the Tribunal on which to alter the previous decisions made on this application, and accordingly, given the need to give priority to Tribunal Hearings over personal professional commitments, I refused the application and directed parties that the Hearing should proceed.

10. Having absorbed this decision, Mr Watt sought a short adjournment upon which to seek instructions, for approximately 10 minutes, which was granted unopposed.

11. The purpose of the Hearing was to determine whether or not the claimant is, and was at the material time, a disabled person within the meaning of section 6 of the Equality Act 2010.

12. Following the adjournment, the claimant gave evidence. The Tribunal was able to make the following findings in fact.

Findings in Fact

13. The claimant, whose date of birth is 10 April 1992, consulted a solicitor, Mr Anthony Cacace, of Messrs Barton & Hendry Solicitors, in order to seek advice as to her complaints against her former employers, the respondent. Having received that advice, she presented her claim to the Employment Tribunal.

14. The claimant suffers from hyperthyroidism and fibromyalgia. She also said that she has been prescribed medication in order to address her depression.

15. The claimant's employment was ended by letter dated 9 August 2018 (an error: the correct date was 9 August 2019) with immediate effect (33).

16. The claimant was diagnosed as suffering from fibromyalgia on 31 October 2019.

17. She had a holiday in New York, and after she returned from that holiday, in February 2019, she was very tired. She believed for a time that this was a symptom of jet lag following her return flight, but she began to suffer from excruciating pain in the soles of her feet from February 2019. Her medical records note that she attended a consultation on 21 March 2019 (7): “...no energy struggling to get up, on citalopram and feels anxiety much better though process better and getting on more. PLAN continue citalopram Bloods FBC b12 folate ferritin U&E LFT TFT gluc Vit D calcium pth”.
18. She continued to attend her GP over the succeeding months, complaining of swollen thyroid and pressure in throat when swallowing. It was noted on 13 June 2019 that her diagnosis was uncertain, and that she was complaining of multiple non-specific symptoms, though she continued to raise concerns relating to her thyroid. On 19 June 2019, she telephoned the surgery complaining of ongoing lethargy with headaches. On 5 August 2019, she was noted to have ongoing pains all over her body, and that she felt that the pain was getting worse. She was suffering from nausea and vomiting and a worse mood.
19. The claimant’s evidence was that she was diagnosed with fibromyalgia on 31 October 2019. It is recorded on 6 November 2019 (5) that she had seen the rheumatology specialist and had received a diagnosis of fibromyalgia, though the surgery was awaiting correspondence from the specialist. Similarly, on 21 November 2019, she contacted the surgery to advise that she was continue to experience lethargy and weakness. At that stage, nothing had been received by way of correspondence from the hospital in relation to the diagnosis.
20. Prior to her diagnosis, the claimant’s attendance at work was good. In January 2019, she required to take some days off in order to look after her son who was unwell. She felt she could not take time off due to the nature of her sales role, and she said that she “just ploughed through”.

21. She summarised her condition as having started with the pain in her feet, and affecting her limbs, together with nausea, fatigue, forgetfulness and finding it hard to cope with an intense job.

5 22. The claimant had advised the respondent about her illnesses, and she was absent from work for a period after the end of June 2019. She did not have a term for her condition until she received the diagnosis of fibromyalgia on 31 October 2019.

Submissions

10 23. For the claimant, Mr Watt made a brief oral submission. He submitted that the claimant's evidence was given in a very straightforward, honest manner, and that her evidence was credible and reliable.

15 24. He invited the Tribunal to conclude that the claimant was disabled under the meaning of the Equality Act 2010. The claimant suffers from a condition which impinges upon her day-to-day living, which she confirmed. She suffers from a disability, that is, a substantial, long term impairment, and she continues to suffer from those health issues.

25. For the respondent, Mr Cunningham also made a brief oral submission. He invited the Tribunal to find that the claimant does not have a disability in terms of the 2010 Act.

20 26. He argued that the onus of proof rests on the claimant to prove on the balance of probabilities that she has a relevant impairment within the statutory definition (**McNicoll v Balfour Beatty Rail Maintenance Ltd 2002 ICR 1498, at paragraph 19**).

25 27. Mr Cunningham said that the claimant's medical condition seems to be a physical impairment, which is fibromyalgia. He submitted that the evidence did not really establish whether the claimant suffers from a condition which has an adverse effect on her ability to carry out normal day-to-day activities, though the claimant did refer to her pain, swelling, nausea and forgetfulness.

28. He then addressed the question of whether her condition had a long-term effect upon her ability to carry out such activities, and proposed that the Tribunal must focus upon the point of the alleged discrimination. Based on the evidence, the last act upon which the claimant relies is 10 August 2019. Her symptoms did not begin until February 2019, and accordingly, at the date of dismissal, her symptoms had not affected her for 12 months or more. The Tribunal must therefore make a prediction, based on the evidence, as to the length for which it was likely to continue.

29. Mr Cunningham argued that the Tribunal is not entitled to have regard to events after the alleged discrimination to determine whether it did or would have lasted more than 12 months (**All Answers Ltd v Mr W & Another 2021 IRLR 612, paragraph 26**).

30. He submitted that on the evidence, and particularly in light of the lack of medical evidence available, there is no basis upon which the Tribunal can find that the claimant's condition was likely to last more than 12 months or more as at the date of the discrimination alleged.

31. As a result, Mr Cunningham invited the Tribunal to dismiss the claimant's disability discrimination claims, on the basis that the claimant has not proved that she was at the material time a disabled person.

20 **Discussion and Decision**

32. The Tribunal must determine a number of matters, based on the evidence available, in considering whether or not the claimant was at the material time a disabled person within the meaning of section 6 of the Equality Act 2010.

33. The definition of disability is set out as follows in section 6(1) of the 2010 Act:

"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."

34. In this case, although there was mention of the claimant suffering at times from hyperthyroidism and depression, it is plain that the condition relied upon as a disability is that of fibromyalgia, a physical impairment.

5 35. The claimant's evidence indicated that the condition has an adverse effect upon her – she suffers from pain in the feet, swelling, nausea and forgetfulness – but it is not clear to what extent it can be described as substantial (meaning more than trivial). The evidence did not specify its effect on her day-to-day activities in much detail. I found the claimant, however, to be a credible and honest witness, and I was prepared to accept
10 that while her evidence was general, she was conveying to the Tribunal a sense that her condition, whose name she did not know until after her employment ended, was a substantial one which had a very adverse effect on her ability to carry out normal activities. It is clear that she has suffered considerably due to this condition, notwithstanding the fact that she has
15 been able to “plough through” and continue to attend work.

36. I agree with Mr Cunningham's submission, however, that the critical focus in this case is upon whether or not her condition is one which was long-term at the time when the alleged discrimination took place, that is, in August 2019. I take into account the helpful and relevant Judgment in **All Answers Ltd**,
20 at paragraph 26, to which he referred me:

*“The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making
25 an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in McDougall v Richmond Adult Community College: see per Pill LJ (with whom Sedley LJ agreed) at paragraphs 22 to 25 and Rimer LJ at
30 paragraphs 30-35. That case involved the question of whether the effect of*

an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase "likely to last at least 12 months" in paragraph 2(1)(b) of the Schedule. I note that that interpretation is consistent with paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act which states that in assessing the likelihood of an effect lasting for 12 months, "account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood".

37. As at 10 August 2019, the claimant had suffered from a number of symptoms, which commenced in January 2019 on her return from a trip to New York. Initially, her symptoms were pain in the soles of her feet and fatigue. In time, those symptoms were joined by nausea and forgetfulness. Accordingly, as at the date of the alleged discrimination, she had not suffered from the physical impairment for more than 12 months.

38. Whether it was likely to last more than 12 months is the critical question here. In my judgment, it is impossible to say on the evidence that at that date, it was likely that her condition would last more than 12 months. Taking into account what was known at that time, the claimant had suffered from symptoms relating to this condition, so far as the Tribunal is aware, from January 2019 until August 2019; there was no diagnosis available to the claimant, and accordingly it was not known to anyone at that time whether her condition would be likely to last 12 months from the first symptoms appearing; the claimant had not been absent for significant periods during that time until June, and her attendance to that point was good. I was not presented with any medical evidence beyond the bare medical records from her GP, which lack any context or explanation without the GP speaking to them, and no medical reports were produced in order to assist the Tribunal in this matter.

39. Taking all of this together, then, it is my judgment that the claimant has not proved on the balance of probabilities that the condition of fibromyalgia from which she suffers amounted to a disability at the material time, and accordingly the Tribunal lacks the jurisdiction to hear her claim of disability discrimination, which is therefore dismissed.

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Employment Judge: Murdo Macleod

Date of Judgment: 23 June 2022

Entered in register: 27 June 2022

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and copied to parties