



EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Judgment of the Employment Tribunal in Case No 4103223/2022 Following
Open Preliminary Hearing Held at Edinburgh on the 30th of November 2022**

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Employment Judge J G d'Inverno

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Mr C Rodger

**Claimant
In Person**

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Forestry and Land Scotland

**Respondent
Represented by:
Mr R Byron, Solicitor
per Harper MacLeod
Solicitors**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:-

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(First) At the material times for the purposes of his complaints of
Discrimination, the claimant was not a person possessing the protected
characteristic of Disability in terms of section 6 of the Equality Act 2010.

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(Second) The claimant lacking Title to Present and the Tribunal lacking
Jurisdiction to Consider his complaints of Discrimination because of the

protected characteristic of Disability, the same are dismissed for want of Title and Jurisdiction.

IMPORTANT INFORMATION ABOUT ORDERS

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(1) You may make an application under Rule 29 for this order to be varied, suspended or set aside. Your application should set out the reason why you say that the order should be varied, suspended or set aside. **You must confirm when making the application that you have copied it to the other party(ies) and notified them that they should provide the Tribunal with any objections to the application as soon as possible.**

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(2) If this order is not complied with, the Tribunal may make an order under Rule 76(2) for expenses or preparation time against the party in default.

(3) If this order is not complied with, the Tribunal may strike out the whole or part of the claim or response under Rule 37.

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(4) Any person who without reasonable excuse fails to comply with this order shall be liable on summary conviction to a fine of £1,000.00.

(5) If you have no documents which fall into the category described above you should notify the Tribunal in writing immediately.

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(6) If you claim confidentiality for any of the documents you should notify the Tribunal of this and send copies of the documents to the Tribunal in a sealed envelope.

REASONS

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1. This case called at Open Preliminary Hearing at Edinburgh further to the Tribunal's Orders of 7th October 2022; for determination of the following Preliminary Issues:-

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(First) Whether the claimant was a person possessing the protected characteristic of Disability, in terms of section 6 of the Equality Act 2010 ("EqA"), at the material times for the purposes of his claims the same being, in respect of the alleged discriminatory acts given notice of, variously in relation to:-

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- (i) the Performance Improvement Plan issues: December 2019 to January 2021;
 - (ii) the disciplinary process issue: November 2021 to January 2022;
 - (iii) the Occupational Health Report issue: in March 2022; and, in terms of his Application for Leave to Amend:-
 - 10 (iv) RRA/TRA issue: November 2020 to April 2022; and
 - (v) the Line Manager move issue: from October 2020 to March 2022; and

15 **(Second)** Determination of the claimant's Application for Leave to Amend dated 6th September 2022.

2. The claimant's Application for Leave to Amend is dealt with in the separate Determination of the Tribunal signed and issued to parties of even date. This
20 Judgment and this Note of Reasons relates solely to the disposal of the Preliminary Issue of Disability Status.

Sources of oral and documentary evidence

25 3. The hearing proceeded "In Person". The claimant appeared on his own behalf. The respondent was represented by Mr Byron, Solicitor.

4. The claimant gave evidence, on oath, on his own behalf and answered questions put in cross examination and questions from the Tribunal.

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5. Each party addressed the Tribunal in submission.

6. Parties lodged a Joint Bundle of Documents extending to some 86 pages to which there was added, of consent and on intimation prior to the Hearing, an

additional Fit Note for the claimant dated 25th January 2021 covering the period to 28th January 2021; and, by the claimant in the course of giving his evidence and received subject to the respondent's objections for lack of fair notice, pages 88 and 89, these being standard form emails advising the claimant, respectively on the 26th of January 21 and the 9th of March 2022, that he had been referred to the computerised "Cognitive Behavioural Therapy Programme".

7. On the oral and documentary evidence presented the Tribunal made the following essential Findings in Fact restricted to those relevant and necessary to the determination of the issues before it.

Findings in Fact

15 Did the Claimant have the Mental Impairment Relied upon at the Material Times

8. The stress and anxiety experienced by the claimant was in part attributable to the extension of his probationary period.

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9. The claimant accepted in cross examination that it would not be uncommon for persons generally to experience some stress or anxiety at the prospect of a probationary period of employment being extended.

10. The extended period of lockdown associated with the Covid pandemic, during which period the claimant continued to self isolate and work from home, and the extension of his probationary period, were factors causing the claimant stress at the material times.

11. The claimant felt that the workload which he had undertaken led to him "burning out".

12. The claimant accepted in cross examination that such burn out was something also experienced by other workers facing an onerous workload.

13. The claimant's firm conviction and position in evidence was the symptoms of 'stress and anxiety/'depression'" which he asserts he variously experienced at times during his employment, were all caused by the events which he was experiencing in the workplace. The claimant repeatedly asserted that causal connection throughout his evidence in chief and in cross examination.
14. The claimant's reaction in those terms, to the circumstances which he perceived as adverse, was one which was entrenched in his evidence.
15. In the claimant's perception and analysis, the symptoms upon which he relied for the purposes of evidencing his possession of the protected characteristic of Disability were all caused, and were exclusively caused, by work events.
16. The mental impairment given notice of as relied upon by the claimant is "stress, anxiety and depression". It is against that asserted impairment that the issue of disability status must be determined.
17. At no point across the material time periods was the claimant diagnosed with clinical depression.
18. Such "depression" as has been from time to time identified by the claimant results from his adverse reaction to circumstances experienced by him.
19. The stress experienced by the claimant was a result of unhappiness with a decision taken by the respondents or of unhappiness with a particular colleague. It was not of itself a mental impairment.
20. The claimant did not have the impairment of which he gives notice of relying on, that is the impairment of "stress, anxiety and depression" at all the relevant times for the purposes of his complaints.
21. Taken at its highest, and assuming for the purposes of this hearing that the claimant proves all that he offers to prove, the claimant's evidence only goes

to his experiencing part of, that is to say some but not all of the three elements of either “stress, anxiety and depression”, at the particular material times, for the purposes of his complaints; viz

5 (a) In relation to the Performance Improvement Plan issue, (December 2019 to January 2021);- the claimant did not evidence any “stress” until March 2020. His certified absence for a “stress related problem” did not emerge until January 2021. There was no evidence that went to establish the
10 presence of the other constituent elements of the impairment relied upon, namely anxiety and or depression, at that point in time or at those material times.

15 (b) In relation to the Disciplinary Process issue (November 2021 to January 2022), at no point during that period was the claimant signed off sick from work. There had been an Occupational Health Report in February 2021, that had found that the claimant was suffering from “*stress at work*” at the period of time covered by the Report. However the examining Medical Reporter does not identify the presence of either of the other two elements of
20 the impairment relied upon namely, anxiety or depression.

25 (c) In relation to the Occupational Health Report issue (March 2022), the claimant was diagnosed with “anxiousness” and signed off work by his GP for a 13 day period from 14th March to 27th March 2022. His GP prescribed for him at that time a course of medication which, amongst its other uses, is used as an antidepressant. His GP made no diagnosis of depression but rather a diagnosis of “anxiousness”. Nor, at that time did his
30 GP diagnose the other element of the relied upon impairment namely “stress”.

(d) In relation to the RRA/TRA issue (November 2020 to April 2022), the claimant was absent from work in that period on two

isolated occasions namely one in February 2021 and one in March 2022, both short term. The evidence presented indicates that the claimant was suffering from “stress” in those periods of absence. There was no diagnosis or indication of “depression” and it is not until later in the period i.e. in the two weeks 14th to 27th March that the question of “anxiousness” or anxiety is referred to. (ET1).

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(e) In relation to the Line Manager move issue (October 2020 to March 2022), the evidence supports only the presence of one element of the relied upon impairment namely “stress”. There is no or insufficient evidence to support the presence of depression and in relation to stress none until the end of the period 14 to 27 March 2022.

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22. On the evidence presented the claimant has failed to establish, on the balance of probabilities, that he “had” in terms of section 6 EqA the relied upon impairment, at the material times, as opposed to, from time to time, his experiencing symptoms of one or other of its asserted elements, at those material times, in respect of any of his complaints. (Occupational Health Report of 31st March 2022).

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Does the impairment affect the claimant’s ability to carry out day to day activities?

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23. The adverse effects which the claimant asserted in evidence he experienced as a result of the mental impairment and of which he gives notice are:-

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(a) *“I struggle to get out of bed, did not complete basic hygienic tasks, no motivation, felt dead inside. Cut myself off from my family, withdrew and spent more time crying and feeling in a constant state of despair and always feeling on the edge.”*

- (b) *“I firmly believe that one of the reactions to debilitating impairment manifested itself through my eczema, where it has not been as bad before.”*
- 5 (c) *“I was under an enormous amount of stress and anxiety. This did manifest itself in physical and psychological symptoms”*
- (d) *“Chris discussed struggling to switch off from work and struggling to sleep at night. Chris has experienced several absences with stress related illness”* (Occupational Health Report of 26th February 2021).
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- (e) *“He can still have days where he feels low in mood and stressed”* (Occupational Health Report of 26th February 2021).
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- (f) *“Last night dreaded? stomach about going about (sic) back to work. Feeling broken?/damaged. No motivation to do things”* (Medical Records 25th January 2021).
- (g) *“Not left flat for past week”* (Medical Records 25th January 2021 entry).
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- (h) *“Note drinking more. Bottle of wine in the evenings”* (Medical Records 14th March 2022).

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24. Whereas, on the one hand, the claimant has pled (offered to prove) that the adverse effects outlined at sub-paragraph (a) above had lasted from the period November 2020 to April 2022, the evidence presented fell far short of what would be required to establish the same. On the other hand the

30 evidence showed that during that period the claimant did not seek treatment, giving rise to an inference that the effects either were not permanently and continuously being experienced by him, or that their impact was not substantial in relation to his ability to carry out day to day activities.

25. The medical treatment which he received, the effect of which falls to be discounted when considering adverse effects, was limited to medication for a single two month period between March 2022 and May 2022.
- 5 26. The claimant neither offers to prove, nor did he present evidence which went to demonstrate, a substantial adverse effect on his day to day activities beyond that which would be expected to be experienced by many people in the context of Covid induced lockdown.
- 10 27. Making allowance for removal of the environmental impact of Covid the evidence presented did not go to establish that such adverse impact which the claimant experienced went beyond the normal differences that can be seen to exist between people.
- 15 28. On the evidence presented the claimant has failed to establish, on the balance of probabilities, that the asserted mental impairment relied upon had a substantial adverse impact on his ability to carry out day to day activities.

20 **Was the effect long term?**

29. Under paragraph 2 Part 1 Schedule 1 of the Equality Act 2010, the effective impairment is long term if:-
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- It has lasted at least 12 months; or
 - Where the total period for which it lasts, from the time of the first onset, is likely to be at least 12 months; or
 - Which is likely to last for the rest of the life of the person affected.
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30. Within his written response to the request for further specification (Further Particulars of Claim which were received by the Tribunal) the claimant gave notice of offering to prove that the adverse effects upon which he relied

commenced in November 2020 which, let it be assumed for the purposes of the Open Preliminary Hearing the claimant established, leads to the consequence that the possession of the protected characteristic could not be established from earlier than that date or be applicable in respect of any alleged discriminatory act or omission of the respondent until, on or after
5 November 2021.

31. When the claimant became aware of that consequence in the course of giving his evidence, he sought to depart from the position of which he had given notice, asserting that what he had meant to say in the written
10 Particulars presented by him was that the adverse effects started in 2019.

32. On the evidence presented and in terms of the case of which the claimant gives notice, the effects relied upon by him appear to be experienced in consequence of individual instances of work or home stressors. Such
15 individual acts, and the claimant's reaction to them, do not constitute ongoing and long term impairment. Separately, and in any event, not all of the instances relied upon are said to be as a result of the asserted impairment of "stress, anxiety and depression", but are often said to have been effects
20 resulting from a stressor involving only one of those components; viz

(a) In relation to the Performance Improvement Plan issue:
December 2019-January 2021:-

25 There is no mention of any stress until March 2020. Further, the absence for a "*stress related problem*", did not occur until the end of that period 25th January 2021. The particular adverse effect had not lasted for 12 months at that point nor could it be said that it was likely to have done. The
30 Occupational Health Report indicated that the effect was not likely to recur.

(b) The Disciplinary Process Issue: November 2021-January 2022.

5 During that material period of time, the claimant was not signed off sick. Whilst there had been an Occupational Health Report in February 2021 that indicated that the claimant was suffering from stress at work at that particular period of time. And not in consequence of the relied upon impairment. Further, that the adverse effect (impact) experienced by the claimant at that material time had not lasted for 12 months nor could it be said it was likely to have.

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(c) The Occupational Health Report: March 2022

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The claimant was diagnosed with “anxiousness” and signed off from work during the 14 day period from 14th March to 27th March 2022. Although his GP prescribed him at that time with a two month course of medication which, amongst for other purposes is prescribed as an antidepressant, his GP makes no diagnosis of depression. The adverse effect (impact) experienced by the claimant at that material time had not lasted for 12 months and nor can it be said was it likely to have done.

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(d) The RRA/TRA Issue: November 2020-April 2022

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There were two distinct periods of absence which occurred in that period. Both were short term, the first in February of 2021 and the second in March of 2022 separated by over 12 months. While there was evidence of stress occurring during that period it was not until the end of that period i.e. March 2022 that “anxiousness” or anxiety is first diagnosed by the claimant’s GP or otherwise referred to. The adverse effects (impact) experienced by the claimant in that period did not last for 12 months nor can it be said they were likely to have done.

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(e) The Line Manager Move Issue: October 2020-March 2022

5 In that period earlier referred to short term absences occurred that is, the first in February 2021 and the second in March 2022 over the year. Whilst there was evidence of stress being experienced in that period it was not until the end of the period that is March 2022 that anxiousness was first diagnosed by the claimant's GP or was otherwise referred to. The adverse effects (impact) experienced by the claimant in the period had not lasted for 12 months nor can it be said that it was likely to have done.

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Summary of Submissions

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For the Respondent

The respondent's representative having addressed the Tribunal on the evidence made reference to the case of **Goodwin v Patent Office** ICR 302 EAT and to the guidance set out at page 308 thereof by the EAT viz that; Tribunals in approaching the question of the possession of the protected characteristic of Disability may find it helpful to consider each of the following four questions:-

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- “● Does the claimant have an impairment which is either physical or mental?

- Does the impairment affect the claimant's ability to carry out normal day to day activities?

- Is the adverse effect on the claimant's ?? to carry out normal day to day activities substantial?; and,

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- Is the adverse effect long term?"

33. The respondent's representative reminded the Tribunal that each of the four steps must be met as a condition of possession of the protected characteristic.

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34. He further submitted that the question of status required to be ascertained at the material time, that is to say at the time of the alleged discrimination and he thus invited the Tribunal to so consider the question in respect of each of the three material time periods already pled, that is December 2019-January 2021, December 2021-January 2022 and March 2022 and, on a contingent basis, the additional two time periods which the claimant sought Leave to Amend into his pleading those being, November 2020-April 2022 and October 2020-March 2022. On the evidence presented and upon the Findings in Fact which he invited the Tribunal to make thereon, the respondent's representative submitted that the claimant had failed to satisfy each element of the four part "Goodwin test" and to hold in the circumstances that the claimant was not a person possessing the protected characteristic of Disability for the purposes of section 6 of the Equality Act 2010, at the material times for the purposes of his complaints.

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For the Claimant

35. The claimant, in his submission reiterated the point made by him repeatedly in evidence that the adverse effects experienced by him, namely the combined "*stress, anxiety and depression*" were caused directly and wholly by the adverse work environment and incidents for which the respondent held to be regarded as responsible and liable. That those adverse incidents had occurred variously at times within a period of time he regarded as material for the purposes of his complaint each resulting in him experiencing one or other

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of the elements of stress, anxiety or depression at individual particular times. On the basis that when he had first given notice of the adverse effect starting in November 2020 he had done so in error meaning to state November 2019, the whole period to which he was referring could be seen to have lasted for more than 12 months. On the above grounds and for the above reasons he invited the Tribunal to hold that he was a person possessing the protected characteristic of Disability at the material times for each of his claims being those already given notice of in terms of his initiating Application ET1 and those which he sought to introduce by way of amendment.

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Discussion and Disposal

36. Upon the evidence presented and upon the Findings in Fact which it has made, the Tribunal found that the claimant had not been diagnosed with clinical depression at any of the material times for the purposes of his claim and further that such “depression” as he gives notice of having experienced at the particular material time relied upon was experienced by him by way of an adverse reaction to particular stressors (see **J v DLA Piper UK LLP**, 2010 ICR 1052, para 42).

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37. On the same basis the Tribunal found that the stress which the claimant gives notice of experiencing was experienced by him as a result of his unhappiness with a decision of the respondents and, on another occasion, because of the conduct of a colleague. It was not of itself a mental impairment but rather was a reflection of his character or personality (see **Herry v Dudley Metropolitan Council 2017** ICR 610, EAT); paras 70-72 (applying DLA; para 56.), viz;-

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56 Although reactions to adverse circumstances are indeed not normally long lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day to day activities. A doctor may be more likely to refer to

5 *the presentation of such an entrenched position as stress rather than
as anxiety or depression. An Employment Tribunal is not bound to
find that there is a mental impairment in such a case. Unhappiness
with a decision or a colleague, attendance ?? grievances, or a refusal
to compromise (if these or similar findings are made by an
Employment Tribunal) are not of themselves mental impairments:
they may simply reflect a person's character or personality. Any
medical evidence in support of a diagnosis of mental impairment
must of course be considered by an Employment Tribunal with great
10 care; so must any evidence of adverse effect over and above an
unwillingness to return to work until an issue is resolved to the
employee's satisfaction but in the end the question of whether there
is a mental impairment is one for the Employment Tribunal to assess"*

15 38. On the evidence presented and on the Findings in Fact made, assuming, for
the purposes of the present Hearing, that the claimant has proved all that he
gave notice of offering to prove, the Tribunal held that the claimant did not
have the pled portmanteau impairment of "stress, anxiety and depression", at
all of the material times for the purposes of his claims, or indeed at any of
20 those material times. He experienced rather, and at best, one or other of the
three constituent elements and on one/possibly two such occasions
experienced two but never all three constituent elements. (See **Cruickshank
v VAW Motorcast Limited** 2002 ICR 720; paragraphs 22 and 25).

25 **Disposal**

39. On the evidence presented, and taking the claimant's pleaded case at its
highest for the purposes of today's Hearing, that is to say on the assumption
that the claimant has proved all that he has offered to prove, the Tribunal
30 concluded;

- (a) that the claimant did not have, at the material times for the
purposes of his claims, an impairment which was either physical
or mental; further and in any event,

5 (b) that the matters relied upon by the claimant as constituting an impairment while from time to time affecting the claimant's ability to carry out normal day to day activities, did not have an adverse effect which was substantial on the claimant's ability to carry out normal day to day activities, and

10 (c) nor was it long term when considered at each of the material times for the purposes of section 6 of the EqA.

15 40. The Tribunal holds that at each of the material times for the purposes of his claims the claimant was not a person possessing the protected characteristic of Disability in terms of section 6 of the Equality Act and the associated guidance, including that contained in the EHRC Code Appendix 1, para 8.

15 41. The claimant accordingly lacks Title to Present and the Tribunal lacks Jurisdiction to Consider his complaints of Discrimination because of the protected characteristic of Disability and those claims are dismissed.

20 Employment Judge: Joseph d'Inverno
Date of Judgment: 15 December 2022
Entered in register: 19 December 2022
and copied to parties

25 **I confirm that this is my Judgment in the case of Rodger v Forestry and Land Scotland and that I have signed the Judgment by electronic signature.**