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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103136/2019

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Preliminary Hearing Held in Dundee on 8 October 2019

Employment Judge I McFatridge

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Ms Shirley Douglas

**Claimant
In person**

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Hometryst Care Limited

**Respondent
Represented by
Ms Brown,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant was not disabled in terms of the Equality Act at the relevant time. The claim of disability discrimination is dismissed.

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REASONS

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1. The claimant submitted a claim to the Tribunal in which she claimed that the respondent had unlawfully discriminated against her on the grounds of disability. She also complained of having been unfairly dismissed and unlawfully deprived of her notice pay and holiday pay. The respondent
E.T. Z4 (WR)

resisted the claims. Following some case management, a preliminary hearing was fixed to decide whether or not the claimant was disabled in terms of the Equality Act. At the hearing the claimant gave evidence on her own behalf. A joint bundle of documentary productions was lodged.
5 During the course of the hearing it became evident one page of the medical notes which the claimant had sought to lodge had not made it into the final productions. I allowed the claimant to add this document. On the basis of the evidence and the productions I found the following essential factual matters to be proved or agreed.

10 **Findings in fact**

2. In or about October 2014 the claimant separated from her husband. It was her choice to end the marriage and her position was that her husband had been abusive over a number of years. The claimant started seeing her doctor shortly after this complaining that she was suffering from stress.
15 In February 2015 her ex-husband made an accusation that she was guilty of child abuse towards her youngest son. This followed an incident where her husband had been arrested in response to an allegation of stalking. From February 2015 until February 2016 there was an ongoing criminal process. The claimant was put on trial in February 2016 accused of abuse
20 towards one of her children. The trial lasted two days and the claimant was acquitted. During this period it was the claimant's position that her husband had poisoned her children's minds against her and she has not seen either of her two children since February 2015. In or about February 2015 the claimant was prescribed anti-depressants for the first time. The
25 claimant's medical notes were lodged (J11). As noted the first page of these notes was omitted from the joint bundle and subsequently added during the hearing. The notes listed only encounters with her GP which had taken place between 10 May 2018 which is the first encounter mentioned until 24 December 2018. The notes also include notes of
30 prescription which show the claimant being prescribed 100mg of Sertraline starting in or about 3 February 2015 and continuing to date. On occasions the dose has been varied down to 50mg. The claimant would prefer not to be taking anti-depressants and has tried to reduce her dosage whenever possible.

3. The claimant has also been prescribed Diazepam. This is not to be taken on a regular basis but her GP suggested that she take this when she feels she needs it. The claimant carries Diazepam with her. The claimant was first prescribed Diazepam according to her GP notes in or about March
5 2018 when she was prescribed nine tablets. She was prescribed these so that she could take these as required up to a maximum of six daily. She has received two repeat prescriptions of nine tablets since then, the last being on 24 December 2018. The claimant has a substantial number of Diazepam tablets still at home. She has discussed this with her GP
10 who has indicated that he is relaxed about this since he does not consider her to be at any risk of self harm.

4. When she first went to her GP the symptoms which she described to him were that on occasions she would have an extremely racing heartbeat, her stomach would be churning like a tumble drier and she felt unable to
15 focus on matters. Her body would vibrate and she would feel anxious. These are symptoms which she has continued to feel from time to time.

5. On occasions the claimant has found herself unable to go to the supermarket. She will get to the supermarket and then find the symptoms start, her body starts vibrating and her heart pounding. On at least one
20 occasion she had to go home again without going to the supermarket.

6. The claimant has also on occasions suffered these symptoms when going back to her home alone at night. The claimant feels acutely the absence of her children. She went from being part of a family where the house was busy to living on her own. On occasions the claimant would ask to be
25 escorted home by one of her friends if she was out visiting them in the evening. She would also on occasions telephone a friend and have them talk her through as she went back into the house at night. On some occasions she has found herself unable to go into the house and has driven to her mother's house which is around two hours away.

- 30 7. The claimant lives on her own. She has friends who sometimes make her meals and either drop them off at the house for her to heat up or invite her to eat with them in their home. This would happen around twice a week. She has also arranged for her mother to come and stay with her on

occasions. When this happened her mother would do all the shopping and cooking. Although the claimant didn't like cooking for herself she would be able to put an item which had been supplied frozen by her friends in the oven but that was it. Her position was that getting the food from the fridge to the cooker just didn't happen apart from with these pre-prepared meals. She had lost around two stone in weight. She did not like going into supermarkets, she would force herself to go in if her friends had omitted to get something she needed but on those occasions would only take a small basket of food. She felt claustrophobic in a large store.

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10 8. Shortly after she first went to see her GP at the end of 2014/beginning of 2015 her GP suggested that she visit a private therapist. He did not at any time seek to refer her to a consultant psychiatrist or to an NHS provided counsellor. The claimant attended this therapist for a time and learned coping strategies from the therapist. The therapist is a "holistic therapist". The claimant had had weekly discussions with her GP and advised her GP that she wanted a holistic therapist. The claimant at no time sought a referral to a consultant psychiatrist or NHS therapist.

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20 9. The claimant would, as noted above, occasionally drive to her mother's house near Glasgow. When she did she would stay overnight with her mother but then drive back in time to be in Crieff to attend work in the morning. She would usually stop for a coffee on the way at a motorway services.

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30 10. The claimant and her husband have been in protracted divorce proceedings. The most recent judgment in the divorce was issued by the Sheriff on 13 November 2018 and a copy of this was lodged (J5). It shows that the case first called for a proof hearing on 18 December 2017 and that evidence was eventually led on 19 December 2017, 13, 14, 15 and 28 March 2018 and on 12 and 13 April 2018. The hearing dealt mainly with the financial dispute between the claimant and her husband. The claimant is in the process of lodging an appeal against this judgment which is still to be heard.

11. In August 2008 the claimant was visiting friends in Carlisle. One of them is a GP. She discovered a breast lump which she discussed with him.

The claimant was extremely concerned this might be cancerous. She consulted a GP locally in Carlisle with a view to getting tests done. She also contacted her GP in Crieff. There was a degree of confusion as regards where it would be best to carry out the tests however the claimant was eventually referred to a specialist in Scotland . A biopsy was carried out and the claimant was subsequently advised the growth was not cancerous.

12. The claimant's position is that she was disabled as from June 2018. Up until June 2018 the claimant had been able to attend work and prided herself on being at work on time. The claimant was given fit notes by her GP. These were lodged (J4). The first of these covers the period from 29 June 2018 to 12 July 2018 and states that the claimant was not fit for work because of stress. The next one was issued on 12 July 2018 and also states stress. The next was issued on 2 August 2018 and states "marital breakdown" as the reason. The next dated 23 August and again states "marital breakdown". The next one was dated 13 September 2018. The next one dated 5 October 2018 states "marital breakdown" and the following one dated 30 October 2018 states "stress". The next one is dated 27 November 2018 and states "stress related problem". The next one is dated 24 December 2018 and states that the claimant would benefit from a phased return to work with altered hours and gives the reason as stress related problems. After 'comments' it states that there was an intention to be fit to return to work on a phased basis.

13. The claimant's medical notes do not disclose the claimant having at any time been formally diagnosed as suffering from depression or anxiety. The claimant has at no time been formally diagnosed as suffering from depression or anxiety.

14. On 23 November 2018 her GP wrote to the respondent in relation to the claimant's condition. The letter was lodged (J6). It stated

"Thank you kindly for your letter regarding the above patient dated 31 October 2018. I can confirm that the primary reason for Shirley's inability to be at work is significant stress related illness as a result of personal circumstances. As you are likely to be aware the main issue

with regards to Shirley's ongoing stress is as a result of her marital breakdown and subsequent divorce proceedings which had gone through the courts. Unfortunately, it is taking some time to get a final judgment with regard to divorce proceedings however a ruling is anticipated shortly.

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I have discussed your letter with Shirley and her plans to return to work. Shirley has indicated to me that her intention is to return to work however the timing of a planned return to work is very much dependent on when a ruling is passed and on her subsequent reaction to this depends on a result that she gets."

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15. On 31 May 2019 the claimant attended a preliminary hearing at Dundee in relation to these proceedings. A note of the preliminary hearing was lodged (J3). At paragraph 6 it notes

"I asked the claimant to confirm what condition she relied upon as a disability. In her agenda for this PH, she identified the condition as 'stress', but when I observed that this is not, of itself, a medical condition, she confirmed that she wishes to rely upon anxiety as the disability from which she suffered at the material time."

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Subsequent to this the claimant produced a letter from Dr Stuart Evans of Crieff Medical Centre dated 24 June 2019. This was lodged (J8/1). This stated

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"As a result of ongoing severe symptoms of anxiety and depression in June 2018, I advised Shirley that I did not feel she was medically fit to be at work. Shirley's presenting and ongoing symptoms were as a result of a very difficult breakdown in her marriage which had affected all aspects of her life and ability to function on a day to day basis. In addition to the above, and during this difficult time, Shirley's anxiety was significantly exacerbated by an acute medical scare relating to a breast lump. This was subsequently referred and investigated with thankfully a reassuring outcome.

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In December of last year following discussion with Shirley I provided a 'Med3' Certificate indicating Shirley was medically fit to return to employed work on a phased return basis."

16. The respondent lodged various excerpts from the claimant's Facebook profile (J7). This shows that in January 2019 the claimant went on a skiing holiday. This was a holiday which the claimant was offered by friends. She discussed the matter with her GP and was advised that it would assist her health if she went on the trip. The profile also shows the claimant having lunch with friends at a restaurant in Glasgow on 13 January. The claimant was able to travel to the restaurant which is situated in the Trongate area of Glasgow.

Observations on the evidence

17. The claimant had as part of the case management of the proceedings been asked to produce a disciplinary impact statement. This was lodged (J10). Unfortunately, the vast bulk of this document sets out the claimant's dissatisfaction with the respondent and her criticisms of the respondent's management style. I note that many of these criticisms are denied by the respondent. To some extent this approach continued in her evidence to the Tribunal. In evidence, the claimant was repeatedly pressed by me to give evidence as to the effect of the impairment which she alleged on her ability to carry out day to day activities. Despite being pressed she was unable to be precise and my findings in fact above really encompass all that she said in this connection. I considered the claimant was broadly a truthful witness but some of her evidence was unreliable and she was not prepared to engage with cross examination. She was cross examined as to the type of counselling she was doing and eventually accepted that this was private holistic counselling. Evidence in relation to why she had not been referred to an NHS counsellor was somewhat confusing. Initially she said that this was because it was not available. She then said it was available but the waiting list was too long and her condition was too serious. She then said that she had not in fact ever asked for this. She then said that she had asked for an NHS counsellor but had been told this was not available. Next, she said that the position was that she wanted to go down the route of holistic therapy and was told that the NHS didn't supply holistic therapy. She then said that she didn't know why she had not been referred for NHS therapy and said it was probably because every time she went to see her doctor she asked her doctor when she would be

able to stop taking the tablets. When it was suggested that her evidence was contradictory she said that she just wanted to get better and that she would have taken counselling if offered.

5 18. As noted above it was very difficult to get the claimant to concentrate her evidence on the issue of what day to day activities she was unable to carry out. In cross examination she accepted that she could do shopping on occasion but she said that she got other people to do her shopping most of the time but then accepted that she would be able to do shopping herself if something had been forgotten. She said that she could go in to pick up
10 one or two things. She said that when her mother was staying with her then her mother did all the shopping.

19. As noted above there was some confusion regarding the medical notes which had been provided. Initially when I asked the claimant about this I was referring to the fact the note of encounters in the medical notes
15 appeared to start in May 2018 and there was nothing before this. I understood by the end of the evidence, although the claimant gave various contradictory answers, that the reason for this was that the claimant had only asked for the medical notes from May 2018 onwards. It then became clear that the second page which covered the period from August to
20 December 2018 had for some reason been omitted from the bundle. I allowed the claimant to add this subsequently. Following the hearing the claimant wrote to the Tribunal indicating that she had sent all of the pages to the respondent's solicitor and could not understand why they were not in the bundle. I did not feel that I required to make any finding as to who
25 was responsible for the specific page being missing. These things happen. The matter was discovered during the hearing and resolved when the additional page was inserted. Even if it was originally the fault of the respondent for not including this page in the bundle then the claimant ought to have spotted this when they checked the bundle prior to
30 the hearing. In any event, I was left with the position that there is no specific note of the encounters which the claimant had with her GP prior to June 2018.

20. It was clear to me during the hearing that the claimant herself had accepted that the evidence she provided to the hearing was somewhat

lacking in specificity. At various points she said that she was not a lawyer and that “I can only tell it as it is.”

Discussion and decision

5 21. Both parties made submissions. The respondent’s submission was in writing. It had been prepared prior to the claimant giving evidence and it was therefore added to orally during the hearing.

22. Rather than repeat the submissions at length it is probably better to refer to both of them in the discussion below.

10 23. The definition of disability is contained in section 6 of the Equality Act 2010. It states

- “(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.”

15 In order to assist Tribunals with the decision as to whether or not a person is disabled further guidance is provided in Schedule 1 of the Act and also in guidance produced by the Secretary of State. In particular paragraph 2 states

- “(1) The effect of an impairment is long term if
 - 20 (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.”
- (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
 - 25 treated as continuing to have that effect if that effect is likely to recur.”

I should also note that paragraph 5(1) of Schedule 1 potentially has relevance where it states

30 “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.”

24. The respondent’s position is that the claimant had to show four things which were

- 5 (a) does the person have a physical or mental impairment,
- (b) does that impairment have an adverse effect on their ability to carry out normal day-to-day activities,
- (c) is that effect substantial, and
- (d) is that effect long term.

10 25. It is clear that the onus is on the claimant throughout to demonstrate that the answer to all four questions is in the affirmative. The question was whether or not the claimant suffered from an impairment. Various cases before the higher courts have emphasised the importance of this question particularly in cases where the alleged disability takes the form of
15 depression. As noted by the Employment Judge at the preliminary hearing, stress per se is not an impairment. Many people who are not disabled suffer from stress. Indeed, stress is part of everyday life. The case of **J v DLA Piper UK LLP [2010] IRLR 936 EAT** does however state that there are sometimes cases where identifying the nature of the
20 impairment pose difficult medical questions. In such a case it may be appropriate to look at the employee’s ability to carry out normal day-to-day activities first to see if they have been adversely affected. It is therefore admissible to effectively draw the inference that if someone is suffering substantial adverse effects then they must be suffering from an
25 impairment. It is not for the Tribunal to make a medical diagnosis. On the other hand in the case of **Royal Bank of Scotland plc v Morris UKEAT0436/10** referred to by the respondent, Justice Underhill reiterated in that case the importance of expert medical evidence where disability takes the form of depression as an impairment.

30 26. Approaching matters first of all using the “**Morris**” approach I was struck in this case by the complete absence of any supporting contemporary medical evidence. All of the fit notes mention either stress or marital breakdown. The contemporary medical notes that were lodged effectively

show someone who is going through a series of life events which are bound to be stressful. The claimant was charged with abusing her own child and required to face a criminal trial. The claimant has been going through what on her own description is an extremely bitter divorce from her husband which has so far led to numerous days in court and the promise of more to come. Finally, to cap it all, the claimant suffered a “cancer scare”. The claimant has described symptoms which are essentially symptoms of a stress reaction. This has been identified by her doctor as such. Nowhere in the medical notes is the claimant diagnosed as suffering from anxiety or depression. I agree with the respondent’s representative that it is not appropriate to take the letter sent to the claimant in June from her GP as adding anything in this respect. It is clear that by this time the claimant was well aware of the fact that the law does not recognise stress as an impairment. Often a medical report will be taken at face value however where we have a situation where the contemporary medical notes do not mention any diagnosis of an underlying condition of depression anxiety but merely discuss stress and the claimant’s GP thereafter produces a letter which for the first time mentions depression and anxiety then one would expect at the very least that medical professional to come to the Tribunal and be cross examined on this apparent change of position. In the absence of that I found I could give very little weight to this letter.

27. Looking at matters from the other end of the telescope as was suggested could be done in the case of *J v DLA Piper* once again I am struck by the relative paucity of clear evidence from the claimant as to the effects of this impairment on her ability to carry out day-to-day activities. It was clear to me that the claimant carries out an active social life. I did not find the facebook evidence to be useful one way or the other. I accepted the claimant had gone skiing and celebrated with friends at a restaurant. I accepted her explanations. These matters are not necessarily inconsistent with someone who is suffering adverse effects on her ability to carry out day to day activities. I accept her evidence that in such cases a holiday may be therapeutic. What was of more concern was the lack of any substance to the examples given by the claimant which she said

amounted to a substantial effect on her ability to carry out day to day activities.

28. On her evidence, she lives alone and up until June at least was able to attend work on a regular basis. The period from June onwards appears to have coincided with the period when she was heavily involved with the court proceedings in relation to her divorce and thereafter waiting for the result. The evidence the claimant gave about shopping for food did not stand up to a great deal of examination. Many women who are in the throes of divorce will have their mother come to live with them and have their mother do the shopping. The claimant's eventual evidence was that if someone else was doing her shopping and they forgot something then she could then do it herself. The physical symptoms which the claimant describes are physical symptoms of stress. Her evidence was that she could carry on through them. I was not prepared to find on the basis of the evidence that the effects of any impairment which the claimant suffered from (if indeed she did) was substantial. Applying *J v DLA Piper* I could not make a finding that the effects on her ability to carry out day-to-day activities was such that I would be able to find that she must be suffering from an impairment.

29. I note that the claimant has been on Sertraline and has been prescribed Diazepam. It did occur to me whether it was possible on the evidence for me to surmise that the claimant's impairment would have had a substantial long term adverse effect on her ability to carry out day-to-day activities. I did not consider that I could make this finding essentially for the reasons set out above. On the basis of the evidence the claimant had not demonstrated she was suffering anything other than stress as a result of adverse personal circumstances. There was nothing to suggest that if she was not taking the Sertraline or Diazepam then she would develop an underlying condition of depression anxiety or that that would have the substantial adverse effects required to qualify as a disability.

30. It therefore follows that the claimant's claim to be disabled would not succeed. Further and in any event however, even if I had been satisfied that the claimant was suffering from an impairment as she stated and that the effects of this were substantial the claimant's own position was that

she became disabled in or about June 2018. The claimant's dismissal took place in January 2019. As at the date of dismissal, even on the claimant's own assertion she had only been suffering from disability for seven months. The only evidence at that stage as to whether any such putative disability was likely to last more than 12 months was negative. The letter from her GP sent in November indicated that the claimant's ongoing stress was dependent on a ruling in the divorce proceedings relating to the financial settlement and on her subsequent reaction to this 'depending on the result she gets'. I do not believe that on the basis of this it could be said that as at January 2019 it was likely that the condition would last for 12 months. It therefore follows that even had I found that the claimant was suffering from an impairment and that the effects of that impairment were substantial I would have found the claimant could not be regarded as disabled because the effects were not long term.

31. It therefore follows that I find the claimant was not disabled. The claim of disability discrimination cannot proceed and is dismissed. There are still claims of unfair dismissal, notice pay and holiday pay before the Tribunal. A date listing stencil should be sent to the parties with a view to listing these for a final hearing.

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30	Employment Judge:	Ian McFatridge
	Date of Judgment:	25 October 2019
	Date sent to parties:	25 October 2019