



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4103088/2022 (V)**

**Held at Aberdeen on 8 November 2022**

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**Employment Judge N M Hosie**

**Mr D Gibbs**

**Claimant  
In Person**

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**Bristow Helicopters Limited**

**Respondent  
Represented by  
Ms G Donald,  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that: -

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1. the claimant was not a disabled person, in terms of s.6 of the Equality Act 2010; and
2. the discrimination claim is dismissed for want of jurisdiction

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**E.T. Z4 (WR)**

## REASONS

1. This claim comprises complaints of constructive unfair dismissal and disability discrimination (failures to make reasonable adjustments). The claim is denied  
5 in its entirety by the respondent.
2. The case called before me by way of a preliminary hearing to consider and determine two issues, in relation only to the discrimination complaints: disability status and time-bar. The hearing was conducted by video  
10 conference using the Cloud Video Platform (“CVP”).

### The evidence

3. I heard evidence from the claimant at the hearing. A Joint Bundle of  
15 documentary productions was submitted (“P”); the respondent’s solicitor also submitted a Chronology, which I was satisfied was reasonably accurate.

### Disability status

- 20 4. Mr Gibbs gave his evidence in a measured, consistent and convincing manner and presented as credible and reliable.
5. He is a helicopter pilot. He was employed by the respondent from 1 September 2014 until 4 August 2022 when he resigned. Latterly, he was  
25 employed as a Search and Rescue (“SAR”) Commander, which involved piloting a helicopter in emergency UK SAR operations.
6. I was satisfied that in certain periods during his employment he suffered from anxiety and depression. With reference to the definition of disability in s.6 of  
30 the Equality Act 2010 (“the 2010 Act”), these were the “mental impairments” upon which he relied.

7. On 14 July 2022, I issued an Order to furnish written answers to questions relating to the issue of disability status (P.51-52). The claimant responded to the Order on 24 July 2022 (P.63-71). I was satisfied, on the evidence, that his anxiety and depression in two specific periods namely February 2020 to August 2020 and March 2021 to July 2021 were as he alleged:

*"I was unable to work, I struggled to get out of bed and care for my three children. I could not concentrate enough to read a book or watch a television programme. There were two significant period (sic) where I didn't sleep, struggled to eat and was sick*

- *Could not care for children*
- *Struggled to sleep*
- *Struggled to eat*
- *Physically sick*
- *Gave up sports/hobbies for a period, archery, swimming, going to cinema*
- *Did not socialise with friends*
- *Contently (sic) tired/lethargic*
- *Lack of interest in sex*
- *Arguing with wife and children."*

8. In response to my Order (P.76/77), the claimant also submitted Further and Better Particulars of his discrimination complaints (P.80-83).

**First period of anxiety and depression from on or about 28 February 2020 to on or about 29 July 2020**

9. The first indication the respondent had that the claimant was suffering from depression was on or about 28 February 2022. Clark Broad, the respondent's Flight Operations Manager, sent an e-mail on that date to Lisa Small, HR Business Partner to advise that the claimant was not able to work "*because of depression*" (P. 173-174).

10. The first medical report with a diagnosis of "Generalised Anxiety Disorder" was from Dr. Moghul, Consultant Psychiatrist, dated 29 July 2020 (P263-265). This was his clinical assessment based on a number of reviews, the earliest of which was 31 March 2020.

11. The claimant had been signed off work from 3 February 2020 until 24 February 2020, but that was only in respect of an “*elbow injury*” (P.259-260).
12. In his report of 29 July, Dr. Moghul also said this: “*When most recently reviewed on both 30 June and 22 July in particular, his anxiety symptoms had largely resolved. He is now sleeping normally without any problems relating to insomnia. He has not had any anxiety episodes for approximately 4 weeks and is now largely settled apart from very brief moments where he may feel slightly anxious. He now has no restrictions or limitations in day-to-day functioning*” (P264).
13. Dr. Moghul also said in his report that, “*the prognosis is very good*” and that he judged that, “*the prognosis is good and the risk of recurrence to be small in the medium term*” (P.265).
14. There was also produced a report from Dr. Peter Smith, a Consultant Psychiatrist to the Civil Aviation Authority, dated 3 November 2020 (P.266-267) which recorded that at a meeting on 3 November Mr Gibbs, “*had a bright and positive attitude and feels most of the stresses of the past are behind him*”.
15. There was also produced a report from Dr. Robin Love, dated 2 December 2020, which recorded that the claimant’s Class 1 CAA Certificate had been re-instated (P.268-269).
16. Based on that medical evidence, I was satisfied that the claimant’s first period of alleged disability was from on or about 28 February 2020 to on or about 29 July 2020. This was consistent not only the medical evidence but also his own oral and written evidence (P.63, for example).

**Second period of anxiety and depression from on or about 24 March 2021 to on or about 21 July 2021**

- 5 17. On 29 March 2021, Dr. Moghul submitted a report following the claimant undergoing A “simulator training and test” in Aberdeen (P. 272-273).
18. The training and test had “*gone badly*” and as a consequence Dr. Moghul reported that his “*anxiety levels have risen enormously in response*”.
- 10 19. Dr. Moghul also recorded in his report that, “*prior to this week, his anxiety levels had been as normal as they had been for many months and so it does suggest that this is a response to this situation*” (P.273).
- 15 20. On 21 July, Dr. Moghul reported that the claimant’s condition was much improved. That he was, “*functioning with no limitations or restrictions. He is driving. He has no sedation or side effects from the medications*”. He recommended that the claimant should “*begin a return to work process*” (P.274-275).
- 20 21. Based on this evidence, and that of the claimant, I was satisfied that his second period of anxiety and depression was from on or about 24 March 2021 (P.272) to on or about 21 July 2021 (P.274).

**Respondent’s submissions**

- 25 22. The respondent’s solicitor made oral submissions. She also made written submissions which are referred to for their terms. The following is a brief summary.
- 30 23. She referred to the following cases: -

***Richmond Adult Community College v. McDougall*** [2008] IRLR 227  
***All Answers Ltd v. W*** [2021] IRLR 612

*Kapadia v. London Borough of Lambeth* [2000] IRLR 699  
*Goodwin v. Patent Office* [1999] IRLR 4  
*J v. DLA Piper UK LLP* UKEAT/0263/09  
*Khorochilova v. Euro Rep. Ltd* UKEAT/02/66/19  
5 *Tesco Stores Ltd v. Tennant* EAT0167/19  
*Sullivan v. Bury Street Capital Ltd* [2021] EWCA Civ1694

24. She made reference to the claimant's assertion that there were two separate failures to make reasonable adjustments in the period from 17 November  
10 2020 to 16 December 2020; and from 27 January 2022 to 14 February 2022.

25. She submitted, with particular reference to the medical evidence, that the claimant did not suffer from anxiety and depression or a "generalised anxiety disorder" during either of these periods.

15 26. She further submitted that, "*the claimant's impairment did not adversely affect his ability to perform 'normal day-to-day activities' in terms of the Act at either of the relevant times; that the effect was only 'substantial' in respect of the two separate periods from 28 February 2020 to 29 July 2020 and from 29*  
20 *March 2021 to 21 July 2021 only.* She submitted that there was no evidence of his impairment having a substantial adverse effect on his ability to carry out normal day-to-day activities at any other time during his period of employment with the respondent.

25 **Long-Term**

27. She further submitted that the alleged adverse effect was not "long-term": "*It had not lasted 12 months; it was not likely to last for at least 12 months; it was not likely to last for the rest of the claimant's life.*"

30 28. In support of her submission in this regard she referred to the Guidance on the definition of disability (2011) at para. C4:- "*In assessing the likelihood of any effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything*  
35 *which occurs after that time will not be relevant in assessing this likelihood*".

29. She submitted that the medical reports, *“do not contain a precise prognosis as to what, if any, long-term adverse effects are anticipated from 21 July 2021. The respondent notes, however, that Dr. Moghul initially assessed the claimant’s anxiety condition as a response to a specific situation, and does not contradict this assessment in his later report when the claimant is improved. The respondent therefore submits this does not support the anxiety disorder would **likely** be or have a long-term effect.”*
30. In conclusion, she submitted that, *“that the claimant has failed to show that he suffers from a disability as defined in the Act, and as such his complaints of failure to make reasonable adjustments should be dismissed.”*

#### **Claimant’s submissions**

31. The claimant accepted that there were two periods when he suffered from anxiety and depression of six months and four months respectively. He referred to Dr. Moghul’s report of 29 July 2020 and the diagnosis of Generalised Anxiety Disorder (P.263) which was during the “first period”.
32. He also referred to Dr. Moghul’s report of 21 July 2021 which related to the “second period” and submitted that this was “the same condition as the first period”.
33. While Dr. Moghul did say that the deterioration in his health was due to the difficulties which he had with the simulator training and test, his medication was increased.
34. Dr. Moghul also said in his report of 29 July that he had been given “a one-year history of worsening anxiety” (P.263).
35. He submitted, therefore, that his anxiety and depression had lasted for more than 12 months.

**Discussion and decision****Disability status****Relevant law**

5 36. The provisions of the Equality Act 2010 (“the 2010 Act”) apply only in relation to persons who have a disability. S.6 of the 2010 Act is in the following terms:-

**“6. Disability**

(1) *A person (P) has a disability if –*

(a) *P has a physical or mental impairment, and*

10 (b) *The impairment has a substantial and long-term adverse effect of P’s ability to carry out normal day-to-day activities.”*

37. In considering the particular circumstances relating to Mr Gibbs, I had regard not only to the foregoing definition, but also the “Guidance on Matters to be taken into Account in Determining Questions relating to the Definition of Disability (2011)”. The case of **Goodwin**, to which I was referred, is still good law. The different factors involved in the definition of ‘disability’ need to be looked at separately. In doing so, it is necessary to bear in mind that the relevant point in time to consider whether a person was disabled is the date of the alleged discrimination. That was of particular significance in the present case.

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**Physical or mental impairment**

25 38. On the evidence, I readily concluded that for certain periods of time Mr Gibbs suffered from anxiety and depression and that this was a “mental impairment”.

39. Not only did I have the claimant’s own evidence in this regard and he presented as entirely credible and reliable, there was also supporting medical evidence, in particular, from his Consultant Psychiatrist, Dr. Moghul (P.263-

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265, for example) when he was diagnosed as having a “General Anxiety Disorder”.

### **The relevant times when discrimination alleged**

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40. However, as I recorded above, I had to consider whether or not the claimant was disabled at the relevant time, namely at the time of the alleged discrimination (see *Sullivan*, for example).

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41. Mr Gibbs alleged that there were two separate failures to make reasonable adjustments. The first period started in November 2020 when he sent an e-mail to the respondent’s Director Neil Ebberson asking that he be moved to the vacant position at the Lee-On-Solent base (P.177-178). He was required to attend a competitive interview for the role (P.180). He was advised on 16  
15 December 2020 that his application had been unsuccessful. He claimed that the respondent had failed to make a reasonable adjustment in this regard. The first relevant period, therefore, was from 17 November 2020 to 16 December 2020.

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42. The second relevant period related to an allegation that during 2021 and 2022 the respondent failed to make the reasonable adjustment of posting him to the Lee-On-Solent base as a temporary “floater pilot”. As the respondent’s solicitor submitted, the claimant was unable to work between 27 January 2020 and 27 January 2022; and from 14 February 2022 until the termination  
25 of his employment on 4 August 2022. The second relevant period, therefore, was from 27 January 2022 until 14 February 2022.

### **Periods of anxiety and depression**

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43. On the evidence, there were two distinct periods when the claimant suffered from anxiety and depression. The first was from February 2020 to July 2020; the second was from March 2021 to July 2021.

44. On the evidence, I was not persuaded that the claimant suffered from anxiety and depression, other than during these periods. I was satisfied that the submissions by the respondent's solicitor, in this regard, were well-founded.

5 45. As the respondent's solicitor submitted, so far as the first period was concerned, in his report dated 29 July 2020 (P.263-265) Dr. Moghul said this:-

10 *"When most recently reviewed on both 30 June and 22 July in particular, his anxiety symptoms had largely resolved. He is now sleeping normally without any problems relating to insomnia. He has not had any anxiety episodes for approximately 4 weeks and is now largely settled apart from very brief moments where he may feel slightly anxious. He now has no restrictions or limitations in day-to-day functioning....."*

15 ***Likelihood of recurrence***

20 *In my opinion, the prognosis is very good. I base this on the fact that Mr Gibbs has no past psychiatric history and his anxiety symptoms developed in the context of three specific stresses. One of those stresses has now been entirely removed and that sadly his father passed away, but this does not mean that Mr Gibbs does not have the ongoing care and support obligations that were affecting him considerably over the last year or so. He has also now had some success with Social Services in terms of further support such as respite for his child and therefore that stress has reduced considerably. Therefore, due to the reduction of stresses and the fact that he has never had*

25 *any past psychiatric history and not previously needed to be treated, I would judge his prognosis to be good and the risk of recurrence to be small in the medium term."*

30 46. Further, as the respondent's solicitor also drew to my attention, in his report of 3 November 2020 Dr. Hayden Smith said this:

*"Meeting on 3 November: Had a bright and positive attitude and feels most of the stresses of the past are behind him."*

35 47. I was also referred to the letter from Dr. Love to the claimant dated 2 December 2020 (P.268/270) confirming that his UK CAA Medical Certificate had been re-issued and that he was fit to return to flying. His Impact Statement (P.63) supports the submission by the respondent's solicitor,:

40 *"That he had recovered enough by 4 November 2020 to regain his CAA Medical and did not relapse again until March 2021".*

48. So far as the second period was concerned, I was also satisfied that the submissions by the respondent's solicitor were well-founded. She referred to a number of medical reports and e-mails from the claimant (para. 3.4).

5 49. I arrived at the view, therefore, that, on the balance of probabilities, the claimant was not disabled at the relevant times he alleges the respondent had discriminated against him by failing to make reasonable adjustments. His discrimination claim must therefore fail.

10 50. However, for the sake of completeness and, lest I am in error, I deal with the various elements of the s.6 definition.

#### **Adverse effect on day-to-day activities**

15 51. I was satisfied, on the basis of the claimant's own evidence (the Impact Statement (P. 63-64) for example) and the medical evidence, that during the periods when it was established he was suffering from anxiety and depression that this had an adverse effect on his day-to-day activities.

#### **20 Was the effect 'substantial'?**

52. In the two periods when he was suffering from anxiety and depression the effect on him could not be described as "minor or trivial" (s.212(1) of the 2010 Act). Therefore, for these two periods the adverse effects were substantial.

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#### **"Long-term"**

53. Under para. 2(1) of Schedule 1 to the 2010 Act, the effect of an impairment is long-term if it:

- 30
- 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.

54. It follows from my findings above that I was not persuaded, on the evidence, that the claimant's impairment either lasted 12 months or that it was likely to last more than 12 months.

5 55. As I recorded, there were two distinct periods when the claimant was disabled. The first period was from February to the end of July 2020, some 6 months; the second was from March to July 2021, some 5 months.

10 56. I was satisfied that the adverse effect on the claimant's impairment had not lasted for 12 months at any point during either of the relevant periods or was likely to last for 12 months.

15 57. In arriving at this view I was assisted by the Guidance on the meaning of "long-term effects" at section C. In particular, there was the following at para. C.6 :-

20 *"In contrast, a woman has two discreet episodes of depression within a ten-month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she experiences a bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered the Act. This is because, as at this stage, the effects of impairment have not yet lasted more than twelve months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the twelve-month period. However, if there was*  
25 *evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond the twelve-month period, she would satisfy the long-term requirement."*

30 58. That was particularly apposite to the present case. There was no evidence that the claimant's two episodes of anxiety and depression were part of an underlying condition of depression which was likely to recur beyond the twelve-month period. Indeed, the second period was caused by a different factor: the difficulties which the claimant experienced undergoing training on the simulator which the respondent's solicitor described as "reactional".

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59. I was not persuaded, therefore, that the adverse effect was "long-term".

**Onus**

60. I was also mindful that the onus was on the claimant to establish that he was disabled; not just disabled, in a general sense, but as defined in s.6 of the 2010 Act.

61. For all these reasons, therefore, I arrived at the view that the claimant was not disabled, as defined in s.6 of the 2010 Act.

**Time-bar**

62. Also for the sake of completeness, I record that had I found that the claimant was disabled I would have decided that his claim was time-barred.

63. There was no allegation of a continuing act of discrimination. There were two distinct allegations of a failure to make reasonable adjustments based on different facts and circumstances.

64. In short, the first allegation ended on 16 December 2020. The claimant only notified ACAS on 19 May 2022; the Certificate was issued on 27 May (P. 1); the claim form was submitted on 6 June 2020. This meant, having regard to the three month time limit, that only acts complained of on or after 28 February 2022 would be timeous.

65. I would not have been of the view that it would be "just and equitable" to extend the time limit, in all the circumstances. The claimant was aware on 16 December 2020 that his application for a move to work at the Lee-On-Solent Base had been unsuccessful. He is an educated, articulate, person and was well able by reasonable enquiry, to establish there was a three-month time limit and to submit his claim in time. There was no impediment to him doing so.

66. Further, as the Court of Appeal stated in *Robertson v. Bexley Community Centre* [2003] IRLR 434, “*the exercise of the discretion is the exception rather than the rule.*”

5 67. I would also have taken the same view in respect of the second allegation which ended on 14 February 2022. That claim was also out of time and, for the same reasons, it would not have been “just and equitable” to extend the time limit.

10 **Dismissal**

68. As the claimant failed to establish that he was disabled in terms of the 2010 Act, as he was required to do, the Tribunal does not have jurisdiction to consider his discrimination claim and it is dismissed.

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**Employment Judge: N M Hosie**

**Date of Judgement: 28 November 2022**

**Date sent to Parties 29 November 2022**

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