



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000468/2023

Held in Glasgow on 23 January 2024

Employment Judge: M Sutherland

5 **Ms Siobhan Donaldson**

**Claimant
In Person**

10 **Life Technologies Limited**

**Respondent
Represented by
Ms I Moretti –
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

15 The judgment of the Tribunal is that the Claimant was not disabled at the relevant time and her claim is dismissed.

REASONS

1. The Claimant has presented complaints of disability discrimination. An open preliminary hearing was arranged to determine whether the Claimant was a disabled person at the relevant time. The Claimant appeared on her own behalf. The Respondent had professional representation.

2. The Claimant asserts that she was disabled at the relevant time by reason of the mental impairment of anxiety, panic attacks and low mood. For the purposes of this hearing parties agreed that the relevant time (when the alleged acts of discrimination occurred) was from June 2022 to July 2023.

3. An impact statement was provided by the Claimant which advised that her mental health affected the following activities: her sleep; driving her kids to school; socialising; grocery shopping; her working hours; and her place of work.

30 4. At today's hearing the Claimant gave evidence on her own behalf and no other witnesses were called. A joint bundle of documents was provided.

5. The issues to be determined were –

Disability status

- a. At the relevant time, did the claimant have a mental impairment?
- b. If so, did that impairment have an adverse effect on her ability to carry
5 out normal day to day activities?
- c. If so, was that effect substantial (more than minor or trivial)?
- d. If so, was the substantial effect long term having lasted (or being likely
to last or recur) for 12 months?

10 **Findings of Fact**

6. The tribunal makes the following findings in fact-
7. The Claimant was employed by the Respondent as an Associate Accountant
from 7 September 2020 to 11 August 2023.
8. In 2019 the Claimant separated from her partner and court proceedings were
15 initiated regarding their shared property ('the separation proceedings'). Due
to the Covid pandemic they continued to live in the same house until August
2021.
9. From March 2020 the Respondent staff worked from home on account of the
Covid pandemic.
- 20 10. In 2020 the Claimant consulted with her GP but not on account of her mental
health (other than a discussion regarding a fear of flying).
11. In Summer 2020 the Claimant experienced what she referred to as her first
"panic attack" (which she described as a very brief episode of high anxiety).
The Claimant's GP records did not refer to any panic attacks.
- 25 12. On 31 March 2021 the Claimant consulted with her GP regarding her mental
health. She described "extreme stresses re ex-partner" who was still in the
family home and sought a letter regarding the impact on her mental health for

the purpose of the separation proceedings. Her GP provided a letter for use in the separation proceedings which noted that she had “contacted me today to advise me of current problems related to significant mental health difficulties”, that issues relating to the separation from her partner “are all conspiring to significantly impact on her mental wellbeing, displaying extreme levels of stress and agitation and also a lowering in mood” and noted “the impact the present situation is having on her mental wellbeing”.

- 5 13. In September 2021 the Respondent staff returned to partially working from the office.
- 10 14. In January 2022 the Claimant agreed with the Respondent that she could work from home to address her concerns that her ex-partner would return to the house to remove property from their home.
- 15 15. On 22 February 2022 the Claimant attended occupational health (‘OH’) in respect of her request to continue working from home. OH noted that “the Claimant reported heightened anxiety levels reactive to her personal stress” but that it was not having any impact of the activities of daily living or her work duties. OH recommended that the Claimant be allowed to remain working from home until her personal stress is resolved.
16. In April 2022 the Claimant changed work team.
- 20 17. In May 2022 the Claimant was first absent from work on account of her mental health. She was absent for around 5 days which she self-certified.
18. On 20 June 2022 the Claimant had a therapy session through the Respondent the Employee Assist Programme. The session notes refer to her having occasional panic episodes and high anxiety.
- 25 19. From 4 July to 17 September 2022 the Claimant was absent from work on account of her mental health. On 12 July 2022 the Claimant consulted with her GP regarding her mental health. Her GP noted “work and situational stressors, anxiety through roof and low mod, not keen on meds” She was issued with two fit notes in respect of her absence which referred to a diagnosis of “work related stress/ low mood”. The Claimant explained that she
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did not want to take antidepressants because of the effect they had on her mother and her ex-partner would have used it against her to gain custody of their children.

- 5 20. On 25 July 2022 the Claimant attended occupational health ('OH'). OH noted that she advised symptoms of anxiety, poor sleep, panic and stress when thinking about work and having discussed medication with her GP but would prefer to speak with someone. OH noted that she had made contact with the Employee Assist Programme and that she intended to make further contact for counselling. OH concluded that she was unfit for work but was unlikely to
10 qualify as disabled under the Equality Act.
- 15 21. On 8 August 2022 the Claimant attended occupational health ('OH'). OH noted that there was a significant impact on her mental health and well being which was having an impact on activities of daily living and work duties. OH concluded that she was unfit for work but was unlikely to qualify as disabled under the Equality Act.
- 20 22. On 30 November 2022 the Claimant was absent from work for 1 day on account of her mental health which she self-certified. She advised having a panic attack of longer duration. She consulted with her GP regarding her mental health. Her GP noted workplace stress and prescribed periciazine to be taken as required for her anxiety. She took that medication on average 3 times a fortnight in the period from November 2022 to February 2023. She advised that had she not taken that medication her symptoms of anxiety would have been worse.
- 25 23. The Claimant attended or was due to attend court hearings in the separation proceedings in May, August and November 2022 and January 2023. Her absences on account of her mental health largely coincided with these hearings.
24. In January 2023 the Claimant was placed on a performance improvement plan by the Respondent.
- 30 25. In March 2023 the Claimant was absent from work for 1 day on account of her daughter's mental health.

26. On 25 April 2023 the Claimant had a therapy session through the Respondent the Employee Assist Programme. The session notes work related stress in the context of a formal meeting with her manager and a failure to provide due notice of that meeting.
- 5 27. In May the Claimant received a written warning in respect of her performance which she appealed. In June she was advised that her appeal had been unsuccessful.
28. In June 2023 the Claimant moved to a new house which she felt was a fresh start. The Claimant did not consult with her GP regarding her mental health at any time in 2023.
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29. On 6 July 2023 the Claimant attended occupational health ('OH'). OH noted that she had been working from home since January 2022, that she was now able to return to working in an office environment and proposed a phased return to work commencing on 31 July 2023 although residual symptoms of anxiety and panic remain at times.
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30. The Claimant took the decision to resign on or about 11 July after she had received the OH report. She felt in a good place and she was concerned that if she returned to work her mood would lower and her anxiety would return.
31. In the period between April 2022 and February 2023 the Claimant experienced episodes of heightened anxiety. These episodes aligned with work and situational stressors including court hearings in the separation proceedings. On occasions during these episodes the Claimant's sleep was affected; she didn't have the energy or concentration to drive her kids to school; she did not want to leave the house; her new partner would do the grocery shopping; she would utilise the flexible working arrangements by starting work later; and she preferred to work from home.
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Observations on the evidence

32. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur.

5 33. The Claimant was on the whole a credible and reliable witness. She was however on occasions prone to exaggeration. She stated that she had been offered medication numerous times from her doctor which she refused every time but the GP records note only one such occasion. The Claimant gave evidence that on occasions she had thoughts of self-harm but neither the GP, OH or EAP records note any such thoughts and her own impact statement
10 describes only one such occasion. The Claimant described having regular panic attacks but the Claimant's GP records did not refer to any panic attacks and on questioning she explained that this was a very brief episode (around 30 seconds) of high anxiety.

15 **The Law**

Disability status

34. Section 6 of the Equality Act provides that: (1) A person has a disability if: (a) that person has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on their ability to carry out normal
20 day-to-day activities.

35. In determining disability status the Tribunal must take into account any aspect of the Guidance on the definition of Disability (2011) and the EHRC Code of Practice on Employment (2015) which appears to be relevant.

36. The burden of proof is upon the Claimant.

25 *Mental impairment*

37. The Equality Act does not define 'mental impairment'. Appendix 1 paragraph 6 to the EHRC Code states: 'The term "mental impairment" is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities'.

38. Where there is no clear medical diagnosis it may be legitimate for a tribunal to first consider adverse effect and then to consider whether the existence of an impairment can reasonably be inferred from those adverse effects on a long term basis (*J v DLA Piper UK LLP 2010 ICR 1052, EAT*). “If, ..., a tribunal starts by considering the adverse effect issue and finds that the claimant’s ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering “clinical depression” rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived”.
39. The cause of the impairment does not require to be established (Guidance A3).
40. A distinction may be drawn between a mental impairment such as clinical depression and stress/ low mood (both of which may be a reaction to adverse life circumstances). In some cases tribunals may find that effects suffered by a single claimant were sometimes attributable to a mental impairment and sometimes to stress/ low mood which does not amount to a mental impairment (*Piper*).

Normal day to day activities

41. Day to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This includes work related activities such as interacting with colleagues, using a computer, driving, keeping to a timetable etc (Guidance D2– D3).

Substantial adverse effect

42. The impairment must cause an adverse effect on normal day to day activities but it need not be a direct causal link.
43. The adverse effect must be substantial. Section 212(1) of the Equality Act provides that “substantial” means more than minor or trivial. The EHRC Code

notes that a disability is “a limitation going beyond the normal difference in ability which might exist among people”.

- 5 44. It is important to consider the things that a person cannot do, or can only do with difficulty (Guidance B9). This is not offset by things that the person can do.
45. The time taken by a person with an impairment to carry out an activity should be considered when assessing whether an effect is substantial (Guidance B2).
- 10 46. Schedule 1 paragraph (5) of the Equality Act provides that 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 measures are being taken to correct it and but for that, it would be likely to have that effect. The tribunal should deduce the effect on activities if medication or treatment were to cease unless it has resulted in a permanent improvement.
- 15 47. The Guidance provides at para B7 “Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.”
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Long term effect

- 25 48. Schedule 1 paragraph 2(1) of the Equality Act provides that 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.
49. Schedule 1 paragraph 2(2) provides that if an impairment ceases to have a substantial adverse effect, it is to be treated as continuing to have that effect
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if that effect is likely to recur. In *SCA Packaging Ltd v Boyle 2009 UKHL 37*, the House of Lords ruled that “likely to” in this context means “could well happen” rather than “more likely than not”.

50. Where a person has a mental impairment with recurring or fluctuating effects, the effects are to be treated as long term if they are likely to recur beyond 12 months (Guidance C6). If a person has separate episodes of a mental impairment (e.g. depression) each of which last less than 12 months the issue is whether these are discrete episodes which are not connected by an underlying condition or whether these short separate episodes are connected as part of a long term underlying condition the effects of which are likely to recur beyond the 12-month period.
51. Whether a person has an ongoing underlying condition and the likelihood of recurrence of its effects must be judged at the relevant time and not with the benefit of hindsight. An employment tribunal should disregard events taking place after the alleged discriminatory act but prior to the tribunal hearing.

Submissions

52. The Claimant’s brief oral submissions were in summary as follows –
- a. She has experienced low mood over the years which was worse during the relevant period. She was offered and elected not to take medication for good reasons.
 - b. She had a mental health condition which had substantial and long term effect on her life. It was not possible for any GP to corroborate the substantial adverse effect on day to day activities.
53. The Respondent’s submissions were in summary as follows –
- a. The issue of disability status falls to be determined retrospectively at the time of the alleged discriminatory acts and not at any time subsequent to that (*Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT*, paragraph 31).

- b. The burden of proof lies squarely on the claimant (*Kapadia v London Borough of Lambeth* [2000] IRLR 699 (CA));
- c. The phrase mental impairment has its ordinary and natural meaning.
- d. In cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance (*Royal Bank of Scotland plc v Morris* UKEAT/0436/10). In this case the GP records provided shed little light on the questions to be answered and no expert report was provided.
- e. The Claimant experienced a reaction to “adverse life events” or a “medicalisation of work problems” and did not suffer a mental impairment.
- f. The occupational health reports make no mention of panic attacks or low mood or a diagnosis of anxiety.
- g. The Claimant produced no corroborating medical evidence regarding her assertions of a substantial adverse effect on normal day to day activities or the actual or likely duration of that effect.
- h. The OH reports although not determinative expressly concluded that she was not disabled under the Equality Act

Discussion and decision

At the relevant time, did the claimant have a mental impairment?

54. From January 2022 the Claimant worked from home initially because of her personal circumstances and latterly because of her mental health. The Claimant was absent from work on account of her mental health for 5 days in May 2022, for over 2 months starting July 2022, and 1 day in November 2022. The Claimant consulted her GP on account of her mental health in March 2021, July 2022 and December 2022. She did not consult with her GP regarding her mental health in 2020 or 2023. In her fit notes her GP referred

to a diagnosis of “work related stress/low mood”. In July 2022 her GP discussed medication but she was not keen. In November 2022 her GP prescribed medication for anxiety which she took for 3 months until February 2023.

- 5 55. A distinction may be drawn between a mental impairment such as clinical depression/ anxiety and stress/ low mood (*DLA Piper*). The Claimant was diagnosed by her GP with stress/low mood in July 2022. Whilst there was no formal diagnosis of anxiety, she was prescribed medication for it in November 2022 which she took for 3 months. Furthermore, a tribunal may be able to
10 infer the existence of a mental impairment from a long term and substantial adverse effect on normal day to day activities (*DLA Piper*).

Did that impairment have a long term substantial adverse effect on her ability to carry out normal day to day activities?

- 15 56. The Claimant’s sleep, driving her kids to school, socialising, grocery shopping, attendance at work, working hours, and place of work were affected on occasions by episodes of heightened anxiety in the period between April 2022 and February 2023. These are all normal day to day activities. The effect on these activities was more than minor or trivial and is therefore considered substantial. However these effects were sporadic and short term and
20 accordingly did not provide a reasonable basis upon which to infer that they were caused by an overarching mental impairment rather than by stress and low mood.

- 25 57. Accordingly at no time during the relevant period did the Claimant have a mental impairment which had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. The Claimant was not therefore disabled under Section 6 of the Equality Act 2010 during the relevant period. The claim of disability discrimination cannot proceed and is therefore dismissed.

M Sutherland

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Employment Judge
29 January 2024

Date

Date sent to parties

29 January 2024