



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4102677/2023**

**Preliminary Hearing held on 1 September and 6 November 2023**

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**Employment Judge J Hendry**

**Mrs Carol Malone**

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**Claimant  
Represented by:  
Ms R Wallace,  
Representative**

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**Communityfirstuk.com**

**Respondent  
Represented by:  
Mr Y Mahmood,  
Litigation Consultant**

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is that the claimant has demonstrated that she was a disabled person throughout her employment with the respondent; and the case will now proceed to a preliminary hearing for case management purposes in order to identify dates for a final merits hearing.

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### REASONS

E.T. Z4 (WR)

1. The claimant in her ET1 made various claims for disability discrimination. The case proceeded to a preliminary hearing for case management purposes which took place on the 7 June 2023 before Judge C McManus. Disability status was not accepted and a hearing was arranged to determine whether or not the claimant had disability status. The claimant's position was that she suffered from a significant anxiety condition and the Judge made various orders for the claimant to provide additional information in relation to her alleged disability such as an impact statement.
2. The case came to a hearing on 1 September. At that point disability status was still not conceded. I heard evidence from the claimant Mrs Malone and from her husband Tom Malone.
3. At the outset Mr Mahmood asked for a postponement. The only witness for the respondent was Pauline Lockhart who had difficulty attending for various personal reasons. He explained that she was in the middle of a house move, her mother for whom she cared was ill and she had had difficulty in downloading documents to prepare for the hearing. I was sympathetic to the respondent's position and decided that the hearing should proceed to hear the claimant's evidence in the matter and then be adjourned to allow the respondent's witness to give her evidence at a later date. Mr Mahmood indicated that he was sufficiently well instructed to proceed in the absence of his client. In support of her position Mrs Malone had lodged a written statement from herself, her daughter and from a Mrs Cadman, a friend. She had also lodged medical records from her GP showing prescriptions for Citalopram, an anti-depressant medication for some years.

### **Facts**

4. The claimant Mrs Carol Malone is 53 years of age. She is a teacher by profession. The claimant suffered from acute anxiety from her teenage years. As she grew up she developed various coping strategies to combat her anxiety. She tried yoga, breathing exercises and homeopathy. These were all effective to a limited extent but did not address the underlying condition she had.

5. The claimant would become particularly anxious in new situations or in the company of people she did not know or if something unexpected happened. She would become anxious in the presence of conflict or disagreement even if she was not directly involved. She would not drive to places she was unfamiliar, even if nearby, unless she was accompanied there by a friend or family member or had visited it accompanied beforehand.
6. The claimant would cope with her condition through the support and encouragement of her husband and family. Her husband would agree to be at hand either in person or contactable by telephone to reassure her. He would drive with her to local towns she needed to visit as part of her job before she had to do so herself. The claimant minimised her condition by being obsessively organised and planning her day and activities in detail beforehand. She would try not to outwardly show anxiety but found it difficult to pick up social cues from others giving the appearance of being distant.
7. The claimant became a primary school teacher and went to College in 1987. She started her career as a primary teacher in 1991. She kept her anxiety condition hidden except from close friends and family.
8. The claimant found it difficult to take part in social occasions.
9. The claimant moved into adult education and began working with Angus Council. Through her work she got to know Pauline Lockhart with whom she became friendly. From about 2015 onwards they would work together on various projects two or three times per week. On occasions they would socialise together. Mrs Lockhart was unaware of the claimant's condition but was aware she had problems when she became menopausal.
10. In about 2015 the claimant found it more and more difficult to cope. Her coping strategies became insufficient. She would regularly become anxious. She would have panic attacks two or three times a week. These would leave her confused and upset. At this point she was pre-menopausal. The claimant contacted her GP. She consulted the practice on 14 December 2015. The notes record *"telephone triage encounter. Tearful all weekend, feeling bad for weeks, peri-menopausal but not keen*

*for HRT as found COCP had effect on her before wondering re options? SSRI. Keen to come for chat appt tomorrow with SJ thanks."*

11. The claimant met her GP on 15 December and the notes record "pre-menopausal menorrhagia anxiety irritable ++ stressed, married, three kids, Christmas coming up, as below long discussed about options for SSRI." Thereafter the claimant was prescribed Citalopram. This had an effect on her mood. It made her less anxious. She was prescribed 20mg daily. The notes indicate that she was prescribed a supply of 28 tablets per month and thereafter 56 tablets per month throughout 2016, 2017, 2018, 2019, 2020. At various points the claimant felt slightly better and the dosage was latterly reduced to 10mg per day. The tablets came in 20mg form. She would halve a tablet.
12. The claimant had some difficulties in sourcing medication because of difficulties with her local pharmacy and on occasions because of such difficulties or because she felt better she would stop taking medication for a few weeks.
13. The claimant was taking Citalopram daily from 1 March 2023 onwards.

### **Witnesses**

14. The claimant is an articulate and intelligent person. Her evidence was both credible and reliable in relation to her description of her condition and its impact on her over the years. I also found the claimant's husband generally a credible and reliable witness, he gave his evidence in a straightforward manner, he must have found it difficult to do so given the sensitive nature of the subject matter. Mrs Pauline Lockhart was an honest witness but although she did not see signs of an anxiety condition she was unaware that the claimant was a long term user of Citalopram or had various coping strategies in place to combat symptoms of anxiety and as such she was not in a strong position to gainsay the claimant's evidence.

### **Submissions**

15. Mr Mahmood's position was that the claimant had failed to show a substantial effect of her condition on her. He pointed to the periods when

she was not taking medication. He stressed that she had worked very closely with Mrs Lockhart who was wholly unaware the claimant was in receipt of anti-depressant medication except for periods in 2019 for difficulties with the menopause coupled with problems at home. He suggested that the difficulties that had arisen at work which included the claimant's husband being removed from the board of the company and problems with her role in the company were "life events" which caused the anxiety/stress condition. The evidence of Mrs Lockhart was that she appeared well and able to cope. He submitted that this evidence contradicted the claimant's evidence about difficulties in getting up, cooking and so forth.

16. I was referred to the cases of *Herry v Dudley Metropolitan District Council* UKEAT/0100/14/LA (and the earlier decision in 2011) and the well-known case of *J v DLA Piper UK LLP (2010) UKEAT 0263/09/1506*.
17. Broadly the respondent's position was that the claimant suffered from transient work-related stress but this did not entitle her to be classed as disabled in terms of the Equality Act. Ms Wallace, the claimant's daughter and representative submitted that the evidence of Ms Pauline Lockhart related to the claimant's work. She could not "see behind the scenes" the effort and support the claimant had to have before being able to go to work. It took about a month before any medication wore off so even during short gaps the claimant had the benefit of the medication in her system. She found she could not cope with the absence of the medication. The claimant, she said, had difficulties with getting medication at periods but was still carrying out her usual coping mechanisms to mask the effects of the stress condition on her.

### Discussion and Decision

18. The provisions of the 2010 Act apply only in relation to persons who have a disability. The Act states:-
- "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 on P's ability to carry out normal day-to-day activities."**

19. When considering the particular circumstances relating to the claimant I also had regard to the issued guidance called “Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)” and also the EHRC Code of Practice on Employment (2011).  
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20. It is up to the claimant to demonstrate that she falls within the statutory definition. The case of **Goodwin v Patent Office** [1999] IRLR 4, remains good law. The different elements required by the definition of “disability” need to be considered separately. In this case the claimant said she had a mental impairment namely a condition of anxiety.  
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21. A qualifying condition must be “Long-term” Under para. 2(1) of Schedule 1 to the 2010 Act, 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. A condition that is likely to recur is also treated as long term.  
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22. The evidence seems clear that the claimant has suffered from her anxiety condition since her teenage years. It has been part of her life throughout. She has developed strategies to cope. Without these she would become anxious and have disabling panic attacks.
- 20 23. Mr Mahmood argued that the substantial effect was linked to adverse life events and that this was reflected in the limited medical evidence we had when the claimant appeared to stop taking medication. He said that the Tribunal could link this with the difficulties she was experiencing at work for example when her husband was removed from the Board on which she was a Director.  
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24. The difficulty with this submission is that the medical records speak to someone with a long term persistent underlying condition from the fact that the claimant was prescribed Citalopram since 2015. That medication is an antidepressant but also one that is prescribed for panic attacks which the claimant said was a feature of her condition. There are some, mostly short, gaps in the prescription of the medication but I accept that at least one was caused by a problem with the claimant’s local pharmacy and that even during short gaps the medication would still be in her system and likely to  
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be of some effect. In any event she did not stop using her normal coping strategies throughout.

25. The longer period absent from the GP Notes seems to relate to a situation where claimant felt better and by agreement with her GP halved her medication thus making her prescription last double the length of time before needing a repeat prescription.
26. The claimant and her husband gave persuasive evidence that she arranged and organised her life in some detail to cope with the condition (and had done so since her teenage years) whilst giving no indication to her colleagues that these strategies were in place. Her organisation abilities were praised by Mrs Lockhart. I accepted that the claimant would be very organised to reduce the chance of having to face something unexpected which would leave her anxious and be likely to trigger a panic attack. This may well have led her colleagues such as Mrs Lockhart to entertain no suspicion that this was a struggle for her. The claimant gave evidence that prior to having been prescribed Citalopram she could have up to two or three panic attacks per week which left her breathless and disorientated.
27. The claimant gave the example of being unable to drive, without strong feelings of anxiety or experiencing a panic attack to a town she was not familiar with. This led her to arrange to go to the town beforehand with her husband so the journey would not be unfamiliar to her and when made by her on her own to have the reassurance he was available to come and get her if she panicked. Driving to unfamiliar places is not a day-to-day activity but the example shows the depth and seriousness of the condition. This leads to the next issue was whether the effect of the claimant's admitted impairment had a substantial adverse effect on her ability to carry out normal day-to-day activities. The term "substantial" is defined by Section 212(1) EQA as meaning "more than minor or trivial". It sets a fairly low threshold for a claimant to surmount. (***Kapadia v London Borough of Lambeth [2000] IRLR 699 CA***).
28. Disability status has to be considered on the basis of the adverse effect on each claimant and on his or her particular circumstances. The EAT

commented in Goodwin that it is important to remember that the focus is on what a claimant cannot do, or can only do with difficulty, rather than what a person can do. This is a case where the claimant without her developed coping strategies and medication would be prone to regular disabling panic attacks or crippling anxiety when encountering new situations, people or the usual common day-to-day stresses of life. These effects are not trivial. In short I concluded that she would be unable to cope with day-to-day activities and comes within the definition of disability in the Act.

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10 29. In the round I do not place much weight on the gaps as the bigger picture is more instructive and shows a long term condition which has periodic “flare ups” and to this extent Mr Mahmood’s submission must be considered carefully as the issue is whether the underlying condition itself is sufficiently disabling to allow the claimant the protections of the Act or if  
15 the disabling symptoms can be treated as recurrent. The evidence that I accept tends to demonstrate that the claimant’s underlying condition, absent any exacerbations caused by stressful life events, amounts to a disability.

20 30. I am conscious that the claimant is not legally represented. One matter that the evidence suggested strongly was that the claimant presented to her colleagues as a competent and confident person with considerable organisational skills because of her coping strategy of being ultra organised. It was also apparent from the claimant’s evidence that apart from a small group of friends and relatives she kept these difficulties to  
25 herself. It was not part of the hearing to consider the employer’s knowledge of the claimant’s disability but nevertheless I cautioned her that if I found in her favour and the disability discrimination claims proceed the issue of the employer’s knowledge would be an issue.

30 31. I would hope that the claimant would seriously reflect on this matter. I accept it was not the focus of the hearing and there may be some evidence, which she can lead, to show constructive knowledge of the disability (which then triggers the duty to make adjustments) but if not then the claimant should withdraw these claims. The fact that the claimant was in fact suffering from this condition would remain part of the background



to her dismissal, even if claims for disability discrimination were withdrawn, and its relevance to the situation a matter for the Tribunal hearing the evidence to consider.

5           **Employment Judge:           J Hendry**  
              **Date of Judgment:           14 November 2023**  
              **Date sent to parties:           15 November 2023**