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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105459/2020

Preliminary Hearing Held by Cloud Video Platform (CVP)

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on 13 October 2021

Employment Judge P O'Donnell

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Mr G Stewart

**Claimant
Represented by:
Mr Baird
Trade Union
Representative**

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Rolls Royce Plc

**Respondent
Represented by:
Ms Gould
Counsel,
instructed by
Pinsent Masons**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the Claimant has not established that he was disabled as defined in s6 of the Equality Act 2010 at the relevant time and so the Tribunal does not have jurisdiction to hear the claims under the 2010 Act. The claims under the Equality Act 2010 are, therefore, dismissed.

REASONS

Introduction

- 5 1. The Claimant has brought complaints of unfair dismissal under the Employment Rights Act 1996 and disability discrimination under the Equality Act 2010. The condition which is said to amount to a disability is depression.
2. The Respondent does not concede that the Claimant was “disabled” as defined in s6 of the 2010 Act at the relevant time and the present hearing was listed to
10 determine this issue. The dispute arises in relation to whether any effects on the Claimant’s day-to-day living activities were “long term” and “substantial”.
3. At the outset of the hearing, Mr Baird explained that the Claimant was not present as he did not feel fit to attend. No application to adjourn the hearing was made, either in advance or at the hearing. No-one else was being called
15 to give evidence and Mr Baird sought to proceed on the basis of submissions.
4. The Tribunal questioned how it could make findings in fact on which its determination would be based in the absence of any evidence. Mr Baird indicated that he sought to rely on the documents in the joint bundle.
5. After an adjournment to allow her to take instructions, Ms Gould confirmed that
20 the Respondent’s position was that they were prepared to accept that contemporaneous documents said what they bore to say but that any later documents (such as the Claimant’s disability impact statement) should be given no weight where there was no witness to speak to them. On that basis, the Respondent was content to proceed with the hearing.
- 25 6. Mr Baird had no objection to proceeding on that basis. The hearing went ahead on the basis of submissions with findings of fact being made from the documents in the bundle. Those documents will be identified below by the page number in the bundle.

Findings in fact

7. The Tribunal made the following relevant findings in fact from the contemporaneous documents.
- 5 8. The disciplinary process which led to the Claimant's dismissal started on 18 December 2019 when he was suspended. There was then an investigation and disciplinary process which culminated in the Claimant's dismissal on 10 July 2020. The Claimant appealed this decision and the appeal was decided on 13 August 2020.
- 10 9. The Claimant had no pre-existing diagnosis of depression or any other mental health issue.
10. The Claimant's GP records are produced at pp92-97:-
 - 15 a. The Claimant attended his GP on 23 January 2020 and described the issue that had arisen at his workplace. He described difficulty sleeping the night before. The GP notes that the Claimant's blood pressure reading indicated that he was "*obviously stressed*".
 - 20 b. On 20 February 2020, the Claimant attended his GP again. He describes that he is stressed at the cancellation of a disciplinary hearing the day before and had been unable to sleep.
 - c. A further meeting between the Claimant and his GP occurred on 5 March 2020. He describes attending Occupational Health with his wife as he felt unable to face it on his own. He says that he is to attend counselling but does not think it will help as it is an "*acute thing*".
 - 25 d. A telephone call with the GP occurs on 2 April 2020 during which the Claimant describes himself as "*less worried*", that he is sleeping better and doing some DIY. The GP adds a comment that the Claimant's mood was a bit better.

- 5 e. The Claimant again speaks to his GP by phone on 21 May 2020. He is described as *“not great”* and reference is made to a *“works doctor”* who has said the Claimant is not fit for work but is fit for a disciplinary hearing. The Claimant describes having headaches, difficulty sleeping and pains in chest and back which he describes as feeling like a strain. There is a comment which states *“depression screening using questions”* but says nothing more than that.
- 10 f. Another telephone consultation occurs on 18 June 2020 at which the Claimant described the current position in relation to the disciplinary process. In particular, he describes occupational health as deciding he was fit to attend a hearing but that he did not know the criteria for this and states that the assessment was not made with any questions about *“sleep, self-harm etc”*. It is noted that he is still angry about the situation but wants an end to it.
- 15 g. The Claimant and his GP again speak by telephone on 23 June 2020 at which he describes the postponement of the disciplinary hearing for a medical report to be provided. It is noted that there was no thought of suicide risk. The GP notes that the Claimant sounds agitated as if pacing during the call and suggests he tries calming music or walk.
- 20 h. The Claimant calls his GP again on 16 July 2020 to tell her that he has been sacked. He comments that he did not pick up his last prescription.
- 25 i. The last relevant entry in the records relates to a call on 24 July 2020 in which the Claimant asks for a backdated sickness certificate. It is noted that the Claimant *“sounds a bit brighter”*.
- j. There are later entries in the records which occur after the appeal decision and so fall after the relevant date for the assessment of disability status.

11. The Claimant submitted four doctor's certificates during the disciplinary process stating he was unfit for work; 5 March 2020 (p111), 2 April 2020 (p114), 21 May 2020 (p118) and 18 June 2020 (p119). All four of the certificates describe the reason why the Claimant was unfit as "*stress reaction*".
- 5 12. The Claimant's GP also wrote a letter dated 20 February 2020 (p138) which describes the Claimant as "*suffering from acute work-related stress with consequent lack of sleep*". It goes on to state that he would not be able to cope with "*official proceedings*" at this time but says nothing further about the effects of the stress on the Claimant.
- 10 13. A further letter was prepared by the Claimant's GP dated 16 July 2020 (p224) which described him as "*suffering from a lack of concentration following a stress reaction from adverse event at work, followed by agitated depression and chronic loss of sleep*". The letter goes on to state that the Claimant is on anti-depressants and gives the opinion that he is unfit to attend a hearing. The
15 letter describes the effects on him as an inability to listen and retain information.
14. The Claimant attended meetings with the Respondent's Occupational Health provider during the disciplinary process and a number of reports were produced:-
- a. A report dated 25 February 2020 from an Occupational Health Adviser
20 describes using a "*mental health assessment tool*" to assess the Claimant and that this showed him to be experiencing moderately severe depression and moderate anxiety. The report goes on to express an opinion that the Claimant is not fit to attend a disciplinary hearing but does not describe any effects on the Claimant's day-to-day
25 activities.
- b. A further report dated 17 March 2020 (pp112-113) by the same Occupational Health Adviser describes the Claimant as being less emotional although still upset and angry. It is noted that he has recently started medication and it is expected that it will take a further 2-3 weeks
30 to be effective. The report records the Claimant describing headaches,

insomnia, indigestion and gastric upset. It notes that he is sleeping but does not wake up feeling refreshed.

5 c. A report dated 20 May 2020 (pp115-117) is prepared by a Consultant Occupational Physician and this notes the Claimant describing poor sleep, poor concentration, low energy and motivation as well as pain in his chest and back. The physician expresses the opinion that the Claimant is fit to attend a disciplinary hearing and makes some recommendations which he considers would assist the Claimant.

10 d. A further report by the same physician dated 1 July 2020 (pp120-121) confirms the opinion that the Claimant is fit to attend the disciplinary hearing. It says nothing about the effects of the Claimant's condition on his day-to-day activities.

Claimant's submissions

15 15. Much of the submissions made on behalf of the Claimant were addressed to the substantive claims seeking to explain the basis of the unfair dismissal and discrimination claims as well as the matters raised by the Respondent which the Claimant disputes. The Tribunal does not propose to set these out in detail as they were irrelevant to the issue being determined at the hearing.

20 16. Mr Baird drew the Tribunal's attention to the various documents in the bundle from the Claimant's GP and the Respondent's Occupational Health provider referring to their contents.

17. It was submitted that, from the Claimant's perspective, he is suffering from a continuing depressive disorder.

25 18. Reference was made to Schedule 1 of the Equality Act and the criteria that a disability had to last at least 12 months. The GP reports indicate that there was a substantial adverse effect regarding matters such as the Claimant taking longer with everyday tasks and having issues with socialising. The Tribunal pauses to note that this is a reference to the contents of the GPs

letter of June 2021 (p234) which, for reasons set out below, the Tribunal considers does not provide relevant evidence.

5 19. Mr Baird also made reference to *Balda v Church Housing Association* UKEAT0290/18 in relation to the issue of an employer's knowledge of disability which was not an issue being determined at the hearing.

20. It was said that depression could be a condition which was not obvious or declared by an employee.

10 21. In rebuttal, Mr Baird commented that the Occupation Health report of 25 February 2020 was clear in what it said. The GP could not speak to the medical records and the notes are not exhaustive. The effects of the Claimant's condition could fluctuate and there was a reference to the Claimant's ability to concentrate being affected.

Respondent's submissions

15 22. Ms Gould pointed out certain issues relating to the fact that the Claimant was not present to give evidence; there was no evidence about what the effects of his condition would be without medication and the effect on his activities at the time.

20 23. Reference was made to the case of *Boyle* (below) and the definition of "likely" in the context of the test for disability. It was submitted that this was an objective test based on the facts at the time.

25 24. The determination of whether the Claimant meets the definition of "disabled" is to be made as at the time at which the discrimination is said to occur (*McDougall* below). Both the law and the guidance say that matters after the alleged acts of discrimination are not relevant. In this case that would include GP records from after the date of dismissal.

30 25. In terms of the relevant date, Ms Gould made reference to the final version of the Claimant's further particulars which start at p76. It was submitted that it

was not entirely clear but that the Claimant appears to allege discrimination from his suspension on 18 December 2019 up to the appeal outcome on 13 August 2020.

5 26. The Claimant accepts that there was no prior history of depression.

27. Ms Gould went on to take the Tribunal through the Claimant's GP records, the Occupational Health reports, the Claimant's sick notes and the letters from the GP. For the sake of brevity, the Tribunal does not propose to set
10 this out in detail. The main points which Ms Gould sought to make from these records were that the Claimant's condition rose from the situation in which he found himself, that, for much of the time, there was no clear indication of substantial adverse effects and no evidence that, if there were such effects, these would last at least twelve months.

15 28. If the Claimant did not agree with the contents of the documents then he required to give evidence about this. Similarly, although there had been a suggestion that the Claimant's GP was willing to give evidence about the effects of his condition, the time for this evidence to be given was at the
20 present hearing and this had not happened.

29. Although the Respondent did make some adjustments to assist the Claimant in the disciplinary process, this does not prove he was disabled. An employer could make such adjustments as a matter of good practice and it does not
25 mean that an employee is disabled.

30. The burden of proof is on the Claimant and there is no evidence that he meets the definition of disability. He has failed to demonstrate that he suffered a mental impairment which was likely to last at least 12 months and there was
30 very little evidence that this had substantial adverse effects on his day-to-day living activities.

Relevant Law

31. Disability is one of the protected characteristics covered by the Equality Act 2010 and s6 of the Act defines disability as a physical or mental impairment which has long-term, substantial adverse effects on a person's day-to-day living activities.
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32. Schedule 1 of the 2010 Act sets out further provisions in relation to the definition of "disability":-

Paragraph 2

- 10 (1) *The effect of an impairment is long-term if—*
- (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.*
- 15 (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 treated as continuing to have that effect if that effect is likely to recur.*
- (3) *For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.*
- 20 (4) *Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.*

Paragraph 5

- 25 (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.*

(2) *'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.*

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33. The Government Guidance on the definition of disability addresses the issue of what can be considered “normal, day-to-day” activities at D2-7.

34. The word “*likely*” appears in a number of contexts in the provisions relating to the definition of disability. The House of Lords in *SCA Packaging Ltd v Boyle* [2009] IRLR 746 held that this should be interpreted as meaning “could well happen”.

35. The Tribunal must assess the issues relevant to disability status (for example, whether there are substantial adverse effects, whether the effects are long-term, the likelihood of recurrence) as at the date of the alleged discrimination (*McDougall v Richmond Adult Community College* [2008] IRLR 227).

Decision

36. 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.

37. 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 about the whole disciplinary process rather than just the decision to dismiss and so the Tribunal considers that the relevant date is the period from 18 December 2019 when the Claimant was first suspended to 13 August 2020 when the appeal decision was given.

38. What this means is that the fact that the Claimant may meet the definition at the present time is not relevant to the Tribunal’s determination.

39. Further, the Tribunal finds that the GP letters in the bundle which are dated after 13 August 2020 do not provide relevant evidence because they describe the present effects on the Claimant. It is the facts as at the relevant date (or, in this case, the relevant period) which the Tribunal has to take into account and those letters do not, on the face of it, describe the effects on the Claimant in the period from December 2019 to August 2020.
40. This is not a case where there was any dispute as to whether the Claimant had an impairment; the Respondent did not seek to challenge this. Rather, the dispute between the parties was whether any adverse effects on the Claimant were both long-term and substantial. The Tribunal proceeds on the basis that the Claimant did have an impairment and focus its judgment on the two issues in dispute.
41. The Tribunal will address the “long term” element of the definition of disability first.
42. It is quite clear in this case that any effects there may have been on the Claimant’s day-to-day activities had not lasted for at least 12 months by the end of the relevant period. There was no pre-existing condition and it was the disciplinary process itself which is said to have triggered the condition which is relied on as a disability. Given that the process lasted approximately 8 months and so any effects on the Claimant’s day-to-day activities had lasted, at most, for that period of time by the date of the appeal decision.
43. In any event, even if the Claimant had sought to rely on the criteria in Schedule 1, paragraph 2(a), it would not have assisted him as he would not have been “disabled” for the purposes of the Equality Act until 12 months had passed and could not bring a claim of disability discrimination in relation to any alleged acts which occurred during those 12 months (*Tesco Stores Ltd v Tennant* [2020] IRLR 363). Given that all of the alleged acts of discrimination in this case occurred in that period then it would preclude all of his claims of disability discrimination.

44. The Claimant, therefore, has to rely on the “likely to last” criteria in Schedule 1, paragraph 2(b). The difficulty for the Claimant is that he has produced no evidence whatsoever from the relevant period from which the Tribunal could reach the conclusion that any substantial adverse effects on his day-to-day activities were likely to last at least 12 months.
45. There is certainly no formal prognosis from the Claimant’s GP or the Respondent’s Occupational Health about how long any effects on the Claimant is likely to last.
46. The Tribunal bears in mind that it should not focus solely on formal diagnoses or prognoses and look to see if there is information from which it could draw the conclusion that any effects were likely to last 12 months (*Nissa v Waverly Education Foundation Ltd* UKEAT/0135/18). However, there is no information in the documents which provides evidence from which the Tribunal could draw any conclusion that it was likely that any effects would last at least 12 months.
47. At most, the GP records and Occupational Health reports indicate that the Claimant’s depression was caused by the disciplinary process and there is an implication that the resolution of this process would assist in his recovery. However, this provides no assistance to the Claimant as there is no evidence about how long any recovery was likely to take.
48. The burden of proof is on the Claimant and he has failed to discharge this. There is no evidence that any effects on the Claimant’s day-to-day activities were likely to last at least 12 months.
49. In these circumstances, the Claimant has not satisfied the “long-term” element of the definition of disability in s6 of the 2010 Act and so he had not proved that he is “disabled” for the purposes of the Act.
50. This, on its own, would be sufficient to dispose of the issue of disability status but there is also the “substantial adverse effect” element of the definition of disability. In addressing the “long-term” element, the Tribunal has, to some extent, proceeded by taking the Claimant’s case at its highest and assuming

there were substantial adverse effects on the Claimant's day-to-day activities but now turns to the question of whether there were, in fact, such effects.

51. The Claimant, again, faces the difficulty that he has led very little evidence on this issue. The best person to describe the effects on the Claimant is the Claimant himself but he chose not to attend the hearing and give evidence in support of his claim.
52. The Tribunal has, therefore, had to rely on what is recorded in the GP notes and Occupational Health reports. Whilst these documents do record some symptoms experienced by the Claimant, they are in very brief terms and, for the most part, do not provide any description of the effects on the Claimant's activities.
53. The Tribunal does bear in mind that a substantial adverse effect is something that is more than minor or trivial and so there is a relatively low bar in assessing this. However, the Tribunal needs some evidence from which it can conclude the Claimant has met the definition.
54. The only reference to any kind of effect on his activities is in the GP letter of 16 July 2020 where it is said that he has difficulty in listening and retaining information. However, this is said in the context of assessing the Claimant's ability to attend a disciplinary hearing rather than normal day-to-day activities.
55. The Tribunal does note the references to the Claimant having low mood or difficulty in concentrating but it does not consider that it can draw any inference that this caused any substantial adverse effects on his day-to-day living activities without something more. The Tribunal is conscious that conditions such as depression can have a range of effects and different people can cope with these effects differently. The Tribunal does not consider that it can make any assumptions or speculate about how the Claimant was affected without some evidence about this.
56. As noted above, the burden of proof lies with the Claimant and the Tribunal considers that he has failed to produce sufficient evidence to discharge the

burden in respect of the substantial adverse effect element of the definition of disability in s6 of the Equality Act.

57. In these circumstances, the Claimant has failed to prove that he meets the definition of disabled as he has not proved that his depression had long-term substantial adverse effects on his day-to-day living activities. The Tribunal does not, therefore, have the jurisdiction to hear his complaints of disability discrimination under the Equality Act 2010 and so those claims are hereby dismissed.

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Employment Judge: Peter O'Donnell
Date of Judgment: 20 October 2021
Entered in register: 25 October 2021
and copied to parties

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