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EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4105848/2022

Held on the Cloud Video Platform on 3 May 2023

Employment Judge A Jones

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Mr B Hewitson

Claimant

No appearance

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DL Insurance Services Ltd

Respondent

Represented by

Ms Senior, counsel

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The claimant was not a disabled person for the purposes of section 6 Equality Act 2010 ('EA') at the material time. His claim is therefore dismissed.

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E.T. Z4 (WR)

Reasons

Introduction

- 5 1. The claimant submitted an application to the Tribunal on 11 November 2022 in relation to his employment with the respondent. He claimed that he had been subjected to disability discrimination. He also said that he had been unfairly dismissed although that claim was subsequently withdrawn. There have been two preliminary hearings in this case. As the respondent disputes
10 that the claimant was a disabled person at the material time, a preliminary hearing was set down to determine this matter. The claimant had also made an application to amend his claim and this issue also fell to be determined.

- 15 2. The claimant sent an email to the Tribunal indicating that he did not intend to attend the hearing in person. The email was not entirely clear as to whether the claimant meant that he was attending remotely or not at all. Clarification was sought from him and he indicated that he did not intend to attend the hearing due to work commitments and that information in relation to his disability had already been sent to the parties. He indicated that the matters
20 could be determined by the Tribunal.

- 25 3. Ms Senior appeared at the hearing for the respondent. She indicated that her agents had informed her that the claimant had previously sent an email to them which did not appear to have been copied to the Tribunal in which the claimant had also indicated that he did not intend to attend the hearing and that he was relying on the evidence which had been provided.

- 30 4. A joint bundle of documents was provided. Ms Senior invited the Tribunal, having regard to Rule 47 to proceed with the hearing in the claimant's absence. The Tribunal was satisfied that the claimant had decided not to attend the hearing. He had not asked for a postponement of the hearing and therefore the Tribunal was satisfied that it was appropriate for it to continue in the claimant's absence.

Respondent's submissions

5. Ms Senior addressed the Tribunal on the claimant's application to amend in the first instance and took the Tribunal through the chronology of events. The respondent's position was that the claimant should not be permitted to amend his claim out of time. There was no good reason put forward by the claimant for the delay in raising what was essentially a new cause of action, the claimant had extensive experience of Tribunal procedure and his suggestion that he was a layman should be treated with some scepticism. As the Tribunal has found that the claimant was not a disabled person at the material times, it is not necessary to determine the claimant's application to amend. The amendment application was not entirely clear but appeared to raise new matters not set out in his original claim form relating to disability discrimination. Had it been required to do so, as it found force in Ms Senior's submissions made in objection to the application, the application would have been refused.

6. Ms Senior then took the Tribunal through correspondence in relation to the requirement that the claimant provide information in support of his position that he suffered from a condition, namely anxiety, which resulted in him being a disabled person for the purposes of section 6 EA at the material time being between April and September 2022. She highlighted that in terms of the effect of the condition on his normal day to day activities, the claimant referred to "difficulty in relationships especially at work, with management. I have an inability to back down when I perceive someone is wronging me, I become anxious and argue my point, which managers do not like." He also said that he did not know what he would be like without medication and that he was on a 'heavy dose of fluoxetine'.

7. Ms Senior pointed out that had the claimant been present she would have cross examined him on a number of material issues including, what the claimant's dose of fluoxetine had been at the various times, the references in his medical notes to him stockpiling medication and to what he had informed

his GP about his work circumstances, what he told the respondent about his condition and when and the effect of his condition on him on a daily basis.

5 8. The respondent's position was that the claimant did not suggest he needed any additional support or consideration in relation to a disability in the recruitment process (page 85 of the bundle); that he sent a teams message saying he was not very happy because he had informed the respondent that he "had a mental health disability (anxiety)" and that he felt "Carol's on my back constantly and its really starting to get to me."

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9. A document completed at a return-to-work meeting on 4 August 2022 recorded that consideration was being given to giving the claimant mental health breaks. Thereafter the claimant appeared to complete a document in which his suggestions for support which was required were in relation to IT system problems and working hours.

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10. It was also pointed out that the claimant had been asked to provide up to date medical information and that a legal officer had pointed out to him that the material initially provided did not cover the relevant period. The material provided by the claimant were letters from GPs in January 2020, December 2021 and March 2022, none of which covered the relevant period. The most recent correspondence was very brief in its terms. The claimant did not provide all his medical records, although his GP indicated that he had sight of his records going back to 2010. The medical records which had been provided covered the period from March 2021 to February 2022. It was pointed out by reference to the various judgments from other Employment Tribunal proceedings which had been brought by the claimant, that it appeared the correspondence from his GPs had been prepared in contemplation of other proceedings.

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11. Counsel then took the Tribunal through a forensic analysis of the claimant's medical records with his GP and the chronology of the various Tribunal proceedings in which the claimant had been involved.

12. From these documents she highlighted a number of points, on which she would have sought to question the claimant. In particular:

5 (1) The claimant had a prescription for a medication which is said to be used to treat thyroid issues. The claimant would have been asked to what extent that fluoxetine was prescribed to address any potential effects of that thyroid medication.

10 (2) Although the claimant had indicated that fluoxetine was regularly prescribed and that he was on a high dose, this was not borne out by the records. There was no regular prescription, it was not clear what dose he was on at any given time and whether he took the prescribed dose and that there was reference to him having a stock of the medication at home.

15 (3) The claimant did not appear to have been candid with his GP as to the various reasons for difficulties with employers. For instance in one entry, he said (on 28 January 2022) that he had been suspended for not working long hours and that he had resigned. In fact, from the
20 Employment Tribunal judgment it appeared that he had been dismissed and the reason for his dismissal was a possible falsification of tacograph records.

25 (4) The claimant's visits to his GP seemed to coincide with the employment issues he was experiencing and that there was a pattern of the claimant having employment issues (which it was suggested had at least on a few occasions arisen because of the claimant's conduct and lack of candour) and then attending his GP in advance of Tribunal proceedings.

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13. It was suggested therefore that there was no evidence of a substantial long term adverse impact of the claimant's ability to undertake normal day to day

activities. The only evidence before the Tribunal was that the claimant continued to run into issues with various employers which he then reported to his GP were causing him anxiety. It was said that from the information available the problems at work appear to have arisen at least in part because of the claimant's inability to tell the truth or get on with managers and that there was no link to any anxiety disorder or condition. In addition, it was impossible for the Tribunal to make any findings on the deduced effect of any condition on the claimant were he not taking medication as it was not at all clear whether, when or what dose of medication was taking at any given time.

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14. It was said that the claimant had been given clear direction as to what information was necessary to allow the Tribunal to consider whether or not he was a disabled person. The claimant had not provided up to date information, he had taken a decision not to attend the hearing and therefore could not be cross examined on various material and substantial issues, including his truthfulness and therefore the Tribunal could not conclude that he was a disabled person.

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Discussion and decision

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15. The burden of proof is on a claimant to demonstrate that they have satisfied the test set out in section 6 EA that they have the protected characteristic of disability at the material time.

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16. The claimant made a decision not to attend the hearing. He did not ask for a postponement of the hearing. He is not inexperienced in Tribunal proceedings. He had every opportunity to attend the hearing and to provide evidence in support of his claim. He has not put forward any reason as to why the medical records he has provided do not cover the relevant period. One can speculate that it is because he says he has been told he will suffer from anxiety for the whole of his life. It is not at all clear by whom or when such a diagnosis was made. There are a number of significant matters in the medical information and in particular the interactions between the claimant and his

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GPs and what medication he took and when which would have been explored with the claimant had he attended the hearing. It is regrettable that he did not do so.

5 17. There is simply insufficient information before the Tribunal to determine that
the claimant was a disabled person at the material time. There is no
information regarding the impact of any condition on his day-to-day activities,
other than references to difficulties with management and it is not clear that
this would come within the ambit of normal day-to-day activities or that the
10 difficulties were caused by any medical condition. There were also issues
regarding the candour of the claimant in relation to his condition given the
entries in his GP records which did not accord with the Tribunal judgments
relating to the same periods.

15 18. In these circumstances, the Tribunal is bound to find that the claimant has not
established that he was a disabled person at the material times and therefore
his claim is dismissed.

19. His claim therefore falls to be dismissed.

20 **Employment Judge: A Jones**
Date of Judgment: 04 May 2023
Entered in register: 05 May 2023
and copied to parties

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