



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss K Lake

**Respondent:** Keys Child Care (Holdings) Ltd

**Heard at:** Bristol (by VHS)

**On:** 10 January 2023

**Before:** Employment Judge Leith

## Representation

**Claimant:** Ms Andrews (Representative, appearing pro bono)

**Respondent:** Mr Jones (Counsel)

# RESERVED JUDGMENT

The Claimant was disabled within the meaning of section 6 of the Equality Act 2010 at the relevant times (between 1 October 2021 and the Claimant's resignation in January 2022).

# REASONS

## Claims and issues

1. The claimant claims disability discrimination, sexual orientation discrimination, and constructive (unfair) dismissal.
2. The hearing before me was listed to determine the issues set out in EJ Cadney's CMO of 13 October 2022, namely:
  - i) Whether the claimant was at the material times a disabled person within the meaning of the Equality Act 2010;
  - ii) Whether any claim should be struck out as having no reasonable prospect of success and/or whether a deposit should be ordered as a condition of the claimant being permitted to pursue any claim having little reasonable prospect of success.
  - iii) To give further case management orders and list the case for final hearing.

3. I indicated to the parties that, after clarifying the issues in the claim, I would deal first with the question of disability, with the other issues being dealt with thereafter if time allowed.
4. As it was, given the time taken to clarify the issues in the claim and various delays during the day due to technical difficulties, evidence and submissions regarding the question of disability were not concluded until approximately 4pm. I therefore indicated that I would reserve judgment on that issue and relist the case to consider the remaining points on another occasion.
5. The issues in the disability discrimination claim are set out in the separate Case Management Order. I do not repeat them in this judgment. For the purposes of this judgment, I merely note that the allegations of disability discrimination run from the commencement of a disciplinary investigation into the Claimant's conduct, which commenced on or around 1 October 2021, to the Claimant's resignation on 5 January 2022. That is the relevant period in respect of which I must consider whether the Claimant was disabled within the meaning of the Equality Act 2010. The condition relied upon by the Claimant is anxiety and depression.

#### Procedure, documents and evidence heard

6. I heard evidence from the Claimant. EJ Cadney's CMO recorded that the Claimant's emails of 30 May 2022 and 26 June 2022 would stand as her impact statement. At that point the Claimant was unrepresented. Ms Andrews came on the record as representing the Claimant on the day before this Preliminary Hearing took place. That evening, a new impact statement was sent to the Respondent and the Tribunal, accompanied by a letter from the Claimant's GP dated 29 November 2022. I accepted the impact statement and GP's letter into evidence for the reasons which I gave orally at the time. I gave Mr Jones some time during the hearing to take instructions on the impact statement.
7. I also had before me a bundle of 125 pages. I heard oral submissions from Mr Jones and Ms Andrews.

#### Law

8. The starting point is s.6 of the Equality Act 2010:
  - (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.
  - (2) A reference to a disabled person is a reference to a person who has a disability.
  - (3) In relation to the protected characteristic of disability –

- a. A reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
- b. A reference to persons who share a protected characteristic is a reference to persons who have the same disability

(4) This Act ...applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly ...

- a. a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability...
- b. a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

- 9. The Government has issued guidance under section 6(5) of the EqA 2010, entitled 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ("the Guidance"). The Guidance does not impose any legal obligations in and of itself, but the tribunal must take account of it where it is considered to be relevant.
- 10. The Equality and Human Rights Commission (EHRC) has published a Code of Practice on Employment (2015) ("the Code"). The Code provides guidance on the meaning of 'disability' for the purposes of the EqA 2010. It does not impose legal obligations but must be taken into account where it appears relevant to any questions arising in proceedings.
- 11. In considering the question of whether a Claimant is disabled, the Tribunal must apply the four-stage approach approved by the Court of Appeal in *Sullivan v Bury Street Capital Limited* [2021] EWCA Civ 1694 (while remaining mindful of the need to look at the overall picture):
  - a) Was there an impairment? (the 'impairment condition');
  - b) What were its adverse effects [on normal day-to-day activities]? (the 'adverse effect condition');
  - c) Were they more than minor or trivial? (the 'substantial condition');
  - d) Was there a real possibility that they would continue for more than 12 months? (the 'long-term condition').
- 12. It is usually not necessary to consider the "impairment" condition in detail (*J v DLA Piper UK LLP*). The same case provides that Tribunals

should be aware of the distinction between clinical depression and a reaction to adverse circumstances.

13. There is no definition of 'mental impairment' in the EqA 2010 but Appendix 1 of the Code provides that the term is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities.
14. "Mental impairment" should be given its "natural and ordinary meaning" (*McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] EWCA Civ 1074).
15. Section 212 of the EqA 2010 defines "substantial" as being more than minor or trivial.
16. Paragraph 5 of Schedule 1 provides as follows:
  - (1) An 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:
    - (a) measures are being taken to correct it, and
    - (b) but for that, it would be likely to have that effect.
  - (2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid."
17. In considering whether an impairment has a substantial adverse effect on the ability to carry out normal day-to-day activities, it is necessary to take account not only evidence that person is performing a particular activity less well, but also of evidence that a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation (Appendix 1 to the Code).
18. Schedule 1, para. 2 of the EqA 2010 defines "long-term" as follows:
  - (1) The effect of an impairment is long-term if -
    - (a) it has lasted for at least 12 months,
    - (b) it is likely to last for at least 12 months, or
    - (c) it is likely to last for the rest of the life of the person affected.
  - (2) If an impairment ceases to have a substantial adverse effect on a 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 recur.
19. In that context, "likely" has been held to mean it is a "real possibility" and "could well happen" rather than something that is probable or more likely than not (*SCA Packaging Ltd v Boyle* [2009] ICR 1056).

20. The question of how long an impairment is likely to last must be determined at the date of the alleged discriminatory act, not at the date of the Tribunal hearing (*McDougall v Richmond Adult Community College* [2008] ICR 431).
21. The burden of showing that she is disabled within the meaning of the Act rests on the Claimant.

### Facts

22. I make the following findings of fact on balance of probabilities, based on the totality of the evidence before me.
23. The Claimant was employed by the Respondent as a Residential Care Worker at Daley House, a residential home operated by the Respondent.
24. The Claimant's evidence was that she had suffered from generalised feelings of anxiety and depression for many years. Her evidence was that in June 2020, she took an overdose in order to try to kill herself.
25. The Claimant's medical records note that on 15 June 2020, she presented to her GP. The notes of that visit record that she described feeling low and had impulsively overdosed with alcohol the previous week. The notes further record that the Claimant had previously had talking therapy, and that she was receiving support from her mother.
26. The next entry in the Claimant's GP records was dated 10 July 2020. It noted that the Claimant had been prescribed sertraline, from which she was feeling some benefit, but would like to try a higher dose. She was prescribed 100mg (having previously been prescribed 50 mg).
27. The GP notes recorded that the Claimant had some difficulty obtaining a repeat prescription for sertraline in August 2020.
28. In October 2020 the Claimant's mother was diagnosed with cancer. Her evidence was that this caused her mental health to worsen, and she stopped taking her medication for a period of time.
29. On 5 November 2020 the Claimant saw her GP. The records showed that she discussed her mother's recent cancer diagnosis. She explained that she had stopped taking antidepressants as a result. The notes recorded her state as "withdrawn, emotional liability, anger+++". Her medication was change to escitalopram, initially 5mg rising to 10mg after 2 days.

30. The next relevant entry on the Claimant's GP records was in respect of a consultation on 5 October 2021. This was some 5 days after the Claimant had been suspended from work, on 1 October 2021. The notes recorded that the Claimant explained that she had been suspended from work and was suffering from increased anxiety symptoms. The record showed that sleeping tablets were discussed but not prescribed. A health and wellbeing plan was put in place for the Claimant.
31. As part of the health and wellbeing plan, the Claimant had the benefit of a wellbeing coach via her GP surgery, Janet Guthrie-Smith. The Claimant started working with Ms Guthrie-Smith in October 2021. There was a letter from Ms Guthrie-Smith in evidence before the Tribunal. The letter was undated. Ms Guthrie-Smith did not attend the Tribunal to give evidence. Her letter does not constitute expert evidence and was not endorsed with a statement of truth. Therefore, I treat it with considerable care. However, it does record that the Claimant described symptoms including sleeplessness, not being able to focus, tearfulness, poor diet, and increasing depression symptoms. I take that into account as a contemporaneous record of the symptoms the Claimant was describing to health professionals at that time.
32. There were additionally a number of entries relating to the Claimant's health and wellbeing plan between October 2021 and January 2022 in her GP records. These noted that she had continued to have difficulty sleeping.
33. There was in evidence before me a letter from Dr Stuart Hateley, the Claimant's GP, dated 29 November 2022. That letter noted that the Claimant was diagnosed with symptoms of depression on 15 June 2020, and with "anxiety state unspecified" on 5 October 2021. Dr Hateley noted that the Claimant was treated with Sertraline from 15/6/2020 (dose increased on 10/7/2020), and Escitalopram from 5/11/20, which she currently remains on, having had regular issues since. I bear in mind that Dr Hateley's letter is not expert evidence, but it does record the evidence held by the Claimant's GP surgery.
34. The Claimant's medical records set out the occasions on which she received a prescription of escitalopram, as follows (with 28 days worth being received each time):
- a. 5 November 2020
  - b. 1 December 2020
  - c. 8 March 2021
  - d. 9 April 2021
  - e. 14 May 2021
  - f. 24 June 2021
  - g. 27 July 2021
  - h. 3 September 2021
  - i. 30 November 2021
  - j. 10 January 2022

35. The Claimant accepted that there were some gaps between her prescriptions. Her evidence was that there were some occasions when she couldn't get the medication, although she could not recall which period or periods that was. Her evidence was additionally that one effect of her condition was that she wouldn't always be concerned about making herself feel better, so she would allow her supply of medication to run out and to go without it for a period of time before she managed to seek a new prescription. That is consistent with the way the Claimant describes her condition, in that she refers to a lack of motivation. It is broadly consistent also with the way that Janet Guthrie-Smith describes the Claimant's condition, in that she refers to a lack of focus. I accept the Claimant's evidence that, because of the nature of her condition, she would allow her medication to run out before seeking more, which would mean that there would be some short discontinuity between periods on medication.
36. Aside from those short periods of discontinuity, there were two longer periods during which the Claimant was without medication. The first was January/February 2021, when there was a period of slightly over three months between prescriptions. The second was October/November 2021, when there was a period of slightly under three months between prescriptions. Given that each prescription was for 28 days' worth of medication, that is a period of approximately two months in each case. Save for those two periods, I find that the Claimant was taking escitalopram regularly from November 2020 onwards.
37. The Claimant's evidence was that the escitalopram helped her to complete daily tasks such as doing the dishes, washing, and going out such as to go shopping.
38. The Claimant's evidence was that, even while on escitalopram, she is often unable to sleep, as a result of what she described as "disaster thinking". Her evidence was that her inability to sleep left her fatigued and lethargic, which in turn meant that she found it difficult to leave the house. She explained that she can no longer just leave the house on a whim to go shopping or take her daughter to the park, and that whether she could do so would depend on whether she had slept. Her evidence was that she was effectively unable to socialise, as all of her energy would go towards looking after her daughter (and at times her mother).
39. The Claimant's evidence was that, when she came off her medication she would suffer from low moods, be very snappy and unable to regulate or deal with her emotions at all, and unable to complete simple tasks such as washing the dishes. When the Claimant was asked in cross-examination specifically about the example of doing the dishes, she volunteered that while she wouldn't say she would never be able to do the dishes without medication, she would struggle with it due to lethargy, and that perhaps 9 times out of 10 she wouldn't bother.

40. The thrust of the Claimant's evidence was that her condition was unpredictable. Her evidence was that adverse events or triggers would cause her condition to spike. Her description in evidence was that she found her condition like being under 5 or 10 bricks all of the time, and a trigger or spike would be like someone adding another 10 bricks on top of her.
41. The Claimant was asked, in the course of cross-examination, whether she had had any time off work during the times that she had not taken escitalopram. The Claimant's evidence was that she could not remember. Her attendance records were not in evidence before the Tribunal, and it was not put to her in terms that she had had no time off work. I do not make any finding regarding the Claimant's attendance at work during the periods when she had not taken escitalopram. In any event, she was suspended from work from 1 October 2021 onwards; so for the period in October and November 2021 when the records suggested she had not received a prescription of escitalopram, she would not have been attending work in any event.
42. The Claimant's evidence regarding the effects of her condition was broadly consistent with the contemporaneous medical records. She struggled on occasion to recall specific periods of time, such as the periods in respect of which she had not taken escitalopram. In my judgment that is unsurprising, given the passage of time and the evidence regarding the effects of her condition; in particular, the description in Ms Guthrie-Smith's letter of her having difficulty focusing. I find that the Claimant attempted in her evidence to assist the Tribunal, and that her description of her symptoms reflected her lived experience to the best of her recollection. I accept her evidence regarding the symptoms from which she suffered.
43. I bear in mind that of course the Claimant did manage some periods after June 2020 without medication; but they were relatively short periods, in the context of a much longer time on medication.
44. Taking the evidence as a whole, I find that the Claimant's condition had the following effects on her during the periods from June 2020 onwards when she had taken no medication (that is, when she had not taken either sertraline or escitalopram):
- a) She attempted, in June 2020, to take her own life.
  - b) She had difficulty sleeping, which left her lethargic.
  - c) She would very often be unable to do tasks such as washing the dishes.
  - d) She struggled to leave the house to go shopping or to take her daughter to the park.
  - e) She was unable to socialise.
  - f) She would be very snappy and unable to regulate or deal with her emotions.



45. The Claimant sought to give evidence regarding what she believed the effect of her condition would have been during the times she was taking medication had she not in fact been taking medication. I treat that evidence with some care. The Claimant is not a medical expert, and there was no expert evidence before me regarding the deduced effect of the Claimant's condition had she not been taking medication. The Claimant's condition did, on her own evidence, fluctuate. I bear in mind the Claimant's evidence that, even while on medication, her condition continued to have some of the same effects on her. On balance, I consider that it is likely that, but for the medication, her condition would have had the same effects described above (albeit on a fluctuating basis). That is, had she not been taking sertraline or escitalopram, from June 2020 it is likely that she would have suffered the effects described above throughout, on a fluctuating basis.
46. On the Claimant's own evidence, her condition was worsened by adverse life events; in particular, her mother's cancer diagnosis and her suspension from work. But in my judgment, her condition could not be said to be merely a reaction to adverse life events, for the following reasons:
- a. Her condition pre-dated June 2020, in that there was reference in the medical records to her previously having undergone talking therapy.
  - b. There was no evidence that the attempt to take her own life in June 2020 was triggered by a specific adverse life event.
  - c. Similarly, her diagnosis with symptoms of depression in June 2020 was not in the immediate aftermath of a triggering event.
  - d. She had already been on prescribed anti-depressant medication for over three months prior to her mother's cancer diagnosis.
  - e. She continued to be prescribed medication on an ongoing basis after both her mother's cancer diagnosis and her suspension – if what she had been suffering was merely a short-term reaction then it would have been expected that the medication would have stopped at some point after those events.

### Conclusions

#### Was there an impairment?

47. The impairment relied upon by the Claimant is anxiety and depression. The Claimant's medical records, including the letter of Dr Hateley, indicate that the Claimant was diagnosed with symptoms of depression (on 15 June 2020) and anxiety state unspecified (on 5 October 2021). There is, of course, no need for the Claimant to be diagnosed with a recognised mental health condition in order to meet the impairment condition.
48. I am satisfied that the Claimant met the impairment condition, in that she had a mental impairment at the relevant time.

#### What were its adverse effects [on normal day-to-day activities]?

49. I have found that the impairment had the following effects on the Claimant:
- a. She attempted, in June 2020, to take her own life.
  - b. She had difficulty sleeping, which left her lethargic.

- c. She would very often be unable to do tasks such as washing the dishes.
  - d. She struggled to leave the house to go shopping or to take her daughter to the park.
  - e. She was unable to socialise.
  - f. She would be very snappy and unable to regulate or deal with her emotions.
50. Sleeping, washing dishes, shopping, taking a child to the park and socialising are all day-to-day activities. Her ability to do those things was adversely affected. And although it may not fit as comfortably within the rubric of the Act, the continuation of life must also in my judgment be a day-to-day activity.

*Were they more than minor or trivial?*

51. The effects on the Claimant's life were, in my judgment, clearly more than minor or trivial. The effect of her inability to sleep, and the consequent lethargy she would feel, was significant. It impaired her ability to look after herself and her daughter, by undertaking tasks such as washing dishes, or taking her daughter to the park. Her inability to socialise was also significant; social interaction is an important part of the human experience. And I do not overlook the attempt she made on her own life, which is the very opposite of minor or trivial.

*Was there a real possibility that they would continue for more than 12 months? (the 'long-term condition').*

52. The relevant time, for the purposes of the present claim, is 1 October 2021 to January 2022. I have found that the Claimant's impairment had a substantial adverse effect on her ability to carry out normal day-to-day activities from June 2020. It had therefore already continued for 12 months at the relevant time. So, the long-term condition is met.
53. It follows that the Claimant was disabled for the purposes of the Equality Act 2010 at the relevant times by reason of symptoms of depression and anxiety.

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Employment Judge Leith

24 January 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON  
06 February 2023 By Mr J McCormick

FOR EMPLOYMENT TRIBUNALS