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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102981/2020 (V)

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Held on 11 February 2022 (By CVP)

Employment Judge: J Young

15 **DR**

**Claimant
In Person**

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Automobile Association Developments Ltd

**Respondent
Represented by:
Mr C Ludlow -
Counsel
Instructed by:
Penningtons Manches
Cooper, Solicitors**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the claimant is not a disabled person within the meaning of section 6 of the Equality Act 2010.

REASONS

Introduction

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1. In this case the claimant presented a claim to the Employment Tribunal on 29 May 2020 complaining that he had been unfairly dismissed; that he was due notice pay and that he had been discriminated against because of the

protected characteristic of disability. He maintained that the disability was by reason of the mental impairment of depression.

2. The respondents admitted dismissal but denied that it was unfair maintaining that the claimant failed to follow policy and procedure such that they were
5 entitled to dismissal by reason of gross misconduct without notice or pay in lieu of notice. It was also denied that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 (“the Equality Act”).

3. After a Preliminary Hearing to discuss case management issues the claimant provided a Disability Impact statement and medical records giving further
10 information. While the respondent considered those documents they were not of the view that the claimant was a disabled person as defined and so this Preliminary Hearing was set to consider that issue. None of the elements of the definition of disability were conceded. Therefore the following issues required to be determined:-

- 15 1. Did the claimant have a mental impairment.
2. If so, over what period.
3. If so, did that impairment have an adverse effect on his ability to carry out normal day to day activities.
4. If so, was that effect substantial (as in more than minor or trivial).
- 20 5. If so, was the effect long term.

The Hearing

4. At the hearing the claimant gave evidence along with Sam Alcorn, Area
25 Manager with the respondent since April 2008. No order had been made for witness statements from Mr Alcorn but he produced a statement which had recently been intimated to the claimant and after discussion it was agreed that the witness statement could be utilised. Mr Alcorn adopted as true and accurate that witness statement extending to four pages and also answered questions in cross-examination.

Documents

5. The parties had helpfully liaised in providing a joint file of documents paginated 4 – 210 (J4 – J210).

6. From the evidence led admissions made and documents produced the Tribunal were able to make findings in relation to the issues.

Findings in Fact

7. The respondent is part of the Automobile Association Group providing amongst other things breakdown cover/assistance to drivers of motor vehicles.

8. The claimant was employed from 27 September 2010 as a Roadside Technician/Patrol Person and his work involved dealing with roadside breakdowns repairing where possible, including temporary repairs, or making recovery as necessary. That employment came to an end on 2 April 2020.

9. The timeline in relation to investigation and hearing leading up to the dismissal of the claimant (all of which he regarded as unfair and upon which no comment is made in respect of this Judgment) was:-

(a) 26 February 2020 – email to claimant from Sam Alcorn regarding prospective meeting on 27 February 2020 regarding reports for job times.

(b) 27 February 2020 – meeting amongst claimant, Sam Alcorn and George Philip regarding reports in the respondent's system.

(c) 3 March 2020 – invitation to claimant to attend disciplinary hearing on 12 March 2020 which later rearranged to 19 March 2020.

(d) 19 March 2020 – disciplinary hearing.

(e) 27 March 2020 – invite to further hearing on 2 April 2020.

(f) 2 April 2020 – second disciplinary hearing when claimant dismissed.

(g) 5 April 2020 – claimant appeals decision.

(h) 21 April 2020 – appeal heard.

(i) 24 April 2020 – appeal decision intimated to claimant upholding decision to dismiss.

5 10. It would appear that the incidents upon which the respondent relied in the disciplinary process (paragraph 13 of ET3 – J41) were on 1 November 2019, 18 December 2019, 31 December 2019 and 21 January 2020.

11. Under reference to his Disability Impact statement (J54/55) the claimant explained that he had been “*battling from early 2018*” from depression and that continued until at least the lodging of that statement being 8 September
10 2020. He believed that had been aggravated by the actings of the respondent.

12. There were a number of matters which had “*got on top of him*” from early 2018.

15 13. He had purchased a new build property around February 2018 and there were various completion, snagging and boundary issues which weighed on him.

14. On the first half of 2018 the claimant had been party to a “WhatsApp” group with work colleagues and an issue had arisen regarding comments made. That resulted in an investigation by the respondent and the claimant being
20 disciplined with the issue of a final written warning in August 2018. That affected his mental state.

15. In around July 2018 his wife fell pregnant unexpectedly and he was concerned how that would affect the family financially. His wife had a difficult pregnancy which added to his worries. His wife gave birth to a son in March 2019.

25 16. Through 2019 financial worries with his large mortgage and continuing difficulty with the house builder affected his mood. He stated he found that his concentration was poor and when reading that he was not “*taking it in*”. He struggled to “*concentrate on the job in hand*” as he “*kept thinking about*

things". On one occasion he recalled attending a breakdown at the headquarters of the builder within whom he was in dispute and after dealing with the customer "*burst into tears*".

- 5 17. In December 2019 he was made aware that a volunteer football coach had been allegedly touching a "*friend of a friend's 9 year old daughter*". He had been concerned whether his son had been affected in any way. He had asked his son about the matter but his son had considered he was "*getting into trouble*" and it was not resolved.
- 10 18. In an email to his manager of 17 March 2020 prior to his disciplinary hearing he had outlined these matters (J166/168).
- 15 19. He considered that the respondent would be aware of his low mood and depressive symptoms because at a "work social" evening at the end of November 2019 he explained this to his performance leader Paul McCrory who had told him "*not to worry- doing a great job*". At that time he had received a number of commendations being reports from customers of good service. Mr Alcorn advised that he had sought feedback on that event from Mr McCrory who advised him that the claimant had said he was having issues with his house builder but there was no indication that he was suffering from any mental health issues.
- 20 20. The claimant suffered an injury on 3 November 2018 and he instructed his solicitors to make a claim in that respect (J128). He indicated that it was straightforward to deal with that matter on the telephone with the solicitors concerned.
- 25 21. The claimant was not absent from work with any diagnosis of depression in the period February 2018 through to a Statement of Fitness to Work being issued 25 March 2020. That Statement (J102) advised the claimant was not fit for work until 9 April 2020. Further Statements were issued indicating continued unfitness for work until he found further work around September 2020.

22. The claimant joined “the McGlone Practice” around July 2018 at which time he completed a “*new patient medical questionnaire*”(J136/137) He advised at that time that he did not suffer from any of the specified illnesses or “*any other illnesses*”.

5 **Medical records**

23. The medical records of the claimant (J88/95) disclosed that in 2018 the claimant visited his doctor on two occasions namely 30 July and 6 November 2018 for back strain and ankle strain. He made no complaint of depression on those occasions.

10 24. He attended his doctor in 2019 to arrange a vasectomy with contact being made over March/November 2019 on that matter. Again he made no representation regarding depression. The claimant advised that he had not mentioned depression when seeking information and arrangements for a vasectomy because he felt that if he indicated he was suffering from
15 depression that may have affected his chances of obtaining the appropriate procedure.

25. He attended his doctor on 2 March 2020 complaining of low mood “*for a number of months*” regarding difficulties at home and worry and that he was “*facing disciplinary action from work*” and that he did not “*have the same
20 enjoyment out of going to football etc*”. At that time he was prescribed Sertraline 50mg and that medication increased to 100mg on 9 April 2020.

26. On 4 June 2020 he attended his doctor to advise that his mood remained low which “*largely centred around recent dismissal from work and various
25 personal problems discussed... on 2 March 2020*”. He stated that he felt his “*difficulties started ~ June 2018*”.

27. The McGlone practice had supplied two letters addressed “*to whom it may concern*” on the claimant’s medical condition. One was dated 2 March 2020 (J80) and the other undated (J66)) These advised that the claimant attended “*the practice for symptoms of depression including low mood, difficulty
30 sleeping and difficulty concentrating. He first attended on 2/3/20 but reported*

that the symptoms had been ongoing for a number of months” It was reported he was prescribed sertraline on 2/3/20 and that it was *“recommended that patients continue on antidepressants for at least 6 months. He was also given information about local counselling services”*

5 28. It was suggested to the claimant that he had not been suffering from any mental issues to a significant extent and only when he faced disciplinary action did he tell his doctor. The claimant agreed that he was unaware of any problems or that mental health had been affecting his work until the disciplinary action but then realised that was the case.

10 29. The claimant’s interests were in his family, taking his son to football and other sporting activities such as swimming, attending football matches on a fairly regular basis, and socialising with friends, He continued to be involved in those matters throughout 2018/2019 and 2020. He *“struggled to think”* of any activities that he was not able to do either in or out of the workplace. He
15 advised that he had not attended any counselling services or other such therapy in respect of his mental condition..

30. An Occupational Health appointment was made for the claimant by the respondent on 7 April 2020. However that appointment was made subsequent to dismissal when the claimant was unable to access work emails
20 and so he was unaware of the appointment.

Submissions

31. Each party provided submissions on the matter and no disrespect is intended in making a summary.

Claimant

25 32. The claimant pointed out that the lack of any witness statement from Paul McCrory was detrimental to the evidence provided by Mr Alcorn who could only speak to what Mr McCrory would or should have done in following any procedures or providing feedback. In that respect much of Mr Alcorn’s evidence could be disregarded.

33. The claimant emphasised his mental health had been affected since 2018. He was unaware of how badly affected he was until around February 2020 when the investigation commenced in respect of incidents which took place at the end of 2019.

5 34. While the respondent stated that they were unaware of his mental condition that was not the case. He had pointed out difficulties to Mr McCrory and the respondents should have been aware of his condition.

35. While there had been a focus on the past the true test was whether his disability was "*likely to last for a year*" and that was the case given the length
10 of time he had been prescribed medication. If the respondent had organised an occupational health appointment during the period of the investigation and disciplinary then they would certainly have been aware of his condition.

Respondent's submissions

36. Mr Ludlow identified the relevant legal tests he considered should be applied
15 to identify whether an individual was disabled as defined in section 6 of the Equality Act.

37. From the evidence it was submitted that the claimant had not been suffering from any symptoms of depression prior to 2 March 2020 by which date the disciplinary investigation against him had commenced.

20 38. It was submitted that there was insufficient evidence for the Tribunal to conclude that either the claimant's alleged depression had lasted for twelve months or was likely to do so.

39. The medical records contained no evidence that the claimant had been
25 suffering from mental health issues prior to 2 March 2020. He had various consultations with his GP in 2018/2019 but none of them had raised any mental health issues or symptoms.

40. When the claimant was under investigation on the "WhatsApp" issue in August 2018 he made no reference to mental health issues.

41. The respondent was not informed of any diagnosis of depression until 17 March 2020 by which time a disciplinary procedure had commenced subsequent to an investigation.
42. Even if there were mental health issues affecting the claimant they were not “*substantial*”. There was no evidence that there was any substantial effect on day to day activities.
43. At the time of the investigation and disciplinary action the Statement of Fitness for work dated 25 March 2020 assessed him as not being fit for work only for a short period until 9 April 2020. There was no evidence that the condition was likely to be long term.
44. It was submitted that the claimant’s credibility was undermined by him claiming that making reference to his mental health issues would undermine the request for vasectomy treatment.
45. In short there was a lack of evidence to suggest that depressive symptoms were substantial or long term. The claimant had struggled to recall any activities that he could not do as a result of his symptoms either at work or in his home life.

Discussion and Conclusions

Relevant Law

46. The Equality Act 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 normal day to day activities*” (s.6(1)). The burden of proof is on the claimant to show that he or she satisfies this definition.
47. Although the definition in section 6(1) is the starting point for establishing the meaning of “*disability*” supplementary provisions for determining whether a person has a disability are found in Part 1 of Schedule 1 to the Equality Act. In addition the government has issued “Guidance on matters to be taken into account in determining questions relating to the definition of disability” (2011)

(“the Guidance”) under section 6(5) of the Equality Act 2010. The Guidance does not impose any legal obligation in itself but Tribunals must take account of it where relevant.

5 48. The time to which to assess disability (namely 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 Ltd** [2002] ICR 729.) This is also the material time in determining whether an impairment has a long term effect.

10 49. A step by step approach has been approved in considering the tests which apply namely:-

- Did the claimant have a mental and/or physical impairment? (the “impairment condition”).
- Did the impairment affect the claimant’s ability to carry out normal day to day activities? (the “adverse effect condition”)
- 15 • Was the adverse condition substantial? (the “substantial condition”)
- Was the adverse condition long term? (the “long term condition”) – see **Goodwin v Patent Office** [1999] ICR 302

20 50. Depression affects a person’s physical state mood and thought process and is an illness that requires treatment. It can manifest itself in many different forms and is potentially capable of constituting a disability. However it may be that an individual’s depression is not serious enough to constitute a disability. It may be that symptoms are not severe enough to amount to a physical or mental impairment; or that depression does not have a substantial effect on their ability to carry out normal day to day activities; or that the illness
25 does not last, or is not likely to last, for at least twelve months.

51. In **Aderemi v London and South Eastern Railway Ltd** [2013] ICR 591 it was said that a Tribunal has to consider whether there is an adverse effect and that it is an adverse effect not upon a person carrying out normal day to

day activities but on his ability to do so. Because *“the effect is adverse, the focus of a Tribunal must necessarily be upon that which a claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that is adverse, that it is an effect upon his ability, that is to carry out normal day to day activities, a Tribunal has then to assess whether that is or not substantial”*.

52. In assessing whether the effect is substantial section 212 of the Equality Act advises that means *“more than minor or trivial”*.

53. The Guidance provides that the meaning of *“likely”* is relevant when determining whether an impairment has a long term effect, In that context *““likely” should be interpreted as meaning “could well happen”*”. The Guidance also provides that:-

“In assessing the likelihood of an effect lasting for twelve 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. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example general state of health or age).”

20 **Conclusions**

54. The evidence was insufficient to make any finding that the claimant had suffered from depression until his diagnosis on 2 March 2020.

55. The claimant referred to various matters which were impinging on him in the course of 2018/2019 and while it is accepted that he would have worries and concerns I do not consider that there was sufficient evidence to suggest that he was suffering from a mental impairment which had a substantial effect on his day to day activities.

56. There was no absence from work in the period on account of any mental health impairment. He attended his doctor on 30 July 2018; 6 November 2018

regarding a back strain and ankle injury but made no reference to any mental health impairment at that time. In the course of 2019 there were various interactions with his doctor over March/May/November 2019 but no reference to his mental health or that he may be suffering from low mood or depression.

5 57. Also when he joined the McGlone Practice in July 2019 and completed the necessary forms he advised that he had no illnesses.

58. Additionally as he indicated in his evidence he "*struggled to think*" of any day to day activities which he could not do as a consequence of his mood. While the claimant referred to difficulty in reading and concentration there was
10 nothing to establish that he was unable to carry out any activities either in the workplace or in his home life as a consequence. He stated he would be "*thinking of other things*" and have to re-read items but I did not consider that these issues were more than minor and would come within the definition of substantial adverse effect.

15 59. There were also certain inconsistencies in his evidence, as submitted, as to when any depression may have overtaken the claimant. In his Disability Impact statement he stated that he had "*been battling from early 2018*" with mental health issues but his medical notes indicate that on 4 August 2020 he states that difficulties "*started in around June 2018*" and at the consultation
20 on 2 March 2020 his low mood had been "*ongoing for a number of months*".

60. While it was maintained by the claimant that he had made reference to his worries to Mr McCrory in November 2019 there was insufficient evidence to establish that he had made any particular reference to depression or mental health issues or sought any assistance in that respect. He may have
25 explained his worries but there was not enough to suggest he had been clear in identifying any mental health issues.

61. A Tribunal can infer from a diagnosis of depression that the condition may have been in existence for some time. However in this case it was not possible from the evidence to conclude that in the period early 2018 – March
30 2020 the claimant had exhibited symptoms to satisfy the onus of proof on him

that he was a disabled person. There was not enough to establish that the claimant had in that period a mental impairment which had a substantial and long term adverse effect on his ability to carry out normal day to day activities.

5 62. The claimant was diagnosed with depression from his doctor on 2 March 2020. He then was diagnosed with a mental impairment. This was subsequent to the investigation which ultimately led to dismissal. As indicated depression on its own would not establish disability. There would require to be further symptoms showing a "*substantial adverse effect on day to day activities*".

10 63. Again in this period namely March/early April 2020 I did not find that it was established that there was any adverse effect on day to day activities which were substantial. The claimant was asked but did not identify any activity which he could not do as a consequence of the diagnosis. There was nothing to suggest that to that point he had been unable to conduct day to day
15 activities. It is accepted that he would have concerns and worries which would lead to the diagnosis but there was an absence of evidence of how that affected his day to day activities to meet the requirement that any adverse effect was substantial.

20 64. In assessing whether or not a mental impairment is likely to be long term it is necessary to consider the matter at the time of the alleged discriminatory acts namely March/early April 2020 rather than the date of the Tribunal.

25 65. At the relevant time the claimant received a Statement of Fitness to Work to expire 9 April 2020. The letter from his GP dated 2 March 2020 (J80) stated that the claimant was being "*reviewed and treated for low mood*" which would not suggest long term effect. The further letter from his GP (J66) indicated that it was "*recommended that patients continue on anti-depressants for at least six months*". That would not establish the condition was likely to last for twelve months. The claimant would appear otherwise healthy and there were no surrounding circumstances which would suggest that this was a long term
30 issue. There was a lack of medical evidence to suggest that at the relevant

time there was enough to base a finding that it “*could well happen*” that depression would last for twelve months.

5 66. I was not then satisfied that the impairment diagnosed on 2 March 2020 (1) had an adverse effect on any day to day activities which was substantial and (2) in any event that any adverse effect was likely to be long term. In those circumstances I did not conclude that the claimant was a disabled person within the definition of section 6 of the Equality Act.

10 67. That would mean that the case should proceed to a hearing on the issue of unfair dismissal alone. There would not appear to be any further preliminary issues requiring attention prior to fixing a final hearing on that matter. It would then be appropriate for the Tribunal to send to parties a date listing stencil identifying the period when it would be intended to bring the case out for a hearing and for parties to identify the likely length of that hearing and their and witness availability.

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20 **Employment Judge: J Young**
Date of Judgment: 03 March 2022
Entered in register: 04 March 2022
and copied to parties

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