



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4108378/2022 (V)**

**Held at Aberdeen on 19 July 2023**

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**Employment Judge J M Hendry**

**Mrs H Eke**

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**Claimant  
Represented by  
Mr M Gachuba,  
Solicitor**

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**Sport Aberdeen**

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**Respondent  
Represented by  
Mr G Graham,  
Counsel  
Instructed by  
Ms N Scorgie**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The Judgment of the Tribunal is that the claimant failed to demonstrate that she was a disabled person and that the claims for disability discrimination are dismissed.

**REASONS**

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1. The claimant in her ET1 made various claims, principally claims for disability discrimination (direct, indirect and failure to make reasonable adjustments).

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

The claimant was allowed to lodge Better and Further Particulars which she did and these particulars run to some 56 paragraphs and constitute the claimant's pleadings.

- 5 2. Prior to the hearing which was to determine disability status the claimant's representative Mr Gachuba lodged detailed written submissions. The respondents in their letter dated 7 July sought Strike Out and Deposit Orders in relation to the various claims.
- 10 3. It was agreed at the outset that the issue of disability status would be addressed first and that Mr Gachuba call his client to give evidence if he thought it prudent to do so. The strike out matter can then be addressed.
- 15 4. In the circumstances it was ultimately agreed that strike out would not be determined today and would await the decision on the disability discrimination matter. This would be to a shortening of today's proceedings and avoiding duplicating arguments.
- 20 5. At the outset, I asked parties for their broad position. Mr Graham explained that his client's position was that they accepted that the claimant suffered from various physical impairments which had lasted more than year. The substantial adverse effect of those impairments had not. He referred me to the list of issues. The claimant's position there was that she relied on incontinence caused by her fibroid condition which she said had a substantial  
25 adverse effect on her day-to-day activities.
- 30 6. Mr Gachuba's position was that the condition had lasted more than 12 months. Looked at fairly he said it was clear that the adverse effect had lasted more than a year. His position was also that the claimant was not released from hospital until 30 August because of complications arising from surgery and that this should be counted as part of the duration of the claimant's disability.

7. Mr Graham briefly set out his position in further detail. He took the Tribunal through the list of issues, the pleadings, various medical reports, what happened post operation and what was recorded in the medical records. He urged the Tribunal to focus on the issue of incontinence. This was the substantial disadvantage that the claimant relied on. He made reference to the medical report (page 595) in April 2023 which gave a G.P.'s view that the claimant was covered by the DDA. It was the Tribunal's view that ultimately counted. He hoped to demonstrate that the G.P. had gone too far in the report when the medical records were considered in more detail as it was his contention that saying that the claimant's disability had lasted more than 12 months was simply not supported by those records. As can be seen from the medical records the claimant consulted her G.P. regularly in relation to a range of matters. These included issues in relation to work, difficulties with her relationship, problems with her coil and periods as well as the "lump" she had discovered in her stomach which turned out ultimately to be diagnosed as fibroids which necessitated a hysterectomy.

8. The starting point, Mr Graham suggested should be the consultation on 18 January 2021. He then went over the terms of the consultation and what had been noted. Essentially it was simply the identification of a lump in the claimant's stomach and the G.P. putting in place steps to urgently investigate this. Later that year the claimant was prescribed paracetamol because of pain. In his view that tended to imply that the pain could properly be managed by a readily available "over the counter" medication suggesting in turn it did not give rise to a substantial disadvantage. On 28 October 2021 the claimant attended the G.P. in relation to unrelated stress matters. On 19 January 2022 she had counselling. On 19 January 2022 it was the first occasion that the claimant makes reference to incontinence. He observed that she saw her G.P. in relation to a whole range of other matters and it seems clear from the notes the incontinence only became serious enough for her to consult her G.P. on this date. There was a further consultation on 18 May. In his submission at best the substantial disadvantage lasted no more than 6 or 7 months. The period in hospital had to be discounted.

9. Following Mr Graham's submissions, I gave Mr Gachuba an opportunity to consider his client's position before responding. He had to decide whether he wanted to call Mrs Eke as a witness. After a break he decided to do so and the Tribunal heard evidence from Mrs Eke who took the Tribunal through the history of the various difficulties she had experienced. She emphasised that she had been concerned about the lump in her stomach and this had galvanised her to see her G.P. on 18 January 2021. At this point her G.P. Dr. Hamilton referred her to a Gynaecologist.
10. The first reference the claimant consulted her G.P. about bladder/incontinence problems took place on 27 January 2022. The entry read:
- "Patient reviewed ongoing enlarging pelvic mass (known Fibroids), pressed on bladder and frequent daily urinary incont. now....urgent scan."*
11. On 18 May 2022 the notes record:
- "Patient reviewed now priority 1 for hysterectomy ..... struggling a bit at work, challenging, needs to pass urinary 10 mins, quite embarrassing. Asks for working from home but boss thought best to move next to toilet....."*
12. The claimant had a hysterectomy on 27 July. On the same date she had her umbilical hernia repaired and was discharged from hospital on 1 August 2022.
13. The claimant's stated that the medical notes did not make any earlier reference to her bladder symptoms because she was too embarrassed to raise the matter with her G.P. She found it difficult to recall when things became "unbearable" in relation to going to the toilet. She explained that for some time her children would look out for places for her to go to the toilet when out shopping. They would suggest that she went to the toilet after leaving church. When challenged in cross-examination as to why she had not raised these matters with her G.P. she indicated that she had been embarrassed. In re-examination the claimant indicated that she had raised incontinence with Vai and Nicky her bosses at work but was unable to say

when. She thought it would be 2021. Her position was that although she had not raised the matter with her G.P. she was suffering from incontinence for a considerable time before going to the GP and also with associated pain from her condition. She was challenged by Counsel that if she was too embarrassed to speak to her G.P. about her incontinence despite having spoken to her G.P. about all manner of personal difficulties, it was difficult to believe that she would have spoken about her incontinence to work colleagues.

- 10 14. On 18 August 2020 the claimant had a telephone encounter with her G.P.'s Practice. The notes record:

15 *"Telephone consultation due to Covid- 19 pandemic. Left sided, low back pain for 3d, no HX injury. No radiation, no paraesthesia, bowel/bladder ok. Systemically well. Taking regular paracetamol but still sore."*

- 15 15. On 20 August it was noted in a telephone consultation:

20 *"Lump in abdomen near umbilicus present for 5 years. Initially pea sized, has been increasing in size and now the size of an egg. Feels hard but not painful. APPT arranged for next week TCI."*

16. On 27 August 2020 the claimant has reviewed the notes record:

*"Advised what to watch out for refer general surgery. Also mentioned very stressed, recently tired would like bloods checked - will book."*

- 25 17. Mr Graham finalised his submissions. There were no issues in relation to the claimant's bladder (incontinence) until January 2022. On 19 January 2022 the notes record:

30 *".....also some ongoing physical issues that PT wants dealt with. Multiple Fibroids and umbilical hernia problems pressing on bladder and kidneys concern about this does not need seen by DD (Duty Doctor) but has appoint on Friday could be changed."*

18. The appointment was not changed. The period after the claimant's operation should not be counted towards any period or qualifications as a disabled

person. She had an unrelated hernia fixed. These matters do not relate to the underlying condition which had been cured by the operation.

19. Mr Gachuba's position and oral response was that the Tribunal should take care when interpreting medical notes too strictly. They were not legal documents. They were written for particular purposes and not as full as they might be. It was clear that the doctors were managing the claimant's condition. In his view it was obvious that the condition had an impact on her bladder. This is what was apparent from the report by Dr. Vallam Kondu, the Consultant Gynaecologist. The report was dated 1 March 2021 (page 277-278) stated: *"She also noted to have bilateral renal pelvic dilatation likely because of compression of the Ureters by the enlarged Uterus. An abdominal wall hernia was also noted"*. In other words, it was his position that it was clear from the diagnosis and the claimant's medical notes and records that she was likely to have bladder problems because of her condition namely the fibroids pressing on her bladder. As nothing could be done about this there was no point in recording it.

20. Prior to the hearing Mr Gachuba had lodged detailed submissions running to some 167 paragraphs in which he fully set out the claimant's position against the background of the relevant law. In relation to the issue of substantial adverse effect he deals with this in paragraph 9 and whether it was a long-term impairment in paragraph 12. He refers to an epigastric hernia being detected in December 2020 but that condition is not relied upon. He refers to events beginning with the consultation in January 2022 and the detection of a lump or lumps which turn out to be fibroids. He then asserts that the condition lasted 3 years.

### Discussion and Decision

21. Mr Graham focussed on the issue of whether the adverse effects of the claimant's condition(s) were long term. The issue for the Tribunal therefore was narrow but nevertheless critical. To have the status of being a disabled

person, and the right to make claims under the Equality Act 2010, a claimant must demonstrate that they satisfy the elements required by section 6 of the act:

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*“Disability*

*(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.”*

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22. Long-term is defined in Schedule 1 of the act.

*“Long-term effects*

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*2 (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.*

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*(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.”*

23. The claimant's position seemed straightforward. She claimed that the impairments had lasted much longer than 12 months.

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24. I considered the pleadings and the history of how this matter had evolved. In her ET1 the claimant relies on an “umbilical hernia” (which grew in size) and symptoms of the fibroid condition she had namely heavy bleeding and principally incontinence. I noted that the adjustments argued for by the claimant were to address problems arising from the incontinence and the difficulty of travelling to work and when at work having to go to the toilet very regularly.

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25. The List of Issues was discussed at a case management hearing in May and the formulation of the issues relating to substantial adverse effect were reduced to a number of matters.

5 26. Although Mr Gachuba kept open the opportunity of relying on the hernia we heard no evidence about any impact that condition had and it seems clear that it was incontinence related to the fibroid condition that had a substantial adverse impact on the claimant's ability to carry out day to day activities (because of incontinence) and it was this that the claimant sought  
10 adjustments for such as working from home to obviate the need for travel. In his submissions Mr Gachuba mentioned pain as an adverse effect and that the impairment started with the hernia being discovered three years earlier. However, the medical notes and the claimant's evidence seem to be clear that she was able to work and suffered no substantial symptoms relating to  
15 her hernia itself. In the Agenda document (para S4) completed by her the time frame of events starts in February 2022 with her asking her line managers for home working because *'her bladder was getting more heavily pressed by the growing fibroids'*. It was also clear from the List of Issues discussed at a case management hearing which was then sent to the claimant's representative  
20 and left unamended that the symptom accorded with the fibroid condition. The appropriate section of the List adjusted following the hearing on the 2 May (4(a)) was in these terms:

25 *"The nature of the substantial disadvantage suffered by the claimant was that she frequently had to use the toilet because of incontinence and bleeding, by making travel to and from work difficult and being embarrassed at work as having to frequently use the toilet, having a bloated stomach, possibility of showing bleeding."*

30 27. I noted that the claimant had lodged a "Factual Matrix" setting out her position in more depth. It was interesting to note that the factual background in relation to her health difficulties starts with early 2022 (paragraph 7) and in paragraph 8 she records that *"because of serious difficulties she was encountering in travelling to work"* she discussed her *"health challenges"* with her manager



Vai Mackie. There is no mention of an earlier meeting in 2021 with Ms Mackie and a colleague to discuss her incontinence as she spoke of in her evidence.

28. I also considered the medical records which are contemporaneous records of what the GP noted down. I take fully Mr Gachuba's warning that these can be incomplete and inaccurate but there is a clear pattern here or as Counsel described it the claimant's fibroid condition had a clear trajectory. In simple terms the claimant's incontinence got worse as they grew and put pressure on her bladder. I noted that in August 2020 at a consultation with her GP it was noted; "Bowel and bladder ok" At that point it was recorded that the lump had grown from a pea size to an egg size. There seems to be no mention of bladder or incontinence difficulties throughout 2021. It seems from the records that when repeatedly needing to go to the toilet began to impact on the claimant's life and work she saw her GP and that was in January 2022. She then spoke to her employers in February. I would have thought that if she had experienced incontinence when that started would have been very clear in her mind given the embarrassment she says she felt and which I have no reason to disbelieve. I did not accept the attempts to push back the onset of these particular symptoms becoming serious to three years earlier or even to late 2021.

29. Mr Gachuba pointed to the claimant complaining about colic. That is true but it is not relied upon as being a disabling symptom and I heard no evidence about it. However, on reviewing the papers I think it is important not to take too narrow a view. The conditions relied upon were both the hernia and the fibroids. In this context I considered the claimant's Impact Statement. In it the claimant made reference to being in constant pain and being initially prescribed Co-Dydramol which is a mixture of painkillers. The chronology is not completely clear from the Impact Statement but she seems to refer to 2020. I looked at references to pain in the notes. This did not clarify matters. Initially the claimant approached her GP with migraines and obtained analgesia. Later in 27 July 2020 she described general abdominal pain when

waking. However, in August she complained of back pain and then in January 2021 of back and neck pain.

30. The causes themselves are not necessarily significant if the symptoms were  
5 disabling and long term in other words in themselves having a substantial  
adverse impact. The GP notes are not particularly helpful in this regard. The  
claimant had periodic discomfort from her hernia and no doubt at some point  
the compression of her ureters by the fibroids became painful and indeed the  
fibroids themselves could be painful but I heard no evidence about the impact  
10 of the pain or what it might have been like if no painkillers had been taken. If  
the claimant had periodic backpain then that condition was not relied upon. It  
was pain emanating from the hernia or the fibroids that is important.

31. The suggestion in the notes is that the claimant took painkillers latterly  
15 paracetamol "as and when" and accordingly there is no evidence of it having  
a significant adverse impact.

32. I regret to say that despite having considerable sympathy for the claimant's ill  
health and the difficulties she faced at the time I do not accept her evidence  
20 on this crucial matter. I do not accept, given the terms of the claimant's  
interactions with her GP in whom she confided that is her incontinence had  
been out of the ordinary or remarkable in any way let alone having a  
substantial adverse impact on her life as she suggests that she would not  
have sought help. Mr Gachuba in the face of this difficulty suggested that  
25 incontinence would have been a well-known symptom and not recorded as  
the GP could do nothing about it. With respect that is speculation and we  
know that the GP was not told about the incontinence for some time because  
that is the claimant's evidence on the matter. On a separate but related matter  
if the hernia was likely to have as a symptom incontinence I would find it  
30 remarkable that the claimant had not been warned about this or the matter

raised in consultation with her and noted

<b>Employment Judge:</b>	<b>James Hendry</b>
<b>Date of Judgment:</b>	<b>1 August 2023</b>
<b>Entered in register and copied to parties:</b>	<b>1 August 2023</b>

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