



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No.s: 4109815/2021 & 4109817/2021

Held via Cloud Video Platform (CVP) on 28 April 2021

Employment Judge: M Sutherland

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Christine Briggs

**Claimant
In Person**

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Scottish Ambulance Service Board

**Respondent
Represented by:-
Mr G Fletcher, Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the Claimant was not disabled during the relevant time and her complaint of disability discrimination is dismissed.

REASONS

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1. The Claimant has presented complaints of constructive dismissal and sex discrimination. She made an application to amend to include complaints of disability discrimination which application is yet to be determined. An open preliminary hearing was arranged to determine whether the Claimant was disabled in terms of Section 6 of the Equality Act 2010 at the time of the alleged acts of discrimination ('the relevant time'). For the purposes of this hearing it was agreed between the parties that the relevant time was the period from 27 July 2020 to 24 February 2021.

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2. The Claimant appeared on her own behalf. The Respondent was represented by Mr G Fletcher, Solicitor.
3. The Claimant asserted disability status in respect of the mental impairment of “stress, anxiety and depression”. At a prior case management preliminary hearing the Claimant had been referred to the statutory guidance on the definition of disability. The Claimant subsequently lodged an impact statement.
4. The Claimant gave evidence on her own behalf and did not call any other witnesses. The Respondent did not call any witnesses.
5. The Claimant sought to rely upon a witness statement prepared by a friend about her telephone calls with the Claimant during the relevant time. Her application was refused following discussion given that there was no order for witness statements, the friend was not in attendance to be cross examined, the Claimant could evidence these telephone calls herself, and the Respondent did not seek to dispute these calls.
6. Parties had each prepared a bundle of documents.
7. Parties had not agreed a List of Issues. Parties were advised that the tribunal required to determine the following issues: At the relevant time, did the claimant have a mental impairment? If so, did that impairment have an adverse effect on her ability to carry out normal day to day activities? If so, was that effect substantial (more than minor or trivial)? If so, was the substantial effect long term having lasted (or being likely to last or recur) for 12 months?
8. The parties made oral submissions.

Findings of Fact

9. The Claimant was employed by the Respondent from 12 November 2018 until 24 February 2021. The Claimant worked as an Ambulance Care Assistant.

10. In around July 2020 the Claimant raised a number of allegations with the Respondent regarding the behaviour of a colleague. The colleague then made counter allegations.
- 5 11. On 5 August 2020 the Claimant had a telephone consultation with her GP who noted that she advised of problems with bullying and harassment, and was struggling with a colleague at work. The Claimant had not previously consulted with her GP regarding her mental health.
- 10 12. On 25 August 2020 an informal mediation meeting took place between the Claimant, the colleague and management with a view to resolving matters. The Claimant understood that she was being required to work with that colleague despite her repeated requests not to do so. During the meeting she became very upset, broke down in tears and had to leave the meeting. She then sat in her car for about an hour trying to compose herself before then driving herself home.
- 15 13. Later on 25 August 2020 the Claimant had a telephone consultation with her GP who noted a diagnosis of stress at work and difficulty with sleeping and issued a note of unfitness to work.
- 20 14. The Claimant was absent from work from 26 August 2020 until her resignation on 24 February 2021 on account of “work related stress” (as noted by her GP in her unfitness to work notes). The Claimant did not have any prior absences from work related to stress or her mental health although she had previously been upset at work.
- 25 15. During the period from August 2020 to February 2021 the Claimant’s sleep was negatively effected by stress. She developed psoriasis on her scalp which was contemporaneous with this period of stress and which caused her hair to thin.
- 30 16. For a few weeks after the meeting on 25 August 2021 the Claimant was largely unable to leave her house on account of her mental health. To this end she arranged to do her shopping online rather than in person, she arranged for someone to walk her dogs, she stopped horse riding, and she was unable

to give her school children lifts to their after school activities. She also stopped telephoning her wider family during that time.

17. During the period August 2021 to February 2022 the Claimant was able to engage in detailed correspondence with the Respondent and others (including her MP, her lawyer, and her union) from time to time.
18. On 3 September 2020 the Claimant had a telephone consultation with Salus OH providers. The Claimant advised that she was having no difficulty in engaging her usual activities but was having some difficulty with anxiety/ depression. She described her perception of her overall state of health and well being as being the worst health you could imagine. She completed a HADS questionnaire on anxiety and depression. It generates a score based upon answers to questions of 0-7 (no indication of anxiety or depression), 8 to 10 (borderline indication), and 11 -21 (indication of anxiety or depression). The Claimant scored 16 for anxiety and 11 for depression. The completed questionnaire gave an indication of a possible impairment but it was not intended to give a diagnosis of anxiety and/ or depression. She was given advice and information on managing anxiety and stress. It was recommended that she discuss matters with her GP which she did. The Salus report noted that she may be disabled under EA 10 because she appeared to have a mental impairment which had a long term substantial adverse effect on her ability to carry out normal day to day activities. It did not make any assessment of the duration of the effect.
19. On 4 September 2020 the Claimant had a telephone consultation with her GP who noted a diagnosis of stress at work and issued a note of unfitness to work.
20. On 21 September the Claimant received an outcome from the preliminary investigation into her allegations regarding her colleague.
21. On 25 September 2020 the Claimant had a telephone consultation with her GP who noted a diagnosis of stress at work, that she was not sleeping or eating and struggled to leave the house and issued a note of unfitness to work.

22. On 1 October 2020 the Claimant had a telephone consultation with NHS Scotland Occupational Health Consortium (OH Consortium). Their report noted that: she was fit to carry out her full range of duties; she was not regarded as disabled under the Equality Act 2010 ('EA 10'); a resolution of the work place issue with her colleague was considered necessary to facilitate her return to work; and the Claimant felt she could return to work but not to work with this individual.
23. On 30 October 2020 the Claimant had a telephone consultation with her GP who noted a diagnosis of stress at work and that she was feeling very low and issued a note of unfitness to work.
24. On 3 November 2020 the Claimant participated in a grievance meeting with the Respondent via video.
25. On 4 November 2020 the Claimant attended a mid review with Salus OH. The Claimant advised that she hoped within the next few weeks that arrangements could be put in place in order for her to return to work. It was noted that her scores under HADs had deteriorated to a score of 19 for anxiety and to 15 for depression.
26. In around mid November an investigation commenced into the allegations made by the Claimant and the counter allegations made by her colleague. The Claimant received a letter indicating that she was facing a counter allegation of bullying. On 23 November 2020 the Claimant provided information to the Respondent regarding that allegation.
27. On 27 November 2020 the Claimant had a telephone consultation with her GP who noted a diagnosis of stress at work, formal grievance raised but now had counter allegations raised against her for bullying, she was very tearful and upset, she was feeling very low mood 1/10, not sleeping, psoriasis flare up on scalp, memory and concentration poor, no suicidal ideation or intent, panic attacks and issued a note of unfitness to work. She was prescribed anti depressant / anxiety medication which she took for a few weeks. (She was not otherwise prescribed any medication or treatment for stress, anxiety or

depression by her GP.) She was prescribed treatment for her scalp which she still uses.

28. From around December 2021 the Claimant's mental health started to improve such that she was able to leave the house to attend the shops and take her children to their activities. That improvement was sustained notwithstanding the cessation of her anti depressant/ anxiety medication.
29. On 11 January 2021 the Claimant had a telephone consultation with her GP who noted a diagnosis of stress at work, noted that she was getting exercise and coping a bit better and that she feels she could return to work if they would accommodate workplace adaptations recommended by OH and issued a note of unfitness to work.
30. On 21 January 2021 the Claimant attended a telephone consultation with OH Consortium. In their report: she was described as temporarily unfit to carry out her full range of duties; that she was likely to return to work within weeks; she was not regarded as disabled under the Equality Act 2010 ('EA 10'); resolution of the work place issue with her colleague was considered necessary to facilitate her return to work; and she was considered unfit to attend an investigatory meeting. (The Respondent was endeavouring to arrange an investigation meeting with the Claimant regarding the allegations.)
31. On 29 January 2021 the Claimant had a telephone consultation with her GP who noted a diagnosis of stress at work and that her lawyer advised her not to go back to work until issues resolved and issued a note of unfitness to work.
32. In addition to the formal consultations the Claimant also had informal contact at various times with the OH consortium and with Salus during the relevant time to check on her well being.
33. On 24 February 2021 the Claimant intimated her letter of resignation.
34. On 25 March 2021 the Claimant commenced employment with a new employer which she has attended without sickness absence.
35. On 18 May 2021 the investigation report into the allegations and counter allegations was issued.

Observations on the evidence

36. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event, etc was more likely than not, then the Tribunal is satisfied that the event did occur.
37. The Claimant was at times prone to exaggeration in her testimony which somewhat undermined its reliability. She described having a complete nervous breakdown at work on 25 August 2020 but was able to compose herself sufficiently to drive home afterwards and to write a detailed email to the Respondent the next morning on 26 August 2020. During consultation her with SALUS OH providers on 3 September 2020 she advised them that her overall state of health and wellbeing was the worst health you could imagine (which view she confirmed in evidence) yet when she saw her GP on 4 September 2020 she was not prescribed any treatment or medication.
38. The Claimant's evidence was at times inconsistent which somewhat undermined its credibility. She asserted that her GP and Salus OH had advised her not to work with the individual colleague again but this assertion was not supported by written records of her consultations. She asserted that Salus advised management that they should not contact her when she was on sick leave but this assertion was not supported by the written record of her consultations. She initially stated that she would have been fit to return to work had they made the adjustment she sought (of not working with that colleague) but she then asserted that she would not have been unfit to work regardless. In response to clear and specific questions in chief she expressly stated that her typed diary entries were made contemporaneously on the date of the events recorded. However in cross examination (and with reference to anomalies in the entries) she admitted that she had kept a contemporaneous handwritten diary which she had then subsequently typed up and significantly expanded upon some months later after she had raised her claim.
39. The Claimant asserted in her impact statement that she was desperately unwell, suffering from anxiety and depression, and having suicidal thoughts, throughout the period of her sick absence and indeed beyond it. The Claimant gave evidence, which was accepted, that she had regular lengthy telephone

calls with a friend during that period to whom she advised having suicidal thoughts. However she also had a number of consultations with her GP and OH during that time who did not note any thoughts of self harm (including suicide). And further her GP concluded in November 2020 that she did not
5 have any thoughts of self harm. In the circumstances, and having regard to some reliability and credibility concerns, it was considered more likely than not that she did not have any significant or sustained thoughts of self harm.

The Law

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

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

42. The burden of proof is upon the Claimant.

Mental impairment

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

25 44. Where there is no clear medical diagnosis it may be legitimate for a tribunal to first consider adverse effect and then to consider whether the existence of an impairment can reasonably be inferred from those adverse effects (*J v DLA Piper UK LLP 2010 ICR 1052, EAT*).

45. The cause of the impairment does not require to be established (Guidance A3).

46. A distinction may be drawn between a mental impairment such as clinical depression and stress/ low mood (both of which may be a reaction to adverse life circumstances). In some cases tribunals may find that effects suffered by a single claimant were sometimes attributable to a mental impairment and sometimes to stress/ low mood which does not amount to a mental impairment (*J v DLA Piper UK LLP 2010 ICR 1052, EAT*).

Normal day to day activities

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

Substantial adverse effect

48. The impairment must cause an adverse effect on normal day to day activities but it need not be a direct causal link.
49. The adverse effect must be substantial. Section 212(1) of the Equality Act provides that “substantial” means more than minor or trivial. The EHRC Code notes that a disability is “a limitation going beyond the normal difference in ability which might exist among people”.
50. It is important to consider the things that a person cannot do, or can only do with difficulty (Guidance B9). This is not offset by things that the person can do.
51. The time taken by a person with an impairment to carry out an activity should be considered when assessing whether an effect is substantial (Guidance B2).
52. Schedule 1 paragraph (5) of the Equality Act provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if measures are being taken to correct it and but for that, it would be likely to have that effect. The

tribunal should deduce the effect on activities if medication or treatment were to cease unless it has resulted in a permanent improvement.

53. The Guidance provides at para B7 “Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.”

Long term effect

54. Schedule 1 paragraph 2(1) of the Equality Act provides that the effect of an impairment is long term if it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.
55. Schedule 1 paragraph 2(2) provides that if an impairment ceases to have a substantial adverse effect, it is to be treated as continuing to have that effect if that effect is likely to recur. In *SCA Packaging Ltd v Boyle 2009 UKHL 37*, the House of Lords ruled that “likely to” in this context means “could well happen” rather than “more likely than not”.
56. Where a person has a mental impairment with recurring or fluctuating effects, the effects are to be treated as long term if they are likely to recur beyond 12 months (Guidance C6). If a person has separate episodes of a mental impairment (e.g. depression) each of which last less than 12 months the issue is whether these are discrete episodes which are not connected by an underlying condition or whether these short separate episodes are connected as part of a long term underlying condition the effects of which are likely to recur beyond the 12-month period.
57. Whether a person has an ongoing underlying condition and the likelihood of recurrence of its effects must be judged at the relevant time and not with the

benefit of hindsight. An employment tribunal should disregard events taking place after the alleged discriminatory act but prior to the tribunal hearing.

Respondent's Submissions

- 5 58. Notwithstanding the burden of proof, and having regard to the Claimant's status as a litigant in person, the Respondent agreed to give their submission's first to enable the Claimant to provide any response she wished to make.
59. The Respondent's oral submissions were in summary as follows –
- 10 a. The Claimant suffered from work related stress which stress ceased when the Claimant ceased work.
- b. The Claimant was unfit to work only because of her unwillingness to work with a colleague which cannot constitute a mental impairment
- c. When the Claimant raised her claim she did not advise either that she had a disability or that she was claiming disability discrimination
- 15 d. When Salus indicated she may have disability there was no meaningful consideration of the length of time her condition had lasted or was likely to last
- e. The OH Consortium reports indicate that the Claimant is unlikely to be considered disabled.
- 20 f. The Salus Reports indicate that she does not have difficulty with day to day activities and no adjustments are required.
- g. The Claimant wrote an email stating the SALUS had advised her not to return to work with the colleague or to attend mediation. SALUS confirmed that they did not give her that advice. The Claimant also
- 25 misconstrued advice from her GP.

- h. The Tribunal must consider whether the impairment has lasted 12 months as at the date of the relevant acts (*Tesco Stores Ltd. V Tennant 2019* UKEAT/0167/19/OO)

Claimant's Submissions

- 5 60. The Claimant's oral submissions were very brief and were in summary that she had told the truth and had the status of a disabled person at the relevant time.

Discussion and decision

10 Mental impairment

61. The Claimant asserts that throughout the relevant time she was suffering from the mental impairment of "stress, anxiety and depression."
62. The Claimant was absent from work with what her GP diagnosed as work related stress from 26 August 2020 until 24 February 2021. She completed questionnaires during her attendance at OH in September 2020 and
15 November 2020 that indicated that she may be exhibiting symptoms of anxiety and depression. Whilst the Claimant regularly attended her GP she was not diagnosed as having a mental impairment of anxiety or depression at any time. She was not prescribed any medication or treatment for her mental
20 health other than a short course of anti-depressant/ anxiety medication in November 2020. Whilst it could arguably be inferred that she was suffering from depression and/or anxiety around that time, it otherwise appeared that she was suffering from stress or low mood (by way of an adverse reaction to her perception of her work circumstances) which did not constitute a mental
25 impairment.
63. Whilst the Claimant was signed off sick for about 6 months, her absence appeared to relate to the insistence that she work with a colleague when she refused to do so. Whilst there was a substantial adverse effect on her normal day to day activities (as noted below) that effect was relatively short lived. In
30 the circumstances there is no basis upon which it could reasonably be inferred

that she had a mental impairment throughout her absence notwithstanding their being no formal diagnosis of depression and/or anxiety.

Normal day to day activities

- 5 64. It is accepted that leaving the house, attending the shops, walking the dog, and taking children to their own activities, are all normal day to day activities. It is also accepted that her mental health had a substantial (i.e. more than minor or trivial) effect on these activities for at least a few weeks given that she could not leave the house. The Claimant took anti depressant/ anxiety
10 medication for a few weeks starting in November 2020 and accordingly the substantial adverse impact may have continued for longer but for that medication. However by January 2021 there was a sustained improvement in her mental health notwithstanding the cessation of her medication such that she was able to resume these activities.
- 15 65. Whilst there was a substantial adverse effect on her normal day to day activities for the first few months of her absence, there was no substantial adverse impact thereafter. Accordingly at no time during the relevant period was there a substantial adverse effect which had persisted for 12 months. Further, there was no evidence from which it could reasonably be inferred at
20 the time of the relevant period, that the substantial adverse effect was likely to persist for, or recur beyond, 12 months.

Decision

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

Employment Judge: M Sutherland

Date of Judgment: 09 May 2022

Entered in register: 10 May 2022

5 **and copied to parties**