



## **EMPLOYMENT TRIBUNALS**

**Case Reference:** 1406608/2020  
**Claimant:** Mrs S J Ellis  
**Respondent:** Clayesmore School Limited  
**Heard at:** Southampton by CVP

**On:** 14 January 2022

**Before:** Employment Judge Lowe

### **Representation**

**Claimant:** Mr Whitehouse  
**Respondent:** Mr Jones

## **PRELIMINARY HEARING JUDGMENT**

1. The Judgment of the Tribunal is that the claimant has not established that she was a disabled person as defined in section 6 of the Equality Act 2010, at the relevant time. Accordingly, the Tribunal does not have jurisdiction to hear the claims under the 2010 Act. The Claims under the Equality Act 2010 are, therefore, dismissed.

## **CASE MANAGEMENT TELEPHONE HEARING**

2. The unfair dismissal claim was also listed for a further Case Management Preliminary Hearing which will be conducted by telephone on 29 March 2022 at 12.00 noon. The purpose of the hearing is to list further case management directions. The parties should dial **0333 300 1440** at the appropriate time and enter the code **687204#** when prompted to do so.

# REASONS

## Issue for determination

1. This preliminary hearing has been listed in order to determine whether the claimant was a disabled person, for the purposes of section 6 of the Equality Act 2010, at the relevant time.
2. The claimant contends that she was a disabled person due to 'work related stress and bereavement', and that this was from the date of diagnosis on 30 January 2020. An Impact Statement and medical evidence have been produced as outlined below.

## Hearing

3. The preliminary hearing took place remotely by way of Cloud Video Platform. This was not objected to by either party. An In Person hearing was not practicable due to the Covid-19 pandemic and resultant risk implications for the parties, court staff and wider public.
4. A joint bundle of documents was lodged in advance of the preliminary hearing, extending to 155 pages. In addition, the claimant gave evidence at the preliminary hearing.
5. The Tribunal invited the parties to indicate if any reasonable adjustment were required. After discussion, other than regular breaks, no further adjustments were identified. Accordingly, the Tribunal had regular breaks at the request of the claimant or as deemed appropriate.
6. References in this Judgment to the agreed hearing bundle are in the form [B/page number].

## Medical evidence

7. The evidence before the Tribunal on the issue of the claimant's disability consisted of the following:

- (1) The claimant's own evidence in her Impact Statement [B/43] and in her oral testimony to the Tribunal.

- (2) The claimant's GP notes for the period 11 June 2019 to 2 November 2020 and in respect of a consultation on 29 March 2021.
- (3) Statements of Fitness for Work (Form Med 3) dated: 19 November 2019, 31 January 2020, 7 February 2020, 6 March 2020, 1 May 2020, 29 June 2020 and 29 September 2020.
- (4) An agreed bundle of contemporary documents, including an Occupational Health Report prepared by Dr Jigau, Consultant Occupational Health Physician, dated 14 September 2020 [B/128].

### **Findings in fact**

8. The Tribunal made the following relevant findings in fact.
9. The claimant was employed as a fees administrator from 27 November 2000 until her dismissal without notice on 16 October 2020. The respondent is a private school. The claimant's duties were to administer and operate the respondent's fee system, issuing invoices, fee accounts and maintaining the credit control systems.
10. The claimant's mother sadly died in October 2019. The Tribunal extended its condolences to the claimant at the hearing and I repeat those sentiments again in this Reserved Judgment.
11. As a result, the claimant was absent from work initially for a period of 10 days – this being a combination of compassionate and annual leave. Subsequently, the claimant was certified not fit for work by her GP on 19 November 2019 for a period of 2 weeks. The Med 3 Statement records the claimant's condition as 'Stress – post bereavement' [B/57]. The claimant returned to work at the expiry of this period.
12. From the end of 2019, the respondent undertook a review of the staffing compliment and duties within the accounting department. Discussions were held with all 5 staff members, and this included issues of redundancy, hours of work and re-training.
13. On 31 January 2020, the claimant was certified by her doctor as being unfit to attend work due to 'work stress and bereavement' for a period of 10 days [B/58]. By email of the same day, the claimant informed the respondent of the position, indicating that she expected these conditions to 'have a substantial adverse affect on my ability to carry out

normal day to day activities'. Further that she considered herself to be a 'disabled person for the purpose of the Equality Act 2010' [B/70].

14. The respondent provided the claimant with details of the Employee Assistance Programme and invited the claimant to attend a welfare meeting in accordance with the Managing Attendance Policy, initially, for 12 February 2020.
15. The claimant requested that she be excused from welfare meetings so as to avoid being 'placed at this obvious disadvantage due to the effects of my disabilities' [B/74] and to 'avoid any stressful situations that may exacerbate my symptoms' [B/73]. By way of email on 12 February 2020, the claimant stated that she would discuss the possibility of a short meeting with the respondent and would refer back once this advice had been received [B/75].
16. Following this indication, the claimant did not seek an additional appointment with her GP before the expiry of the current Med 3 certification on 6 March 2020. The GP evidence from the appointment of the same day does not record that this specific matter was discussed [B/50].
17. The claimant raised a formal grievance against the respondent on 10 March 2020, alleging she had been the victim of bullying and intimidation in the workplace on the grounds of her disabilities [B/79]. Initially, the respondent agreed to delay the investigation of the grievance until the claimant was 'ready to meet with' the managers assigned to deal with the matter [B/81]. The claimant was hopeful, at that stage, that her GP in the next few weeks was 'likely to advise...that my health has improved to the extent that I would be able to cope with dealing with the grievance procedures' [B/81].
18. By letter of the same day, 10 March 2020, the respondent invited the claimant to attend a telephone appointment with the Occupational Health Doctor on 19 March 2020 [B/77]. The claimant requested, on 13 March 2020, that this appointment be deferred as 'this appointment should not take place until my own Doctors have advised me that I am fit enough to deal with it. I will discuss this with my Doctors and let you know their advice' [B/83]. The deferment request, at that time, was agreed by the respondent.
19. The claimant's next contact with the GP was on 1 May 2020, the notes of which do not record a discussion in relation to either the grievance procedure or an occupational

health appointment.

20. On 26 June 2020, the claimant raised with the respondent about the possibility of returning to work on a phased return in the next few weeks and that she intended to discuss this with her GP, including any necessary adjustments, at her forthcoming appointment [B/91].
21. This was a clear reference to the claimant's GP appointment on 29 June 2020. The evidence from that appointment do not record conversations/discussions in relation to returning to work or appropriate adjustments. In contrast they refer to the claimant 'requesting further Med 3. Not sleeping sue to stress and anxiety over work'. The claimant was signed unfit for work for a further period of 3 months at this appointment.
22. Despite this certification, on 9 July 2020 the claimant repeated her intention that she was hopeful of a return to work in the next few weeks, would discuss attendance at the proposed welfare meeting on 28 July with her 'Doctor and refer back to you' [B/96].
23. No further consultation occurred between the claimant and her GP until 29 September 2020. Despite this, the welfare meeting was held on 28 July 2020, with the claimant attending by telephone. The respondent's subsequent letter outlines a summary of the matters discussed – this included a discussion about some of the changes that had been implemented to the Billing role as a result of the Covid pandemic, the possibility of a phased return and the steps that would need to be addressed, including an Occupational Health appointment [B/98].
24. An Occupational Health referral took place on 11 September 2020 with Dr Iuliana Jigau, Consultant Occupational Health Physician. Dr Jigau was provided with the email correspondence exchange between the claimant and respondent in addition to the Management Referral Form outlining points of disagreement [B/128]. Her subsequent report, dated 14 September 2020, is contained within the bundle at [B/128].

#### *Report of OH Consultant*

25. The claimant outlined her plan is 'to resume her work as it was prior to this sickness absence, on a phased plan, starting with reduced hours and building up gradually'. She advised that her GP is supportive of her resuming work, providing there is a phased plan [B/129].

26. In the Fitness for Work and Recommendations section, outlined fully at [B/130], Dr Jigau's opinion is that the claimant can 'return to work on a phased plan as she suggested and feels prepared for' once the work-related issues have been addressed/resolved.
27. Dr Jigau concludes that no further medical interventions are necessary as there is 'now a good recovery reported by Mrs Ellis and it appears that a return to work is subject to a mutual agreement on work related factors rather than on a medical intervention. In other words, the way forward is Managerial rather than medical' [B/130].
28. The dispute between the parties in relation to 'the way forward' remained unresolved. Following Dr Jigau's opinion, the claimant indicated that she would again discuss the matter with her GP at her forthcoming appointment on 29 September 2020 [B/134].
29. The notes from this consultation do not record any discussion in relation to the claimant's return to work or matters relating to the grievance. Rather, the notes only reference a previous unrelated medical problem. Whilst being certified unfit to work for a further 3-month period for 'work related stress', no update on the work-related stress is provided.

#### *Claimant's Impact Statement*

30. The claimant identifies adverse impacts with concentration, maintaining focus, disrupted sleep and resultant tiredness, worrying about minor matters, memory and difficulties with carrying out routine tasks such as shopping. Social activities were avoided and the claimant suffered with low self-esteem and high levels of agitation. During her oral testimony, the claimant indicated that she was also unable to drive a car.
31. The Statement identifies the date of these adverse impacts as being 'before and at the time of my dismissal on 16 October 2020' [B/44].
32. In evidence, however, the claimant acknowledged that the degree of severity of her symptoms was variable during this period, synonymous with a diagnosis of stress. She indicated that she experienced some symptoms as a result of her bereavement, but that it was the combination of work pressure/bullying on top of this that triggered her inability to cope on a day-to-day basis. She indicated that she felt at her lowest during January, February and March; but by June she 'felt brighter, more upbeat' and ready to

return to work on a phased basis. From June until September, the improvement continued with the claimant 'feeling stronger, more upbeat and better able to cope'.

33. The claimant confirmed that, despite being prescribed medication (Sertaline) on 6 March 2020, she did not take this medication; her husband had previously used this drug, and as a result, she had some concerns. Further, she believed that she could try and help herself first before using medication.
34. The claimant did return to her GP in March 2021, after which she did utilise this medication.
35. The claimant also confirmed that she did not seek any additional consultations with her GP outside the appointments either on, or leading up to, the expiry of her existing Med 3 certification.
36. Although discussed with her GP, the claimant did not take up the option of Steps to Wellbeing as she was able to talk with her husband.
37. The claimant had no pre-existing diagnosis of 'work related stress' prior to January 2020. She confirmed that whilst it was not possible to separate the two elements of her condition (bereavement and work-related stress) definitively, there was an initial overlap of the two.
38. There is no reference to 'bereavement' in the GP records after the consultation on 7 February 2020.
39. The GP records note the following symptoms: 'feels cannot cope' (31 January 2020); 'tearful' (7 February 2020); 'has nightmares about having to go back', 'is tearful when talking about it' (6 March 2020); 'emails from work which is making her upset and she has lost lots of confidence' (1 May 2020); 'not sleeping due to stress and anxiety over work' (29 June 2020) [B/49-50].

## **Relevant law**

### *40. Disability Status*

Section 6(1) Equality Act 2010 provides:

*'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'.*

Schedule 1 of the Equality Act 2010 contains supplementary provisions in relation to the determination of disability. Paragraph 2 states:

- '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*
  - (c) it is likely to last for the rest of life of the person affected'.*

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'.*

The *'Guidance on matters to be taken into account in determining questions relating to the definition of disability'* (the Guidance) does not itself impose legal obligations, but the Tribunal must take it into account where relevant (Schedule one, Part two, paragraph 12 Equality Act 2010).

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'.*

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 substantial alone 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'.*

Paragraphs B4 and B5 provide that:

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

Paragraph B1 should be read in conjunction with Section D of the Guidance which considers what is meant by *'normal day-to-day activities'*.

Paragraph D2 states that it is not possible to provide an exhaustive list of day-to-day activities.

Paragraph D3 Provides that:

*'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 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.'*

In *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, sequentially. These are:

- 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?
- d. Is that effect long-term?

### *Burden of Proof*

41. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability.

### *Case Law*

42. The Tribunal was referred to the following cases:

*Richmond Adult Community College v McDougall [2008] EWCA Civ 4*

*Goodwin v The Patent Office [1999] IRLR 4*

*J v DLA Piper UK LLP [2010] UKEAT 0263 09 1506*

*Herry v Dudley Metropolitan Council [2016] UKEAT 0100 16 L*

### **Submissions**

A summary of the submissions made were as follows:

43. The respondent's submission was that the claimant has failed to demonstrate that any of the 4 elements were satisfied at the relevant time. It cannot be held therefore that the claimant was a disabled person at the relevant time.
44. There is little or no evidence of impairment beyond the claimant's Impact Statement, as the notes of the GP merely reflect what the claimant herself has told the GP. This is a matter where the correct categorization is one of a 'reaction to adverse circumstances' rather than an impairment. In any event, the Tribunal should conclude that the evidence of the Occupational Health Consultant, a specialist in this area, is preferable to that of the GP.
45. There is overarching disparity between: the claimant's actions, correspondence with the

respondent and medical evidence with that of the claimant's assertions in relation to day-to-day impacts. The claimant has sought to exaggerate and mislead the respondent.

46. In relation to timescale, it was submitted that the test for 'long term' has not been satisfied. The chronology does not support a finding of having lasted 12 months, and the test as to whether, as at 16 October 2020, it was likely to do so is not made out.
47. The claimant submitted that they have satisfied the 4 elements, and as such, the claimant was a disabled person at the relevant time.
48. The claimant has provided clear evidence as to the difficulties she encountered on a day-to-day basis. The test is not simply that an individual could complete tasks, but if they struggled to do so. Further, that only one capacity needs to be affected. In respect of the claimant, these impacts were substantial, not simply minor or trivial.
49. The importance of not requiring a specific 'label' in order to establish impairment was highlighted, with the Tribunal being required to consider what the adverse effect was on day-to-day activities. In this matter, the claimant suffered a combination of bereavement, work related stress and the pressure of being a carer for her husband – it was a combination of factors.
50. In relation to timescale, it was submitted that this criterion was met as the claimant's condition was evident from November 2019 onwards. As the date of dismissal, 16 October 2020, this represented a period of some 11 months. As such, it was more than likely that the condition would last, at the very least, for a further month.

## **Decision**

### *Relevant period*

51. The Tribunal considers that the starting point for its determination on disability status is the question of the relevant date for assessing whether the claimant is disabled for the purposes of the Equality Act 2010.
52. The case of *McDougall* (above) makes it clear that this needs to be assessed as at the date of the alleged discrimination. In this case, the claimant makes allegations of discrimination in respect of her dismissal, application of the Managing Attendance Policy in respect of her periods of absence and in respect of her inability to deal with her grievances [B/18]. Further, the claimant makes it

clear that she considers herself to be a disabled person as from 31 January 2020 until her date of dismissal, 16 October 2020. This is consistent within the Claim Form, CMO and evidence today.

53. There are no allegations of discrimination within the evidence that outline particulars arising from the claimant's bereavement absence from 19 November until 2 December 2019.

54. The relevant period, therefore, for assessing whether the claimant was disabled is therefore 31 January 2020 until 16 October 2020.

#### *Impairment*

55. The existence of an impairment is disputed; the respondent indicating that this is a case of an 'a reaction to adverse circumstances'. I am satisfied, on balance, that the claimant suffered symptoms of lack of concentration, difficulties with her memory, disrupted sleep and resultant tiredness, low mood and higher than usual levels of agitation. I am further satisfied that the cumulative impact of these amounted to a mental impairment.

#### *Adverse impact on day-to-day activities*

56. The Tribunal then considered whether the impairment had an adverse effect on the claimant's ability to carry out normal day-to-day activities. I am satisfied, on balance, that it did. The claimant has provided an Impact Statement and given detailed evidence to the Tribunal about the difficulties she experienced on a routine basis. Household tasks became a source of frustration, with routine matters being forgotten or left incomplete as a result of memory/concentration loss. She became reliant on her husband for such tasks to be carried out. This impacted her mood, confidence and ability to engage with others. Social activities were circumvented and interaction with others avoided.

#### *Substantial effect*

57. The Tribunal then considered whether that adverse effect was substantial. The Tribunal was mindful that this is something more than minor or trivial, and as such, this is a relatively low bar. The tribunal heard detailed evidence from the claimant in relation to the effects on her as an individual. I am satisfied, on balance, that the effects were more than minor or trivial, and by definition therefore, substantial.

#### *Long term*

58. Addressing the 'long term' element of disability, chronologically, any effects there may

have been on day-to-day activities had not lasted for 12 months by the end of the relevant period – Schedule 1, paragraph 2(1)(a) is not relied upon. The claimant therefore relies on the ‘likely to last’ criteria in Schedule 1, paragraph 2(1)(b). The parties agree that in this context, likely to last should be interpreted as ‘could well happen’ reflecting the House of Lords’ decision in *Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening)* 2009 ICR 1056, HL. The claimant submits that she had a pre-existing condition triggered by bereavement in November 2019, and that therefore she had an impairment from that point until dismissal in October 2020. Given that this reflected a period of some 11 months, it was more than likely that it would last for a further month – at the very least.

59. There is no formal prognosis from the claimant’s GP in relation to how long any effects on the claimant were likely to last.
60. The last reference by the GP to any effects upon the claimant is 29 June 2020. This records: ‘requesting further Med 3. Not sleeping due to stress and anxiety over work’ [B/50]. The consultation on 29 September 2020 records that the claimant was signed off for a further period due to ‘work related stress’. The notes are completely silent on prognosis, symptoms or general update; the only reference being to a previous unrelated medical problem.
61. The report of the Occupational Health Consultant, Dr Jigau, dated 14 September 2020 is the only medical opinion before the Tribunal on this issue. There are no references within the report in relation to ongoing symptoms raised by the claimant. Dr Jigau deals specifically with this aspect and concludes that the claimant did not fall within the definition of the Equality Act 2010 as ‘there is indication of good recovery and potential to return to work in due course, there is no need for regular medication and there is no clear persistent impact on daily activities’ [B/130]. Dr Jigau is clear that there are no medical issues outstanding that would prevent the claimant returning to work; the matter outstanding was a managerial one, rather than medical.
62. The oral testimony of the claimant provided additional clarity in reference to this issue. She gave evidence that she felt at her lowest during January, February and March; but by June she ‘felt brighter, more upbeat’ and ready to return to work on a phased basis. From June until September, the improvement continued with the claimant ‘feeling stronger, more upbeat and better able to cope’. It was an improving trajectory throughout the period. This correlates completely with the claimant’s express intention to return to work

from June onwards. This was despite being certified as unfit to work by the GP during this period. In my view, I conclude that the claimant would not have been able to cope with the levels of concentration and focus, attention to detail that her accounting role required had she still been experiencing the substantial adverse impacts as have been described.

63. Again, in my view, if the claimant had not begun to make a positive and significant improvement to her condition after a reasonable period, she would have sought further assistance from her GP. The offers of medication or Steps to Wellbeing would have been given further consideration. These were not necessary. The claimant only attended consultations with the GP in order to request further Med 3 certification.

64. In conclusion, I concur entirely with the evidence of Dr Jigau. By the date of this appointment, there were no outstanding medical issues that would preclude the claimant returning to work and dealing with the outstanding work/grievance issues. The only reason that this did not occur was due to the ongoing dispute as to how this should be achieved. As a consequence, the claimant had by early September at the latest, recovered to such an extent that there were 'no clear persistent impact on daily activities' [B/130]. I conclude, therefore, that it was not likely that the effect on the claimant's day-to-day activities would last beyond 12 months. Rather, that by the date of dismissal, they had already ceased to have such an impact.

65. In these circumstances, the claimant has not satisfied the 'long term' element of the definition of disability in section 6 of the 2010 Act. As a consequence, the burden has not been discharged; the claimant has not proved that she is disabled for the purposes of the Act.

Employment Judge Rayner  
Date: 31 January 2022

Judgment & reasons sent to parties: 1 February 2022

FOR THE TRIBUNAL OFFICE