



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102575/2024 (V)
Hearing: 1 October 2024

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Employment Judge: J Hendry

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Miss Aneta Drozdek

Claimant
Represented by:
Ms Lis (friend)
Interpreter
Mr Rozycki

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Transcal Limited

Respondent
Represented by:
Mr S McEntee,
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgement of the Employment Tribunal is that:

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1. The claimant has failed to demonstrate that she is a disabled person in terms of Section 6 of the Equality Act 2010 in relation to any Depression or Depressive/Anxiety condition.
2. That the claimant was disabled in terms of Section 6 of the Equality Act 2010 from June 2023 by symptoms of pain, numbness and loss of grip in both her hands.

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REASONS

3. The claimant raised Employment Tribunal proceedings against her employers seeking, amongst other things, a finding that she had been discriminated against because of a disability.
4. The case proceeded to a Case Management Hearing on the 3rd of April 2024 before Judge Kemp. He indicated that there should be a Preliminary Hearing on disability status. In his Note he promulgated various Orders to progress the case and to obtain information about the claimant's medical conditions.
5. The Preliminary Hearing is to ascertain whether the claimant was a disabled person under the Equality Act in relation to the impairments of depression and weakness in both wrists and if so from what date. The hearing was also asked to consider whether the respondent knew or ought reasonably to have known that the claimant was a disabled person. The hearing was also to consider whether the claim had reasonable prospects of success and if further Case Management Orders were required.
6. In the event it was agreed that the issue of the respondent's knowledge ought to be determined at the full hearing as the claimant says she told various members of the respondent's management about her health difficulties. In addition, the claimant lodged redacted copies of her medical records. In the course of the hearing she agreed to disclose a passage that seemed important and was allowed to do so but this made it difficult for Mr McEntee to take immediate instructions. The claimant's evidence was that both Donnie McTaggart, her Manager and her Team Leader were aware of the problems she had both with depression and with her wrists. It was agreed that once a decision had been made in relation to disability status that a case management Preliminary Hearing should be arranged to fix a Final Hearing, promulgate appropriate Orders etc. The respondents will at that point consider whether they intend pursuing their strike out application under Rule 37. If they do I observed that as the claimant is a party litigant, they should

make a written application within 7 days of the Preliminary Hearing setting out the basis for the strike out application to allow the claimant an opportunity of considering its terms before the hearing.

- 5 7. Finally, I would record that following the Preliminary Hearing before Judge Kemp the claimant had lodged Better and Further Particulars. I read the detailed remarks of Judge Kemp contained in paragraph 9 of the Note. The claimant should re-read what is said there as the Better and Further Particulars she lodged do not appear to deal with all the matters that Judge
10 Kemp clearly set out there. For example, in relation to a claim for reasonable adjustments the claimant doesn't say what the respondents should have done, given the alleged weakness in her wrists, to assist her at work. There is a suggestion that working with heavy leather caused her pain on a daily basis. The Particulars do not go on to say what the employer should have
15 done about this when the claimant alerted them to these continuing difficulties. She should consider what might have assisted her overcome the pain/weakness she says she had.

Issues

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8. The issue for the Tribunal was whether or not the claimant was disabled under section 6 of the Equality Act 2010 (the 2010 Act). The claimant relies on two separate conditions namely depression and weakness in her wrists. The Tribunal considered the papers lodged by the claimant in the course of
25 the proceedings (which unfortunately were not contained in a numbered bundle despite Judge Kemp having made an Order for the respondents to prepare one). The Tribunal heard evidence from the claimant. The respondent company led no evidence.

30 **Facts**

9. The claimant is Polish. She has been a seamstress since she was 16. She came to Scotland in March 2008 to work for her current employers. She is still employed by them.
- 5 10. The claimant works in the respondent's factory. She is responsible for sewing leather seat covers. The work is demanding and physical.
11. The claimant blames the type of work she performs on difficulties she experienced with her wrists. For some years she experienced pain. Tingling
10 and numbness in her hands and wrists. As a consequence of this she had surgery for "carpal tunnel" in 2016 and 2017. This was to relive pain she had in both wrists. Following the operation the pain in her wrists was reduced.
12. The claimant says that the employers were aware of her condition, the
15 appointments before the surgery and the surgeries themselves. The surgery was for "carpal tunnel" and to release pressure on the median nerves. The claimant was absent for a month at each surgery.
13. The claimant submitted sick notes to the employer at the time of her
20 absences but does not have access to them.
14. The claimant's left wrist had been operated on in February 2017 and her right wrist in September 2016. The surgery was deemed successful by the surgeon, the pain in the claimant's wrists was much reduced.
- 25 15. Following her return to work in 2017 the claimant claims that she returned to working with the heaviest and most difficult tasks in the factory which put strain on her wrists. She believes that her wrists never fully "healed" after the surgery and blames the working conditions for this. She believes that she
30 suffered permanent damage to her wrists.
16. In 2018 the claimant's workplace was moved to the corner of the room in which other seamstresses worked. She worked with her back to her colleagues. She became distressed at the work situation and broke down
35 crying on a number of occasions.

17. The claimant asserted that from about the end of 2017/early 2018 her mental health began to deteriorate. She contacted her GP and told her GP that she was suffering stress at work. She developed high blood pressure and has been taking medication for it since 2018. The claimant was in dispute with her employers in and around September 2021 in relation to not receiving a pay rise she thought she was entitled to.
18. The claimant was signed off work by her GP on 23rd of April 2024. The Fit Note indicated that she had the following conditions namely “Depressed mood. Stress at work”.

Further Medical History

19. The claimant attended a physiotherapist on the 16th December 2020, 30th December 2020, 9th of January 2021, 2nd December 2020, 9th December 2020, 18th November 2020, 25th November 2020. She did so principally because of neck and back pain but for a number of other purposes namely to relieve stress and to obtain physical relief for her body including her wrists.

General Practitioner Records

20. The claimant provided the Tribunal with pages 1/14 - 4/14 of her medical records. On the 5th of May 2015 at a consultation it was noted that she had “bilateral numbness and tingling and pain in fingers of both hands for years”.
21. On the 18th of February 2016 she consulted her GP in relation to neck pain. It was also noted that she “describes weakness of R-hand-dropped cup”. On the 11th of April 2016 she attended her GP in relation to a recurrence of neck pain.

22. The claimant underwent surgery for “carpal tunnel release” on the 19 May 2017.
23. On the 19th of May 2017 the claimant had a consultation with her GP in relation to high blood pressure. It was noted *“has been under a lot of stress for the last one year”*. It was recorded: *“she has also been feeling a bit depressed and starts crying spontaneously recently ... some degree of anxiety and depression. Plan: prescribed Ibuprofen for headaches, advised to exercise, meditate and or do things that relieve her stress, advised to have a look at self help sites.”*
24. At a consultation on the 25th of July 2017 it was noted *“Distressed – bullied at work, has complained to Manager who does not seem to listen – tearful”*.
25. On the 3rd of December 2018 at a consultation it was noted *“Headache. Telephone interpreters. Headaches, anxiety, tiredness”*.
26. At a consultation on the 30th of September 2021 it was noted: *“Telephone encounter... Has lots of stress at work. Low mood, no energy, headaches. Prev wrist surgery, feels SX (symptoms recurring) and concerned re this due to her job – works as seamstress. Work not supportive (Redacted) feels the stress is making her very unwell. Home BP readings have been very high”*.
27. On 19th of October 2021 it was noted *“Feeling much better, reduced stress and hand pain much better”*.
28. The notes record that on the 8th of November 2021 at a consultation that the claimant’s blood pressure was much more stable. The consultation on the 14th of March 2023 the claimant reported pain for some time *“feels it more in groin, lower back and hips”*.
29. On the 28th of April 2023 the claimant consulted her GP in relation to neck pain.
30. On the 12th of March 2024 the claimant reported ongoing stress at work and getting bullied at work. It was recorded *“poor sleep, low mood, upset a lot.*

TATT (*tired all the time*) doing cooking etc as usual, has not voiced any thoughts of harm, support from (redacted). Wondered about trying medication to see if this helps. Explained when situational then does not always but we could try and see if it also helps sleep.” The claimant was prescribed
5 Mirtazapine an antidepressant.

Wrists

31. Following the claimant’s carpal tunnel operations in 2016 and 17 she found
10 that the pain in her wrists was much reduced. However, she still experienced numbness. She believed that her wrists did not recover as she had anticipated.
32. The claimant consulted her GP in June 2023 about the continuing problems
15 in her hands particularly numbness. On 12th June 2023 the GP recorded likely “*renaud’s phenomena on both hands*”.
33. In recent years the claimant has found that she was unable to lift anything
20 heavier than a dinner plate. Her right hand is worse than her left. She struggles to shop and to lift individual items and bags of shopping or groceries.
34. The claimant deals with these effects by buying small quantities of foodstuffs
25 to keep down the weight of the item or items she has to pick up or carry. If she wants to do a larger “shop” then she gets her son to assist her with carrying her messages to her car. She finds “hoovering” a difficulty. Using the machine causes pain in her wrists. As a consequence of this she has purchased a small light hand vacuum cleaner. The claimant cannot polish or wash windows as this causes pain in her wrists. Any action involving the use
30 of her wrists is difficult for her and repeated actions lead to pain in the wrists. Her hands are numb. She cannot wring out a wet cloth.

35. The claimant is used to managing the pain in her wrists by taking Ibuprofen or Paracetamol and being careful about the weight of things she carries.

36. The claimant believes that the physiotherapy that she underwent assisted her overall wellbeing but also the pain in her wrists.

Witnesses

37. I found the claimant to be generally credible and reliable. She did not seek to overly dramatise her ailments and spoke candidly about her problems. I wasn't completely satisfied with her evidence that she had suffered from significant anxiety or depression in 2020 and 2021 and had not visited or contacted her GP about this because of the Covid Pandemic. There are no records of attempted contact which might have been expected if she was truly unwell. A simpler explanation was that if she was under lockdown she would have not been at work and in the environment that was causing her stress.

38. I also noted that the GP was in the habit of using a translation service to aid communication but it appeared to me that the claimant did not have a full understanding what had been recorded in her medical history and seemed not fully aware that the carpal tunnel operations might relieve pain but did not treat other problems she seemed to have had such as numbness in her hands. She also seemed unaware that the GP had suggested that she was suffering from Renauds Phenomena which might be a possible explanation for her current deficits.

Submissions

39. The claimant's position was that she had two disabling conditions or impairments and that I should accept her evidence. She referred to the GP's records and in particular the circumstances surrounding her being signed off

work. Her response to Mr McIntee's argument that she would have seen her GP about both depression and the problems with her hand ignored the difficulties in getting appointments especially over the Covid lockdown period and that the GP would focus more on her most pressing issues at consultations as she did.

40. Mr McIntee briefly rehearsed the evidence. In relation to the claimant's hands there was no reference to a hand injury as such in the notes. The carpal tunnel operation was recorded as being successful and the claimant accepted that the pain had improved. There was no recorded consultation where the difficulties that she allegedly experienced had been recorded by her GP suggestive of some other condition. The claimant visited her GP regularly about all sorts of matters yet strikingly a history of depression and continuing difficulties with her hands was absent. In particular there is no reference to depression in the period 2020/2021. Indeed, depression was never diagnosed just low mood and that was only in 2024. The claimant had failed to demonstrate that she suffered from disabilities.

Discussion and Decision

20 Disability Status

41. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability contained in Section 6(1) of the Equality Act ("the Act") which provides:

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"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."

30 42. Schedule 1 of the Act contains supplementary provisions in relation to the determination of disability. Paragraph 2 is in these terms:

“2 (1) 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 20 (c) it is likely to last for the rest of life of the person affected.”

5 43. Paragraph 5 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.”

10 44. It should be noted that the “Guidance on matters to be taken into account in determining questions relating to the definition of disability” (the Guidance) does not impose legal obligations, but the Tribunal must take it into account where relevant. The Guidance at paragraph A8 states: **“It is not necessary to consider how an impairment is caused... What is important to consider is the effect of an impairment, not its cause.”**

15 45. The Guidance at paragraph B1 deals with the meaning of **“substantial adverse effect”** and provides: **“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.”**

20 46. Paragraphs B4 and B5 say: **“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**

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would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.”

47. Paragraph B1 should be read in conjunction with Section D of the Guidance
5 15, which considers what is meant by **“normal day-to-day activities”**. The paragraph states that it is not possible to provide an exhaustive list of day-to-day activities but **“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
10 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.”**
48. The Equality and Human Rights Commission: Code of Practice on
15 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.”** It goes on: **“Someone with impairment may be receiving medical or
20 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
25 likely to occur even if the treatment stops (that is, the impairment has been cured).”**
49. In the case of **Goodwin v Patent Office** [1999] IRLR 4, the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate,
30 sequentially. These are: (1) Does the person have a physical or mental impairment? (2). Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities? (3) Is that effect substantial? (4) Is that effect long-term?

Depression/Anxiety

50. It is up to the claimant to demonstrate that she is disabled through having a mental impairment. Guidance was given to the Tribunal by the case of **J v DLA Piper UK LLP** [2010] on how to decide whether or not depression is a protected disability. In that case the claimant had a history of depression. In a previous job she consulted her GP 12 times over a period of just over a year about symptoms of depression, and was off work for four months. She was diagnosed as having 'moderate depression' and was prescribed antidepressants.
51. In 2008 she was offered a job with a law firm. The offer was subject (amongst other things) to her completing a medical questionnaire. Before completing the questionnaire, she spoke to an HR Manager at DLA about her history of depression and was told that the job was a high-pressure one. A few days later the job offer was withdrawn allegedly due to a recruitment freeze. She brought an Employment Tribunal claim alleging that she had been discriminated against under the DDA. The first issue the Tribunal therefore had to consider was whether J's depression was, at the time she applied for the job, a disability within the meaning of the Act. The respondents argued that she was not disabled as her symptoms did not constitute clinical depression and in addition they did not have a substantial effect on her ability to carry out her day-to-day activities. The claim was dismissed by the Employment Tribunal and appealed.
52. The EAT allowed the appeal, but did not go so far as to substitute a disability judgement. The issue of whether or not the claimant was disabled within the DDA was to be decided by another Employment Tribunal. In reaching this decision, the EAT gave practical guidance as to how employers and the Tribunals should approach cases involving claims of a "mental impairment" such as depression or stress.

53. The starting point for the Tribunal should be to consider the effect of the condition on the employee before considering the medical issues of its precise description or classification. If the Tribunal finds that the effect of the condition on the employee's day-to-day activities is substantial, then it is likely to conclude that the claimant is suffering from clinical depression rather than what it described as a reaction to "adverse life events". Such a reaction would be more likely to be temporary or less severe, and less likely to constitute a mental impairment.
54. It was stated that although the original requirement under the DDA that an employee had to prove the existence of a clinically well-recognised illness was removed in 2005, Tribunals should still look behind the often very general descriptions that are given to mental illnesses such as 'depression' or 'stress'. Specialists called to give evidence for either party will need to be as precise as possible about the actual adverse effects on that individual concerned.
55. The claimant has had a number of consultations with her GP (who did not give evidence. The claimant appears to have begun regularly consulting the GP from 2021 and there are references to stress at work and her work not being supportive. This also supports the claimant's evidence that she had periodically become upset at work when a situation arose such as being asked to work with her back to her colleagues. However, there are long gaps between consultations that reference these difficulties with no such references in 2022 and 2023.
56. The claimant does not appear to have been formally assessed for depression and there appears to be no specific diagnosis of depression although she was prescribed an antidepressant in April 2024. The medical certificate issued on the 18 April 2024 makes reference to stress at work. The GP in the notes, when considering treatment, makes reference to the difficulties being situational.
57. The reference to situational difficulties seems to chime with the history and the claimant feeling stressed and upset at work and finally being signed off

work. We do not have the GP's views on the matter but they seem to have drawn a distinction between the claimant experiencing clinical depression and depressed mood because of her work situation. A diagnosis of clinical depression is of course not necessary as the Tribunal has to consider the effect(s) of the mental impairment.

58. Looking at the claimant's evidence in the round I am not convinced that she has demonstrated that she was disabled by having a mental impairment of depression/anxiety. The claimant seems to have coped with her life for long periods without raising such matters with her GP. Her explanation about the impact of covid is not a full explanation. She saw her GP on many occasions because of the difficulties she had with her hands and for other matters and if stress/depression was more constantly part of her life for longer I would have expected that to appear in the notes as something the GP could assist with.

59. My view is that she places too much weight on the final Fit Note as evidence of a pre-existing disability. This was after all the first time she was prescribed an antidepressant and signed off work specifically for these difficulties. That is not to underplay previous problems she has experienced of an upsetting nature which would have led at the time to her feeling anxious, stressed and depressed but these seem to have been transient and as described by her GP "situational" and do not seem to span the latter years of her employment.

60. I would observe that another problem that the claimant has is that the events she complains about occurred before she was signed off in April. The question of whether the employers could have been aware of the claimant's depressive/anxiety condition remains a live one.

Wrist weakness

61. The claimant was unclear as to the prognosis of her carpal tunnel surgery other than it hoped to reduce the pain in her wrists which it did for a period. In my judgment too much weight was put on the comment that the surgery had been successful. The basis for judging success is not clear from the papers

provided. Nor can the claimant recall what the two surgeons said about any residual problems or future difficulties. There is, unfortunately, no clear record in the notes about the extent of the wrist/hand difficulties' before the surgery or if the surgery would address anything other than the pain being suffered. It is a valid point to ask why the claimant has not returned to her GP more often if she is experiencing pain and numbness.

62. That said I am prepared to accept the claimant's evidence on these matters namely that she has had continuing pain, numbness and weakness in both hands. A possible explanation for this is given by the GP as being down to Renaud's Phenomena mentioned in the notes.

63. Unfortunately, the matter is not referred to again but is corroborative of the claimant having continuing problems with her wrists/hands. I accepted the claimant's evidence that the lack of focus on this condition is probably because more urgent matters relating to her low mood and anxiety overtook it in importance. We do not know what treatment is available for this condition and the symptoms she was experiencing and perhaps if the treatment options are limited this might explain why the GP has apparently left the claimant to manage the symptoms herself which she seems to have done with some success. The important issue is whether she genuinely suffers from these symptoms and whether the effects have a substantial impact on her ability to carry out day-to-day activities.

64. I concluded that they are substantial namely more than trivial. The claimant explained the steps she takes to manage these symptoms by taking painkillers and avoiding physical tasks that put a strain on her wrists and seeking assistance from her son in doing the shopping. It may be that her disability goes back beyond the consultation with her GP in June 2023 but I do not have the evidence before me to confidently fix an earlier date on the

balance of probability.

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Employment Judge: J Hendry
Date of Judgment: 16 October 2024

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Date sent to parties

18/10/2024

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