



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107239/2023

Preliminary Hearing held at Dundee on 29 July 2024

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**Employment Judge McFatridge
Tribunal Member E Coyle
Tribunal Member P Fallow**

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Mr D Keen

**Claimant
Represented by:
C Curran,
Friend**

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Richard Irvine FM Limited

**Respondent
Represented by:
Mr Gibson,
Advocate
Instructed by:
M Bramhalls**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the preliminary hearing is that the claimant was not disabled in terms of section 6 of the Equality Act at the relevant time.

REASONS

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1. As noted in the main judgment the claimant lodged claims which included claims of disability discrimination following the termination of his employment with the respondent. Although it had initially been intended to deal with the issue of disability at the final hearing the respondent requested that a separate preliminary hearing be fixed for this purpose

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using the first day set aside for the main hearing. This followed receipt by the respondent of the claimant's medical records. This request was granted and the preliminary hearing took place on 29 July.

Preliminary Issue

5 2. At the commencement of the hearing Ruth Innes of the respondent's HR department was present in the hearing room to instruct the respondent's agent. The claimant's representative asked that she be removed. She said that the claimant was very uncomfortable with her being there. She said that Ruth Innes had bullied the claimant. She said that her presence
10 would make it difficult for the claimant to give evidence. She said he felt intimidated and there was not a good relationship between them. The respondent's representative said that he had prepared on the basis that, as was entirely usual, she would be there to support him and provide instructions. The tribunal retired and gave our decision after a short
15 adjournment. We could see nothing in the pleadings to suggest that Ms Innes had bullied the claimant or that her presence would in any way be intimidating. On the other hand the claimant would be giving evidence in relation to his mental health which was likely to be sensitive and he might feel it to be more difficult to give it if Ms Innes was present. In the
20 circumstances we decided to give the claimant the benefit of the doubt and excluded Ms Innes from the tribunal room during the preliminary hearing relating to disability.

3. The claimant gave evidence on his own behalf. A bundle of productions was lodged and these are referred to below by page number. On the basis
25 of the evidence and the productions the tribunal found the following factual matters to be established relevant to the issue of whether or not the claimant was disabled at the relevant time.

Findings in fact

4. The claimant was 41 at the date of the hearing. The claimant is a plumber
30 and heating engineer. He commenced employment with the respondent on 30 November 2022. Prior to that he worked as a plumber and heating engineer for many years. Latterly he had been self-employed. Immediately prior to his employment the claimant completed a confidential

health screening questionnaire which was lodged (pages 140-141). The claimant confirmed that he did not suffer from any serious illness, injury or condition and that he was not on any medication treatment. He confirmed that he was not on any medication that may affect his ability to drive, that he did not know of any reason why he would not be able to attend work regularly and that he did not consider himself disabled. The claimant signed this statement to confirm that the information given was to the best of his knowledge accurate as at this date.

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5. At no point during his employment with the respondent up until 26 June 2023 did the claimant mention to the respondent he had any difficulty with his mental health. The claimant attempted suicide on or about 4 June 2023. He went to a wooded area with the intention of hanging himself but did not go through with it. The claimant's medical records for the period from 5 June 2023 until 4 April 2024 were lodged (pages 68-69). His medical records show that he consulted his doctor on 5 June. The record states:-

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"Telephone encounter. Mood low attempted hanging yesterday. Made plans, wrote note and tied up loose ends. Walked to forest area with rope but 'couldn't go through with it'. Says he feared 'whoever found him'. Unsure thoughts towards this today but denied suicidal ideation. 1 month worsening – Multiple factors. Tells me he has never had low mood before. No previous DSH. Works as plumber – enjoys. Minimal drugs and alcohol. Lives with mum who keeps well. 'Everything got too much'. Ex partner is verbally abusive. Feels he has to fight to see youngest child. Car crashed into him last year and insurance claim has not been forthcoming and van off the road/affected business. Split with partner. Daughter aged 4. Other daughter is 21 and tells me had to fight to see her too and the thought of doing so again fills him with dread. Did start swearing and voicing frustration RE recent issues with piles/medication. Did not sound keen on counselling. Willing to try medication. Offered F2F for Wednesday. Given emergency contacts."

The medical records also disclosed that the claimant was prescribed Sertraline an anti-depressant on 5 June. He was prescribed 50mg tablets to be taken once a day. The claimant had not been prescribed anti-depressants before. The claimant had never consulted any medical professional about his mental health before his discussion with his GP on 5 June 2023. The record shows that a further appointment was made with his GP for 30 June but the claimant did not answer his phone and this was marked as a failed encounter.

6. There is an entry for 7 June which stated

“Seen by doctor, feeling a little bit better, no SI looks bright in work attire, clean and tidy, optimistic outlook speaking about daughters. Discussed management – speaking therapies, self help strategies and SSRI.”

7. The claimant saw his doctor again on 3 July. He was prescribed a further dose of 50mg Sertraline for four weeks. The note states:-

“No side effects. Has not noticed any difference to mood. Sounds very annoyed today at how the GP practice works. Complaining about the amount of questions reception asks about seeing a different doctor every time about phone appointment being cancelled prior as has not answered call.

Explored mood – low mood, has SH thoughts daily but no plans. Lives with parents and works as plumber. Feels need to work or will stay at home all day doing nothing. No panic attacks. Feels things move very slowly and thinks mood will never improve. Discussed counselling and speaking therapies. Reluctant to this and refused appointment with Matt. Advised this would help longterm – aware of Breathing Space and will try to contact them. Agreed to increase dose of Sertraline for now and review in 4 weeks time.”

On this date the claimant was prescribed 100mg tablets of Sertraline to be taken once a day. It was noted the claimant contacted his GP again on 11 July and was given telephone out of hours advice as he had been struggling with anger over the weekend. He was also given advice in

relation to his position that the Sertraline was making things worse. There was a further telephone encounter on 11 July where the claimant said he was:

5 *“unhappy with Sertraline as it was causing sleep disturbance and thoughts he did not like. says had same on low dose although previous consultation does not state that. Unhappy he has not been given a face to face today. Stopped the Sertraline last night. Advised face to face with GP who is dealing with this med for hm. Booked in tomorrow with OB. I see his complaining about the surgery is not new. Unhappy no appointments after 4.30. Accepted 9.00am. “*

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There is an entry on 12 July stating:-

15 *“Seen by doctor Sertraline not helping with mood and anxiety. Now disturbed sleep and staying up at night until 2am. This is new and since increasing dose of Sertraline. Also feeling more paranoid and having dark thoughts. Yesterday had argument with girlfriend accusing her of cheating which is unlike him. Denies visual or auditory hallucinations. Low mood slightly improved however anxiety worse. Denies panic attacks. Discuss starting different SSRI.”*

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There was another telephone encounter on 31 July. The note states:-

25 *“Telephone encounter. Medication r/v over the phone. Currently on 40mg Fluoxetine. Mood and anxiety improved. However tells me still having ‘thoughts’. Very vague about this, no SH ideation. Told me he was arrested on the Saturday after seeing me as girlfriend pressed charges. Due to attend court later this week and asking for doctor’s letter stating he was on Sertraline and ‘not himself’. I advised I cannot issue this letter. Advised should attend court and formally request letter if police advises so. Wishes to continue on Fluoxetine, no side effects. I will put this on repeats. Note has appointment booked with myself tomorrow – agreed to cancel this as no longer needed.”*

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Following that there appeared to be no further appointments where his mental health was discussed up to and including 4 April 2024.

8. The claimant lodged a Disability Impact Statement (pages 74-75). In this he claims to have been diagnosed on 5 June 2023. He stated his day-to-day life was affected because he was very anxious and depressed and had trouble sleeping and organising and managing his life. He stated his condition had worsened due to the discrimination and victimisation he had suffered from in the workplace during his employment with the respondent. The claimant claimed to have difficulty reading social situations which caused acute anxiety and depression. He claimed difficulty organising and managing his life when stressful situations such as discrimination and victimisation situations arising in the workplace and caused by the respondent. He stated his concentration and workmanship were affected by pressure from the respondent during his employment.

15 **Observations on the evidence**

9. As noted in the main judgment the claimant was a dreadful witness and the tribunal were not prepared to accept any of his evidence which was not independently vouched. The claimant's position in evidence was that he had been diagnosed with anxiety and depression at some stage in the past. He provided absolutely no detail of this. The only medical records provided were those set out above. We did not accept his statement that he had been diagnosed with anxiety and depression in the past because this contradicts what he told his own GP the day after he tried to kill himself and also contradicts what the GP has said. We did not accept what the claimant said in his impact statement about the effect on his day-to-day activities. What we could distil from the claimant's own evidence was that he had been suffering from what he called dark thoughts. He was asked why he had indicated on his pre-recruitment health screening that he did not suffer from depression. He said that he had never been diagnosed at the time. He said he was having dark thoughts but he didn't know that that meant he was having mental health issues. He then went on to say that he did not think of his mental health as a disability and that he was not registered disabled. He was referred to the record of the preliminary hearing (page 56) where his representative raised his mental health. He

said he was not at the hearing and that his representative had dealt with everything. He was asked why his representative had said he had been diagnosed previously and his response was *“I don’t know why it is in there, I never said that at any time.”*

5 10. We accepted that he had told his GP on 7 June that he was feeling a little bit better.

11. He accepted that he had not raised his mental health issues with his doctor on various visits he had had from July 2023 to April 2024.

Discussion and decision

10 12. The definition of disability is contained in section 6 of the Equality Act:-

“(1) A person B has a disability if

(a) B has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on B’s ability to carry out normal day-to-day activities.”

15 13. The onus to show that he is disabled lies on the claimant. We were referred by the respondent to the case of ***Kapadia v The London Borough of Lambeth***. The onus is on the claimant to show that he was disabled at the relevant time. In order to do this the claimant had to demonstrate that he suffered from a mental impairment and that this had
20 a substantial and long-term effect on his ability to carry out day-to-day activities. The long-term effect is defined as something which lasts or is likely to last 12 months.

14. Although the claimant’s representative had indicated at an earlier stage that the claimant had been diagnosed with depression and anxiety prior to
25 June 2023 this was not borne out either by the medical records or indeed by the claimant’s own admissions whilst giving evidence. It therefore appeared to us that whatever “dark thoughts” the claimant may have been suffering from there was absolutely no suggestion that these were part of any mental impairment prior to July 2023. There was also absolutely
30 nothing in the evidence to suggest that at that stage symptoms were likely to last 12 months. When the claimant was challenged on these matters he sought to say that he was of a generation who would not discuss

5 matters of mental health and that he would try to maintain an optimistic
demeanour even if he was struggling inside. Essentially the evidence
showed that this was someone who was having various life difficulties.
We accepted that he had tried to kill himself in June and this is not a trivial
matter. This did not however mean that the claimant must automatically
be regarded as disabled. In order to be regarded as disabled under the
Act he must meet the criteria. In the period from July onwards there is
really absolutely no coherent evidence that the claimant's ability to carry
out day-to-day activities was affected by his mental health. His own
10 evidence was that he was able to mask things appropriately. In any event
even if there were some effects these had not lasted 12 months by the
time of the claimant's dismissal and at that stage it could not be said that
they were in any way likely to last 12 months.

15 15. This was a case where there was unfortunately an almost total failure of
the claimant and his representative to properly address the legal question
as to whether or not he was disabled. The evidence was confused and
contradictory and contradicted his medical records. It was also clear from
the claimant's own evidence that assertions had been made in the
pleadings which were not in any way justified by the facts. The tribunal
had little hesitation in finding that the claimant was not disabled at the
20 relevant time. Although oral reasons were given at the time I considered
that in the circumstances it would be appropriate to set out at least the
outline of the tribunal's reasoning for the benefit of the claimant and his
representative.

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I McFatridge

Employment Judge

25 October 2024

Date of judgment

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Date sent to parties

28 October 2024
