



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101752/2023

5

Held via Cloud Video Platform (CVP) in Glasgow on 5 September 2023

Employment Judge D Hoey

10 **Ms C McGinlay**

**Claimant
Represented by:
Mr Lawson -
Solicitor**

15 **Procast Building Contractors Limited**

**Respondent
Represented by:
Mr Kiddie -
Advocate
[Instructed by
Messrs Radar]**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. Of consent, and in terms of rule 64 of Schedule 1 to the Employment Tribunals
25 (Constitution and Rules of Procedure) Regulations 2013, it is just and equitable for the discrimination claims to proceed.
2. From the evidence before the Tribunal, the claimant was a disabled person in terms of section 6 of the Equality Act 2010 at the material times and the claims in respect of disability discrimination can proceed.
- 30 3. The parties are directed to have a discussion as to further procedure and revert to the Tribunal within 14 days as to next steps.

REASONS

1. The claimant lodged a claim arguing that she had been discriminated against by reason of disability, sex and pregnancy. The claims were disputed. This preliminary hearing had been fixed following an earlier case management preliminary hearing. The hearing had been fixed initially to determine 2 preliminary issues, namely time bar and disability status, but it was conceded by the respondent that it was just and equitable for the discrimination claims to proceed such that the only outstanding preliminary issue was whether or not the claimant was a disabled person in terms of the Equality Act 2010.
- 10 2. The hearing began by a discussion as to the overriding objective and of the requirement to work together to ensure that the case and issues arising were dealt with justly and fairly.
3. The parties had worked together to agree relevant facts and set out the issues to be determined.
- 15 4. The parties had produced 173 pages of productions to which some reference was made in the course of evidence.
5. The claimant gave evidence and was asked questions by both agents and written and oral submissions were provided by both agents.

Issues to be determined

- 20 6. The issue to determine was whether or not the claimant was a disabled person at the relevant time in terms of section 6 of the Equality Act 2010.
7. It was conceded that the claimant had mental impairments (stress, anxiety and depression) and a physical impairment (back pain).
8. The issue was whether or not those impairments had a substantial long-term adverse effect (individually or cumulatively) upon the claimant's ability to carry out normal day-to-day activities.
- 25 9. Although there had been reference to irritable bowel syndrome, that was not argued by the claimant to amount to a separate physical impairment.

Facts

10. The Tribunal is able to make the following findings from the evidence that was agreed and led before the Tribunal which it has done on the balance of probabilities (deciding what is more likely than not to be the case) by assessing the evidence in context.

Background

11. The claimant was employed from 6th September 2021 to 6th September 2022. At all material times for the purposes of this claim the claimant suffered from anxiety, depression, stress, back pain and irritable bowel syndrome (IBS) and had done for more than 12 months.

Mental impairment

12. With regard to the claimant's mental impairment (stress, anxiety and depression), this had begun to affect the claimant over 10 years ago following personal issues that affected her. She had difficulty sleeping and was regularly anxious. As a consequence of the impact of the impairment she was prescribed anti depressants. Over the course of time her medication changed. She continued to require medication following the birth of her son over 11 years ago and continues to require them.
13. Even with the benefit of the medication the claimant struggled to sleep. Her sleep pattern was sporadic and happened in short spurts. She rarely benefited from a deep sleep.
14. The claimant secured a better sleep with medication but when the claimant did not have the benefit of medication, her sleep would be very poor, evidenced by one occasion where the claimant had a 48 hour period without sleep.
15. The lack of sleep affected the claimant (even with the benefit of medication) and that drained the claimant of energy and affected her mood and desire to socialise.

16. The claimant also suffered from IBS. Her anxiety had an impact upon this resulting in the claimant becoming fearful of not being able to be close to a toilet when she needs it. As a result she does not go places where she cannot be sure she would be able to reach a toilet in time.
- 5 17. The claimant's mental impairment has substantially reduced the claimant's enthusiasm for life and desire to socialise. As a result she kept herself to herself as a result of her stress, anxiety and depression. The claimant had the opportunity to spend time herself (when her child was being cared for) but as a result of her mental impairment she would instead spend the time indoors,
10 herself.
18. The claimant's mental impairment caused her to fear going out or to travel to places that might result in her not being able to be close to a toilet. She would become very anxious. As a consequence, the claimant will rarely travel by public transport and only do so where she can be sure to be seated near a
15 toilet. The claimant would limit herself to short journeys.
19. The claimant's mental impairment also resulted in her taking things out of context in her head and worrying about things which then impacted upon her ability to sleep.
20. The claimant's mental impairment resulted in lethargy and prevented the
20 claimant from being able to fully socialise and interact with her child. She restricted the activities in which she engaged often to sedentary activities (rather than other activities with her child which may be more active or outdoor).
21. The claimant's mental impairment had an impact upon the claimant's ability
25 to carry out and complete household tasks such as common house work tasks. The claimant became agitated and often had to stop carrying out housework and ask her child or a friend to assist. That included putting washing or shopping away, cleaning after a pet and cleaning the house and dishes.

22. The claimant encountered a number of significant personal issues in her life in the last year or so. These issues undoubtedly had an impact upon the claimant but the impact of the claimant's mental impairment had already existed prior to these matters, While those matters undoubtedly created further stress and anxiety for the claimant, the claimant's mental impairment (and the impact here set out) was already present.
23. The claimant had, and to an extent continues to have, a good support network and her child and parenting is a source of joy and positivity for the claimant.
24. The impact of the claimant's mental impairments was that she regularly felt overwhelmed or exhausted. She struggled to commence household tasks and regularly felt unable to complete tasks. She was able to look after her child but struggled to complete household tasks herself, including house work and limited her interaction with the child (to restrict to sedentary activities).
25. The claimant's mental health resulted in the claimant becoming more isolated and emotionally drained. The claimant has severely limited socialising with others and struggled to enjoy activities that she would previously have enjoyed, such as watching a film. The claimant found it difficult to lift her mood when she became anxious and on occasion felt she cannot manage to do so. The impact resulted on occasion in hives and sensory overload.
26. The impact of the claimant's mental impairments lasted for over 12 months (and had lasted for over 12 months during the material time in this case). The impact was severe and materially affected the claimant on a day to day basis. The impact of the stress, anxiety and depression resulted in her struggling to complete household chores and made it difficult for her to sleep. The foregoing impact was evidenced even when the claimant had the benefit of medication. While the claimant secured better sleep with the benefit of medication, the difference was not such as to result in the impact being minor. Her sleep levels are poor as a consequence of the mental impairments, even with the benefit of medication.
27. The claimant's mental impairments affected the claimant on a daily basis and had done for over 12 months. The claimant regularly had low moods and her

anxiety levels were regularly high. The claimant had poor sleep. As a consequence, the claimant felt she existed rather than lived.

Back pain

- 5 28. The claimant began to have back pain over a decade ago which worsened following pregnancy. Her stomach muscles had been adversely affected. Painkillers had not worked and the claimant sought medical intervention. She was placed on medication which she was to take when she required it. She used patches and other ways to manage the pain she encountered but the pain persisted.
- 10 29. The claimant's back pain would come and go but had a material impact upon the claimant's ability to wash dishes, cook or drive.
30. The claimant had undergone physiotherapy and is continuing with exercises. Even with the benefit of such treatment the claimant still suffered pain in carrying out day to day activities.
- 15 31. On a scale of 1 to 10, 10 being the most severe, the claimant found back pain caused her to suffer pain around level 8
32. The back pain the claimant encountered affected the claimant's ability to sit down for lengthy periods of time and often cushions are required to mitigate the effects. On occasion the pain resulted in the claimant having to go to bed.
20 The pain significantly impacted the claimant's ability to commence and complete housework.
33. The claimant secured adult disability payments as a result of her back pain (together with the mental impairments)
34. As a result of the claimant's back pain, she was unable to attend the gym and
25 exercise. She struggled to go shopping and stand or sit for any lengthy periods of time.
35. The claimant became sore when doing housework and required support to complete tasks. That includes vacuuming and washing and cleaning.

36. The effects of the physical impairment had lasted for over 12 months.

Observations on the evidence

37. In this case the outcome determined by and large upon the claimant's evidence. The claimant was clear in setting out the impact she said her impairment had upon her ability to carry out day to day activities. The respondent's position was that the claimant was exaggerating (and had done to secure social security payments). The respondent's agent fully and properly tested the claimant's evidence and her credibility in relation to these key points.
38. The Tribunal carefully considered the claimant's evidence and the documentary evidence that was provided having been so challenged. The Tribunal was satisfied that on the balance of probabilities the claimant was accurate and truthful in her evidence. The Tribunal did not consider that the claimant had exaggerated her evidence or that she was seeking to misrepresent the position before the Tribunal.
39. The Tribunal found the claimant credible and clear. She accepted there were occasions where other factors had a major impact upon her life (and there were significant personal issues that she had to face) but the evidence was clear that the impairments the claimant had were impairments which predated many of these personal challenges and impairments which had materially affected the claimant.
40. The claimant was clear that she had raised the issue during her interviews. There was no doubt the discussion at the initial stages did not focus on the claimant's health but more on working hours. The Tribunal did not consider the claimant to have misled the Tribunal. The evidence before the Tribunal supported the claimant's position that she was able to carry out the role for which she had applied and that the respondent would be supportive particularly given the claimant's family situation.
41. The Tribunal did not consider the absence of detail in the claim form, which the claimant prepared herself, as to what she said at the interview stage,

demonstrated that the claimant was not being truthful in her evidence as to the impact of her impairments. The claim form did set out the health issues the claimant had when viewed in context. The key evidence was that before the Tribunal which was clear as to the impact of the physical and mental impairments the claimant had, which were both supported by the medical evidence the claimant had secured.

5

42. The claimant had made it clear that she had good support networks. This did give her time, if she do wished, to enjoy life. Rather than do so, however, she had remained at home and did not undertake activities that she could otherwise have done. The Tribunal did not accept the respondent's agent's argument that the issues in this case arose in large part as a result of the claimant's personal issues (rather than as a consequence of the impairments the claimant had) and that the impairments did not have the relevant effects.

10

43. The issues in this preliminary hearing were resolved essentially by the claimant's evidence and what the effect her impairments had upon her life. While that was supported by the claimant's GP and the outcome of her benefits application, the issues in this case required an assessment of the oral evidence of the claimant and an assessment as to the legal issues in light of that evidence.

15

20 **Relevant law: Disability status**

44. Section 6(1) of the Equality Act 2010 provides: '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.'

25

45. Schedule 1 contains supplementary provisions in relation to the determination of disability. Paragraph 2 states: 'The effect of an impairment is long-term if (a) it has lasted 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.'

30

46. Paragraph 5 of the schedule states: '5(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 treat or correct it; and (b) but for that, it would be likely to have that effect...

47. The ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (the Guidance) does not itself impose legal obligations, but the Tribunal must take it into account where relevant (Schedule one, Part two, paragraph 12).
48. The Guidance at paragraph B1 deals with the meaning of ‘substantial adverse effect’ and states ‘The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.’
49. Paragraphs B4 and B5 state that: ‘An impairment might not have a substantial adverse effect on a person’s ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effect on more than one activity, when taken together, could result in an overall substantial adverse effect. For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of day-to-day activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.’
50. Paragraph B1 should be read in conjunction with Section D of the Guidance, which considers what is meant by ‘normal day-to-day activities’.
51. Paragraph D2 states that it is not possible to provide an exhaustive list of day-to-day activities.
52. Paragraph D3 provides that: ‘In general, day-to-day activities are things that people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out

household tasks, walking and travelling by various forms of transport, and taking part in social activities.'

53. Paragraph D16 provides that normal day-to-day activities include activities that are required to maintain personal well-being. It provides that account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, or personal hygiene.
54. The Equality and Human Rights Commission: Code of Practice on Employment (2011), at Appendix 1, sets out further guidance on the meaning of disability. It states at paragraph 7 that 'There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause.'
55. At paragraph 16 it states 'Someone with impairment may be receiving medical or other treatment which alleviates or removes the effects (although not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if the substantial adverse effects are not likely to occur even if the treatment stops (that is, the impairment has been cured).'
56. In **Goodwin v Patent Office** [1999] IRLR 4, the Employment Appeal Tribunal held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are:
- a. Does the person have a physical or mental impairment?
 - b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
 - c. Is that effect substantial?
 - d. Is that effect long-term?
57. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability.

Submissions

58. Both parties had submitted written submissions and provided supplementary oral submissions having had the chance to consider and comment upon each other's submissions. They are fully taken into account and were considered in detail as were the oral submissions from both parties.

Decision and outcome

59. The Tribunal considered the issues in turn.

Does the claimant have a physical or mental impairment?

60. The parties had agreed the claimant had both a physical and mental impairment, namely back pain and depression, stress and anxiety.

Does that impairment have an adverse effect on the claimant's ability to carry out normal day-to-day activities?

61. The respondent disputed that the impairments the claimant had were such as to have an adverse effect upon the claimant's day to day activities. The Tribunal was not satisfied that the evidence supported the respondent's position.

62. The evidence was clear in showing that the claimant's mental impairment had a material impact upon the claimant's ability to socialise and to sleep. It also affected her ability to use public transport, interact with her child and socialise. Those activities were normal day to day activities and were adversely affected by the claimant's mental impairment.

63. The claimant's physical impairment had a clear impact upon the claimant's ability to stand or sit for long periods, to drive and to do housework. It also had an impact upon her ability to shop and interact with her child. Those activities were normal day to day activities and were adversely affected by the claimant's physical impairment.

64. The claimant's ability to carry out normal day to day activities was therefore adversely affected by both impairments from the evidence in this case.

Was the effect substantial?

65. The respondent's agent argued the effect was minor or trivial in respect of both impairments. The Tribunal did not accept that characterisation from the evidence before the Tribunal.
- 5 66. The claimant's mental impairment affected her ability to socialise and to look after her child. It affected her mood and ability to sleep. This impact was more than minor or trivial: it was substantial. Even with the benefit of medication, the impact upon the claimant was severe. Her sleep pattern was poor and she was unable to socialise. Her mental impairments severely limited her ability to travel such that she only went on short journeys. It also limited her interaction with her child such that she would do sedentary tasks rather than active tasks.
- 10 67. The impact of the claimant's mental impairment upon her ability to carry out day to day activities was substantial.
- 15 68. The claimant's physical impairment significantly affected the claimant's ability to drive and stand and sit for long periods and to carry out house work. This impact was material and severe. On occasion the claimant required to go to bed given the pain she encountered. She would also abandon shopping trips and leave housework incomplete or have others complete it for her.
- 20 69. The impact of the claimant's physical impairment upon her ability to carry out day to day activities was substantial.

Was that effect long-term?

70. The substantial and adverse effect of each of the physical and mental impairments was such to have lasted longer than 12 months and, in this case, had subsisted for many years.
- 25

Summary and next steps

71. The Tribunal is satisfied from the evidence before it that at the material times the claimant had a mental and physical impairment both of which satisfied the definition contained within section 6 of the Equality Act 2010 such that the

claimant was a disabled person. As a consequence, her claims of disability discrimination can proceed, along with her other claims.

- 5 **72.** The parties are directed to have a discussion as to further procedure and whether a telephone case management preliminary hearing is required, or the parties are content that case management orders can be issued from chambers.

10 **Employment Judge: D Hoey**
Date of Judgment: 06 September 2023
Entered in register: 08 September 2023
and copied to parties