



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4103519/22**

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**Preliminary Hearing held on the CVP/Kinly platform on the 30 March 2023 at  
10am**

**Employment Judge Porter**

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**Johanne Davie**

**Claimant  
In Person**

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**Lothian Buses Ltd**

**Respondents  
Represented by  
Ms Coutts, Solicitor**

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**REASONS**

**Introduction** .....

- 30 1. The claimant was employed as a bus driver by the respondents between 16  
April 2007 and the 15 June 2022. In these proceedings the claimant brings  
claims of unfair constructive dismissal and discrimination, relying upon the  
protected characteristics of disability, age and sex.
- 35 2. The claimant's claims are resisted and there was a Preliminary Hearing ("PH")  
on the 30 September 2022. At that PH the respondents confirmed that

Disability Status was disputed and Orders were made for the production by the claimant of an Impact Statement and her Medical Records.

3. Disability Status continued to be disputed and there was a Preliminary Hearing ("PH") at 10am on the 30 March 2023 on the issue. The PH took place on the CVP/Kinly platform. At the PH the claimant represented herself and the respondents were represented by Ms Coutts, solicitor. The claimant alone gave evidence and reference was made to a Joint Bundle of Productions numbered **1-134**.
4. In advance of the Preliminary Hearing Ms Coutts intimated a Note of Arguments.

### **Findings in Fact**

5. After hearing evidence from the claimant, the Tribunal made the undernoted essential Findings in Fact.
6. The claimant began suffering from the symptoms of the menopause in early 2021. The Tribunal accepted her evidence that, as the menopause is not an illness, it was difficult to identify a precise date for the onset of her symptoms.
7. By April 2021 however, the claimant was suffering significant menopausal symptoms. She suffered profound fatigue which arose from a combination of almost constant bleeding and difficulty in sleeping due to muscle tension. This caused brain fog which resulted in her having difficulty remembering bus routes, difficulty finishing conversations and having to write things down on her hand.
8. The Tribunal accepted the evidence of the claimant that due to her symptoms from April 2021 the claimant was unable to carry out household tasks, clean, cook, look after her grandchildren (which had been a significant feature in her life) or socialise. The Tribunal accepted the claimant's evidence that from April 2021 the claimant spent much of her time motionless on her sofa and that in this period the claimant was unable to even take care of her personal hygiene.

9. The Tribunal noted that the claimant was able to continue her employment as a full time bus driver in the period from April 2021; however, the Tribunal accepted the claimant's evidence that she put all her energies into doing her job, leaving her with no capacity to cope with her normal day to day activities.
- 5 10. By July 2021 however the claimant was working as a bus driver for the respondents on a part-time basis. The Tribunal accepted the claimant's evidence that she was able from July to resume her normal day to day activities including cleaning, cooking, caring for herself, looking after her grandchildren and socialising.
- 10 11. The Tribunal noted that the claimant was able to undertake her role as a part time bus driver between July 2021 to May 2022 without raising concerns about her health with her GP or the Respondents.
12. The Tribunal noted that the claimant was prescribed zopiclone in June 2021 (74). However, on the 30 July 2021 it was noted that the claimant had only  
15 taken 2 zopiclone and the prescription was not a repeat prescription. The claimant in her evidence stated that she only took zopiclone now and again. In evidence, the claimant acknowledged that the statement made by her in her Impact Statement at 57 was correct. There, it is stated: *"My GP had also prescribed me Zopiclone tablets, only to be taken sparingly as they are a strong  
20 drug that acts on your nervous system, I can take one of these tablets when the tension in my muscles gets really bad, I've only taken about 5 of these tablets in nearly 2 years."*
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### Observations on the Evidence

- 25 13. In her submissions Ms Coutts pointed to inconsistencies between the evidence of the claimant and the documents before the Tribunal. The Tribunal concluded that the inconsistencies arose as the claimant was endeavouring to present a full account to the Tribunal of what is a complicated narrative.
14. The Tribunal found the claimant overall to be an honest witness. She was  
30 candid and clear in her evidence that she was able to undertake day to day activities once she was working on a part-time basis.

**The Law**

15. The burden of proving that a claimant has a disability and is therefore a disabled person is upon the claimant. The definition of a disabled person is contained in s6(1) of the Equality Act 2010 namely:

5       *"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. "*

io   16. According to s212 of the Equality Act 'substantial' means more than minor or trivial.

17. **Goodwin v The Patent Office 1999 ICR 302** remains the leading case on what is required to provide disability. In that case the EAT said that the words used to define disability in s1(1) DDA (now s6(1) of the Equality Act 2010) require Tribunals to look at four different questions (or 'conditions' as the EAT termed them), 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')** ; **was the adverse condition substantial ? (the 'substantial condition')**, **and was the adverse condition long-term?** These four questions should be posed sequentially and not together.

18. Insofar as 'long-term' is concerned, paragraph 2(1) of Schedule 1 to the Equality Act 2010 states that the effect of an impairment is long term if it has lasted for at least 12 months; is likely to last for at least 12 months; or is likely to last for the rest of the life of the person affected.

19. It is relevant to note that Schedule 1(5) of the Equality Act 2010 provides as follows:-

*"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-*

30       *(a) Measures are being taken to treat or correct it, and*

*(b) But for that, it would be likely to have that effect.”*

20. The Tribunal also considered the Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) (“the Guidance”) and the Equality and Human Rights Commission Code of Practice on Employment (2011). Neither impose legal obligations; however the Tribunal  
5 took them into account where they appeared relevant, all in accordance with paragraph 12 to Schedule 1 of the Equality Act 2010.

### **Submissions**

#### 10 **For the respondents**

21. Ms Coutts provided written submissions for the respondents in her skeleton Note of Arguments which are replicated here.

22. *It is denied that the Claimant's menopause symptoms amounted to a disability under the EQA.*

15 23. *The Claimant's GP noted that the Claimant complained of 'flushes, fatigue, loss of libido, irritable, tearful, period have started to become lighter' on 10 December 2019 (Page 91). These symptoms do not appear to be the symptoms now relied upon by the Claimant.*

20 24. *If the Claimant felt fatigued in late 2019, it is likely that any fatigue related to the sleep disordered breathing she experienced from November 2019 until October 2020, and it did not relate to menopause symptoms.*

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25. *It is noted that the Claimant reported lighter bleeding at that time (Page 91).*

25 26. *The Claimant experienced neck pain in April 2021. She claims that this related to menopause symptoms. However, there is no mention of menopause symptoms in the GP notes in April 2021. She was prescribed diazepam on a short-term basis (Page 89). In June 2021 the Claimant's GP prescribed Zopiclone tablets for muscle tightness. The Claimant claims she has taken 'about 5 of these tablets in nearly 2 years' (Page 57). Any muscle tension appears to be minor.*

27. *The Claimant complained to her GP of experiencing 'brain fog' on one occasion on 7 June 2021. By 30 June 2021 the Claimant's GP notes that she's 'doing really well' (Page 88). She was looking after her grandchildren again (Page 22). The Claimant was competently able to undertake her role from June 2021 to*  
5 *May 2022 without raising any concerns with her GP or the Respondent in this period. Any brain fog appears to be minor. The Claimant was competently driving numerous bus routes.*
28. *The impact of any symptoms appears to fluctuate. Any symptoms appear to have significantly diminished between June 2021 and May 2022. It's not clear*  
10 *that any symptoms had lasted or were likely to last for 12 months. Any symptoms are likely to change and diminish over time.*
29. *There are no reports of any urinary incontinence prior to May 2022 in OH reports or numerous GP notes of appointments.*
30. *The Claimant is currently unable to work due to 'stress, anxiety', rather than*  
15 *any menopause symptoms (Page 87)*
31. *It is denied that the Claimant had a physical or mental impairment that had a substantial and long-term adverse effect on her ability to carry out normal day to day activities.*
32. *If it is accepted that the Claimant is disabled (which is denied), it is important*  
20 *that the date when she became disabled is determined in order to allow her claims to be decided at the merits hearing.*
33. *In addition, Ms Coutts submitted that, at its highest, the claimant's evidence showed that she was a disabled person in terms of s6 of the Equality Act 2010 between April and July 2021 with the proviso that in this period she was able to*  
25 *work full-time as a bus driver.*
34. *Ms Coutts submitted that any medication taken by the claimant in this time period was very limited.*
35. *Ms Coutts further submitted that in any event the menopause is not an impairment but is a natural process.*

**For the claimant**

36. The claimant submitted that the Minutes from the Appeal Hearing in May 2021 reveal that she spoke at length about issues of bleeding and the respondents were then aware of all her menopausal symptoms.

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**Discussion and Decision**

37. The common physical symptoms of the menopause can vary in severity but can potentially be long term and have a significant impact on a person's ability to perform normal day to day activities so as to constitute a disability. Whether  
10 this is the case is for the Tribunal to determine on a case by case basis with reference to the Equality Act 2010, the case of **Goodwin v the Patent Office** and the Guidance.

38. The Tribunal considered firstly whether the claimant suffered from an 'impairment'. The Tribunal noted the words of the Guidance at para **A4** where  
15 it is stated: "*Whether a person is disabled for the purposes of the Act is generally determined by reference to the effect that an impairment has on that person's ability to carry out normal day-to-day activities.*"

39. The Tribunal noted that the claimant's evidence was that from April 2021 she suffered from heavy bleeding, muscle tension, poor sleep pattern/fatigue, and  
20 brain fog. The Tribunal had regard to the Guidance and noted that in para **B6** the Guidance states: "*A person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out certain normal day to day activities.*"  
25 After having regard to the words of the Guidance, the Tribunal concluded that the claimant's symptoms, taken together, were capable of constituting an 'impairment'.

40. The Tribunal then considered whether or not the 'impairment' affected the claimant's ability to carry out normal day to day activities and whether the  
30 adverse condition was 'substantial'. To this end the Tribunal had regard to the claimant's symptoms in the period April- July 2021. In this period, although the

claimant was able to attend work and drive a bus, she was unable to carry out housework, cook, socialise or look after her grandchildren. She gave evidence that prior to April 2021 she was able to carry out all of these activities. She gave compelling evidence that most of the time she simply lay on the sofa and that often she was unable even to shower before leaving for work.

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41. In the light of this evidence the Tribunal concludes that the claimant's impairment did effect the claimant's ability to carry out normal day to day activities in the period April-July 2021. On the evidence as given by the claimant the Tribunal concluded that the adverse effect of the impairment on the carrying out of normal day to day activities was substantial.

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42. Finally, the Tribunal considered whether the adverse condition was long-term. To this end, the Tribunal noted the terms of paragraph 2(1) of Schedule 1 to the Equality Act 2010. The evidence given by the claimant was that the adverse condition caused by the symptoms suffered by her was present only in the period April - July 2021. In these circumstances the Tribunal was unable to conclude that the claimant suffered from any long term adverse condition.

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43. In reaching this conclusion the Tribunal had regard to the fact that the claimant was prescribed zopiclone by her GP. However, the Tribunal noted that the claimant's own evidence was that zopiclone was taken by her sporadically and that only 5 zopiclone were taken by the claimant in a 2 year period. In these circumstances the Tribunal concluded that the claimant was not being 'treated' by zopiclone in terms of Schedule 1(5) of the Equality Act 2010. Neither did the Tribunal conclude that part-time work was 'treatment' in terms of Schedule 1(5) of the Equality Act 2010.

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44. For these reasons, the Tribunal finds that the claimant was not a disabled person in the relevant period, being April 2021 to July 2022 and the claimant's claims of disability discrimination are accordingly dismissed.

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10 **Employment Judge: J Porter**  
**Date of Judgment: 03 April 2023**  
**Entered in register: 03 April 2023**  
**and copied to parties**