



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100143/2024

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Held in Glasgow on 11 June 2024

Employment Judge L Doherty

Mr C Clelland

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**Claimant
Represented by:
Mr T Merck -
Counsel**

15 **Network Rail Infrastructure Limited**

**Respondent
Represented by:
Mr M Briggs -
Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The Judgment of the Employment Tribunal is that the claimant is a disabled person in terms of Section 6 of the Equality Act 2010 (the EQA).

REASONS

1. This was a OPH to consider the issue of the whether the claimant was disabled in term of section 6 of the EQA. The claimant was represented by Mr Merck and the respondents by Mr Briggs, both counsel.
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2. The impairment relied upon is depression and anxiety. It is not in issue that the claimant has that impairment. What is in issue is whether that impairment has a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities.
- 30 3. It was agreed that the material time for the Tribunal to consider whether the claimant was disabled in terms of the EQA ran from July 2022 until August 2023, which was the date of his dismissal.
4. The claimant gave evidence on his own behalf and lodged documents.

Findings in fact

5. From the evidence before it the Tribunal made the following findings in fact.
6. The claimant, whose date of birth is 5 August 1988, was employed by the respondents from September 2018 until August 2023.
7. The claimant attended his GP on 24 October 2017. He sought medical attention because he was experiencing low mood, and felt he was socially isolated. He did not attend social events with friends or family. He had lost weight and do not want to leave his bed in the morning. He felt ready to leave his job, although he did not actually do this.
8. The claimant's GP diagnosed him as suffering from low mood, dysthymia, lack of concentration. Dysthymia is a form of depression. The GP suggested the claimant take anti-depressants but he did not wish to do this. She also recommended a herbal remedy, St John's Wart, which he did take. He also integrated exercise into his routine. The claimant felt the benefit of this and by the time he stated work with the respondents in September 2017, he felt more positive.
9. He did however continue to experience good and bad days. The claimant has experienced severe mood swings since 2017.
10. The claimant's mental health began to decline again at some point after March 2020 with the imposition of the Covid restrictions. He was working from home and was living alone. He felt that he was in a downward spiral. He found it difficult to get out of bed in the morning. He did not shower frequently. He neglected to do housework. He found it difficult to socialise; he avoided social occasions with family and friends.
11. The claimant's symptoms persisted in 2022 and in 2023. He found it difficult to go out even to the shops despite the fact that there were no longer any Covid restrictions. He found it difficult to wake up in the mornings. On occasions when he was invited out by family or friends, he would not attend

without giving any reason. He continued to suffer from severe mood swings. This manifested itself in that he will feel happy one day but 'down' the next and unable to leave the house.

12. The claimant attempted to contact his GP in the latter half of 2022. He
5 telephoned his GP on 8 and 9 and 13 September 2022 and on 8 October and
19 November trying to get medical help for his condition, but his telephone
calls were not answered.
13. In November 2022, the claimant approached his manager and told him he
thought he was suffering from depression.
- 10 14. On 23 February 2023 the claimant did attend his GP and was diagnosed as
suffering from low mood and anxiety, which it was noted the claimant reported
had never really resolved since 2017. His GP noted that he was isolating
himself and did not want to go out even to the shops, which was heightened
during the pandemic. His GP recorded that he had a 'flat affect' and poor eye
15 contract. His GP noted the claimant was resistant to taking anti-depressant
drugs preferring natural remedies. The GP considered that the claimant would
benefit from one to one psychological therapy.
15. On 8 March 2023, the claimant was referred to the mental health nurse where
it was noted the claimant described ongoing symptoms of low mood/anxiety.
20 He stated his condition had slightly improved and he was directed to
counselling and wellbeing therapies.

Note on evidence

16. The Tribunal formed the impression that in the main the claimant's evidence
was credible and reliable. The Tribunal accepted the claimant's evidence that
25 the telephone calls he made to his GP's practice in September to November
2022 were made because he was seeking help with his mental health. His
having made these attempts to get help was consistent with his evidence
about the symptoms he was experiencing at that time.

Submissions

17. In summary Mr Merck took the Tribunal to the medical records and the claimant's disability impact statement, both of which he submitted supported the conclusion that the claimant was disabled in the of the EQA.
18. While Mr Briggs accepted the impairment relied upon, he took issue with its effect, submitting that it did not have a substantial and adverse long term effect on the claimant's ability to carry out day to day activities. He submitted that the test was what not what the claimant felt like, but rather what the effect was on carrying on day to day activities. He submitted there was simply not enough evidence to meet the test of substantial and long term adverse effect. The only examples the claimant could give of the brain fog, or attention deficiency, arose from the disciplinary allegations. The claimant's experience and the effects of lockdown were particular to those circumstances. The circumstances about which he gave evidence about such as not going out were common during lockdown, and were particular to that time. Even if the effects were long term they did not amount to a substantial adverse effect.

Consideration

19. Section 6 of the EQA 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 (a) Part 1 to the EQA provides that:

"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) it is likely to last for the rest of the life of the person affected"*

20. Supplementary provisions on disability status are contained in Schedule 1 to the EQA, and in the Guidance on matters to be taken into account in

determining questions relating to the definition of Disability (the Guidance), and the Equality and Human Rights commission Court of Practice and Supplement.

21. In relation to normal day-to-day activities the Guidance provides:

5 *“In general, day to day activities are things 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.”*

10 22. The Equality Act 2010 (Amendment) Regulations 2023, Regulation 6 adds Schedule 1 of the Equality Act 2010 the following in respect of normal day to day activities:

15 (2) *References in the relevant provisions to a person's ability to carry out normal day-to-day activities are to be taken as including references to the person's ability to participate fully and effectively in working life on an equal basis with other workers.*

23. Substantial means “more than minor or trivial”.

24. The adverse effect should be assessed having discounted any positive impact which is associated with any treatment regime.

20 25. The focus should be on what an employee cannot do or can do only with difficulty, and not on what they can easily do.

26. An impairment will have a long-term effect only if it has lasted for at least 12 months, the period for which it lasts is likely to be 12 months or it is likely to last for the rest of the life of the person affected (paragraph 2(1), Schedule 1).
25 The Guidance clarifies that “likely” means “could well happen”.

27. In considering whether the claimant meets the definition of disability there are 4 questions for tribunal. These are:

(1) *Does the Claimant have a physical or mental impairment?*

(2) *Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?*

(3) *Is that effect substantial?*

(4) *Is that effect long-term?*

5 28. There is no issue that the claimant has the impairment of depression, which was medically diagnosed in 2017.

29. The Tribunal considered whether that impairment had an adverse effect on the claimant's ability to carry out normal day to day activities.

10 30. This is a section 15 claim under the EQA and the 'something arising' from disability was conduct alleged against the claimant in the period from July 2022 until December 2022, with dismissal taking place in August 2023. It was agreed that the material time ran from July 2022 until August 2023.

15 31. The Tribunal was satisfied that the claimant's mental health worsened with the imposition of lockdown restrictions. The Tribunal take into account that as submitted by Mr Briggs, there were particular circumstances arising from lockdown, however, what the Tribunal has to consider is the claimant's condition even if that was exacerbated by difficult circumstances which applied across the board. The Tribunal was satisfied that as he said in evidence, from the onset of lockdown the claimant experienced worsening
20 symptoms of depression. These included finding difficulty in getting out of bed in the morning; not showering frequently; neglecting to do housework; and difficulty in socialising which meant that he avoided social gatherings with family and friends.

25 32. Furthermore, the Tribunal was satisfied on the basis of the claimant's evidence that some of the claimant's symptoms of depression persisted in 2022 and 2023. The Tribunal took into account that the claimant found it difficult to go out even to the shops despite the fact that there were no longer any Covid restrictions, and that he found it difficult to wake up in the mornings. On occasions when he was invited out by family or friends, he would not
30 attend without giving any reason. It also took account of the fact that the

claimant suffered severe mood swings and the effect of these was that his mental state could alter from day to day, with one day his feeling happy and the next his feeling 'down' and unable to leave the house.

33. The fact that the claimant experienced these symptoms is supported by the fact that he attempted to obtain medical help on five occasions between September and November 2022 and that he told his manager in November 2022 that he thought he was suffering from depression. It is also supported by the fact that that when the claimant did see his GP in February 2023 it was noted that he was isolating himself and did not want to go out even to the shops.
34. The Tribunal then considered whether the effect was substantial. In determining this the Tribunal considered the claimant's ability to carry out normal day-to-day activities with his ability to carry out these activities, had he not been not impaired.
35. Appendix 1 to the EHRC Employment Code states: *"The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people"* (para 8).
36. Mr Briggs suggested that the claimant's disability impact statement lacked detail of the day to day activities which were affected and a 'feeling' did not meet the statutory test; the test was the effect of the impairment.
37. The Tribunal however understood the claimant's evidence to be that he did in fact have difficulty in getting up in the morning and difficulty in going out of the house on the occasion when he experiences bad days as a result of his mood swings. The claimants impact statement, which he adopted as evidence, states that he is 'unable' to leave the house on bad days. This is again supported by the GP record to the effect that in March 2023 that the claimant was isolating himself.
38. The Tribunal considered that experiencing severe mood swings with episodes of low mood which resulted in the claimant having difficulty in getting up in the

morning and having difficulty in leaving the house to go to the shops, and avoiding socialising, amounted to a substantial adverse impact on the normal day to day activity of going out of the house to go shopping or to socialise.

5 39. It was the claimant's evidence that he has continued to suffer mood swings since before July 2022 and that he continues to suffer from them, and therefore The Tribunal accepted that the claimant had suffered mood swings in the period from July 2022 till August 2023.

40. The period from July 2022 to August in over 12 months and therefore the Tribunal was satisfied that the effect of the impairment was long term.

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Employment Judge: L Doherty
Date of Judgment: 17 June 2024
Entered in register: 18 June 2024
and copied to parties

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