



## EMPLOYMENT TRIBUNALS

**Claimant**

**Mr A Wood**

**Respondent**

**Durham County Council**

v

## PUBLIC PRELIMINARY HEARING

**Heard at:** North Shields      **On:** 1 November 2017

**Before:** Employment Judge Johnson (sitting alone)

**Appearances:**

**For the Claimant:** Mr J Anderson of Counsel

**For the Respondent:** Mr R Stubbs of Counsel

## JUDGMENT ON PRELIMINARY ISSUE

- 1 The claimant was not at all material times suffering from a disability as defined in Section 6 of the Equality Act 2010.
- 2 The claimant's complaints of unlawful disability discrimination are therefore not well-founded and are dismissed.
- 3 The claimant's application for costs arising from the private preliminary hearing dated 31 October 2017 is dismissed.

## REASONS

- 1 This matter came before me this morning by way of a public preliminary hearing, the purpose of which was to consider one issue, namely whether the claimant was at all material times suffering from a disability as defined in Section 6 of the Equality Act 2010. The claimant was represented by Mr Anderson of Counsel and the respondent by Mr Stubbs of Counsel. It is appropriate for me to record my thanks to both Mr Anderson and Mr Stubbs for their courtesy and expertise in both the preparation and presentation of this case. The standard of advocacy was of the highest order. There was an agreed bundle of documents marked R1, comprising two A4 ring binders containing 587 pages of documents. Mr Anderson's skeleton argument was marked CS1 and Mr Stubbs' skeleton argument was marked RS1. Copies of the authorities referred to, were attached to those skeleton arguments.
- 2 Included in the bundle is a witness statement from the claimant and one from Mr Owen Cleugh, Consumer Protection Manager for the respondent. It was Mr

Cleugh who chaired the disciplinary hearing which led to the claimant's dismissal. The claimant was present at today's hearing, but Mr Cleugh was not. There was produced to me this morning a copy of a letter from the claimant's Clinician, indicating that the claimant may find it difficult, and indeed detrimental, to have to give evidence and be cross-examined in the witness box. Having discussed the matter privately, Mr Anderson and Mr Stubbs agreed that it would be unnecessary for the claimant to have to give evidence and be cross-examined. To a large extent that was decided as a result of the concession by the respondent which is set out below. Mr Cleugh's evidence goes largely to the question of "knowledge", ie whether the respondent knew or could reasonably be expected to have known, that the claimant was suffering from a disability at the material times. Whilst his statement also identifies alleged inconsistencies in the claimant's behaviour at the relevant times, it was considered by Mr Stubbs that Mr Cleugh's evidence would be of little assistance to the Tribunal in considering the sole issue to be decided today. As a result, no oral evidence was given and today's hearing was conducted by way of legal submissions alone.

- 3 At the commencement of the hearing, Mr Stubbs conceded on behalf of the respondent that the claimant was from 24 August 2015 suffering from a mental impairment (post traumatic stress disorder), which mental impairment had a substantial and long term adverse effect on his ability to carry out normal day to day activities. The claimant therefore satisfies the definition of "disability" set out in Section 6(1)-(3) of the Equality Act 2010. Ordinarily, that concession would have resolved the sole issue to be decided at this public preliminary hearing. However, Mr Stubbs went on to state that the claimant remained unable to pursue a complaint of unlawful disability discrimination, because his condition is one which is specifically excluded by virtue of Section 6(5) and (6) of the Equality Act 2010, Schedule 1 of the Equality Act 2010, the Equality Act 2010 (Disability) Regulations 2010 and the Guidance on Matters to be taken into account in determining questions relating to the Definition of Disability (2011). In simple terms, Mr Stubbs argues that the claimant's condition amounts to a "tendency to steal" and is thus excluded from being a mental impairment which would otherwise satisfy the requirements of Section 6. I note and record that it is not the claimant's position that he suffers from a condition which amounts to a "tendency to steal". His case is that he suffers from a mental impairment which includes symptoms of memory loss and forgetfulness. It was agreed between Mr Anderson and Mr Stubbs that it would be for the respondent to prove on the balance of probabilities that the claimant's condition was indeed a "tendency to steal" and thus did not amount to a S.6 impairment.

### **The Employment Tribunal Proceedings**

- 4 The claim form was presented on 15 September 2016, following the claimant's dismissal which was effective from 22 May 2016. In his claim form, the claimant states:-

"The claimant suffers from PTSD/trauma causing memory loss and disassociation, a condition which significantly affects his memory. The claimant avers that he is disabled pursuant to Section 6 of the Equality Act 2010. The claimant proffers that the respondent did know, or ought reasonably to have known about his disability. This is because the claimant informed Mr Wisely of the respondent in January 2016 of his condition.

The claimant went into Boots store to get a sandwich on 24 August 2015. The claimant walked out without paying for the sandwich. The claimant says that he had gone to a speed bank to get money to pay and had informed a member of staff on the make-up counter. The claimant was issued with a FPT and cannot remember anything about the incident. The claimant says that his mistake was as a direct result of his condition which causes memory loss.

The claimant says he explained this to the police after the incident in a letter. The claimant sent an appeal to the police in January 2016. The claimant was advised by his solicitors to pay a fine as it was not an admission of guilt. This incident was placed on the claimant's record."

- 5 In its response presented on 4 November 2016 (and amended with permission of the Tribunal on 21 May 2017) the respondent states as follows:-

"The respondent does not admit that the claimant was disabled at the time of any alleged discriminatory treatment or at all, or that the claimant is currently disabled pursuant to Section 6 of the Equality Act 2010.

The respondent accepts that the claimant informed the respondent that he suffers from PTSD and suffers from memory loss and episodes of disassociation. The respondent does not admit that those symptoms were such that they had a substantial adverse effect of the claimant's ability to carry out day to day activities.

Further, it is averred that the claimant is not entitled to the protection of the Equality Act 2010 in relation to any discrimination he experienced, which is not admitted, as a consequence of any "tendency to steal", because that is an excluded condition under the Act. The "tendency to steal" is one of the conditions set out in the Disability Regulations, as expressly stated not to be impairments and hence is not a disability for the Equality Act 2010 purposes. (Regulation 4(1)(b)). Previously there had been an issue in the case law about whether an excluded condition is excluded only if it is freestanding, or whether the exclusion extends to a condition that is caused by a physical or mental impairment. The Equality Act 2010 Guidance adopts the following position:-

"The exclusions apply where the tendency to set fires, tendency to steal, tendency to physical or sexual abuse of other persons, exhibitionism, or voyeurism constitute an impairment in themselves. The exclusions also apply where these tendencies arise as a consequence of, or a manifestation of, an impairment that constitutes a disability for the purposes of the Act".

- 6 The claimant's evidence about his impairment is set out in a disability impact statement dated 20 January 2017 (page 47-52) and his unsigned and undated witness statement at the very front of the trial bundle. The relevant extracts are as follows:-

"I suffer from post traumatic stress disorder. In February 2014 I attended a medical appointment and I mentioned that I was becoming forgetful. In August 2014 I went to see my GP and again mentioned that I was having memory related issues and was advised to keep a memory diary. In August 2015 I attended my GP surgery for issues relating to my memory loss. At this point it was suspected that I had early onset dementia. In

September 2015 I had an MRI scan and was referred to the local mental health clinic. In October 2015 I had an appointment with a mental health practitioner who gave a preliminary opinion that the problems I was experiencing were not dementia and I was asked to think about possible traumas that I had suffered in the past in preparation for an appointment with a consultant psychologist. Between October and December 2015 I had nine appointments. I had numerous cognitive tests and talking sessions. I was diagnosed with PTSD/trauma causing memory loss and disassociation.

I have already submitted a significant amount of medical evidence which attests to my condition and the substantial and long term effects that it has on my ability to carry out normal day to day activities. At the respondent's request I agreed to be examined by a jointly appointed medical expert and the report of the expert concluded that I was and am disabled at all material times. Throughout the case I have complied with every request by the respondent to provide more evidence. I believe that the evidence I have provided to date has satisfied the burden of proof. Despite this wealth of evidence, the respondent continues to dispute the fact of my disability. The respondent has produced no medical evidence to counter my contention that I am disabled.

The only argument put forward by the respondent to date is based on the premise that as a result of my condition I have a tendency to steal and so I should not benefit from the protection offered by the Equality Act. A tendency would imply that this has happened multiple times which is simply not the case. The respondent has produced no evidence to suggest that the incident which occurred on 24 August 2015 was anything other than an isolated incident.

"Stealing" is theft and requires dishonesty and intent. The evidence I have provided clearly shows that my actions when in a dissociative state (caused by my disability) are entirely lacking in intent and I can confirm that during a dissociative state I would be incapable of dishonesty. Also I have never been convicted of theft. Instead of a "tendency to steal" I have been diagnosed with and suffer from post traumatic stress disorder as clearly set out in the medical evidence provided in this case.

I admit that I received a fixed penalty notice as a result of an incident on 24 August 2015. However, accepting a fixed penalty notice is not an admission of guilt and in any event I dispute that the fixed penalty notice should have been issued as I was in a dissociative state when it was presented to me (as shown by the expert and other medical evidence). None of the medical evidence submitted by me indicates that I have a tendency to steal and the respondent has not put forward any evidence to support the argument that I have a tendency to steal. The incident on 24 August 2015 was not linked to any tendency to steal but was instead the result of me being in a dissociative state caused by post traumatic stress."

## 7 **Factual history**

7.1 The claimant was a Police Officer from September 1989 until November 2005. Following his resignation from the police force, he worked with

Durham County Council, initially as a Fraud Officer, and then as an Antisocial Behaviour Officer. He had a clean disciplinary record.

7.2 The claimant was subject to the respondent's code of conduct, under which public sector employees have a duty to act with honesty and integrity. The code of conduct itself specifies that breaches of any element of the code (inside or outside of work) are a serious matter and could result in disciplinary action, up to and including a dismissal. Along with other employees carrying out the same job, the claimant was required by Durham Constabulary to be vetted to Non Police Personnel Vetting (NPPV) Level 2, to ensure their suitability for clearance. This was considered to be an essential requirement for the post and is set out in the terms and conditions of appointment. The requirement is considered to be essential for the claimant's job because a fundamental aspect of the role of an Antisocial Behaviour Officer includes the necessity to work in close partnership with the police. The remit of the role includes access to police information and intelligence, unaccompanied access to police stations and being involved in multi-agency meetings to resolve complex antisocial behaviour cases. It is not disputed that the claimant was fully aware of the standards required for his job.

7.3 On 24 August 2015, the claimant went into a local Boots store and left the store without paying for goods which he had placed into his shopping bag. The claimant was apprehended and the police were called. The relevant extracts from the police officer's notebook appear at pages 96-102 in the bundle. The claimant's admission is recorded at pages 99-100 in the following terms:-

"My name is Anthony Wood and my date of birth is 2.8.65. I agree that I have been cautioned by PC 2019 Armstrong and I admit that I am responsible for the theft of a chicken and bacon wrap, a bottle of Nivea suntan lotion and 2 x Sure deodorant sprays from Boots Chemist in Durham Market Place on 24.8.15. I took them from the display in the store and placed them into a carrier bag that I had without paying for them or attempting to pay for them as I left the store. I was detained outside the store by security staff and I had no intention of paying for the items as I had no money on me and despite having the means to pay on me, I chose not to. I have made this admission of my own free will and I have not been pressured into making it."

The claimant's signature follows that statement.

7.4 At page 97 of the bundle is a note which records that at the time of this incident, when approached by the Boots security guard, the claimant had removed his Durham County Council ID lanyard and placed it in his pocket. When searched by the police, the claimant had the lanyard in his pocket, but when asked about his occupation, the claimant informed the officers that he "worked in security – travelling from site to site". This was untrue.

7.5 The claimant was issued with a formal fixed penalty notice, known as a Penalty Notice for Disorder (PND). This required the claimant to pay a

fine of £90 as an alternative to a formal prosecution for theft. The claimant agreed to accept the PND.

- 7.6 The claimant paid the £90 fine on 14 September. Before doing so, he consulted two separate solicitors to obtain advice as to whether or not he should do so. He was advised that paying the fixed penalty did not amount to an admission of guilt and the claimant therefore paid the fine.
- 7.7 The claimant did not inform the respondent about the incident, nor the issue of the fixed penalty notice, as he was obliged to do under the respondent's code of practice. The claimant did not formally report the matter to the police, as he was also obliged to do.
- 7.8 In October 2015, the claimant's Non Police Personnel Vetting Level 2 application was refused as a result of the PND issued in August. As a result, the claimant was not permitted to enter any police premises or buildings under any circumstances, with immediate effect. That meant that the claimant was effectively unable to carry out his duties as an Antisocial Behaviour Officer. That matter was brought to the attention of the claimant's Line Manager Mr Ian Houlton, on the morning of 19 October 2015. The following day, Mr Houlton met with the claimant and asked him a series of questions designed to elicit from the claimant details about the incident at Boots in August. The questions put to the claimant were:-
- Was he aware of any information that the council should be aware of?
  - Has something happened outside of work that we need to know about?
  - Has there been anything happening with the police that he should be making us aware of?
  - Is there something that has happened in Durham City Centre that we should be aware of?
  - Is there something that has happened at Boots the Chemist in Durham which we should be aware of?

The claimant replied "No" to those questions. Mr Houlton then pointed out that the police had provided information to him that the claimant had been stopped for shoplifting, charged and that he had paid a fixed penalty notice. The claimant then accepted that he could remember about the incident, but that it had not been his fault. The claimant then explained that he had been seeing a consultant over the past 18 months as they thought he had a disorder that affected his memory.

- 7.9 The claimant was suspended that day by Mr Houlton and by letter dated 18 November, invited to attend a disciplinary hearing on 14 January 2016. The allegations were described as follows:-
- Criminal misconduct outside of the workplace which impacts on your ability to undertake your role within the council.
  - Withdrawal of your non police personnel vetting (NPPV) accreditation as a result of your own misconduct which impacts on your ability to undertake your role with the council.

- Your actions have the potential to cause serious reputational damage to the council and may give rise to a fundamental breakdown in the council's trust and confidence in their employment relationship with you.

7.10 Following a prolonged disciplinary process, the claimant was dismissed by letter dated 19 May 2016 (page 200-202). His appeal was itself dismissed on 13 July 2016, following a hearing on 29 June.

## 8 Medical History

- 8.1 The hearing bundle contains copies of the claimant's GP medical notes and records. The first mention of "memory problems" appears in an entry dated 28 August 2015. The relevant extract states "Ex policeman, now works for council, had few bizarre incidents – parked the car and couldn't find it so got a penalty, no criminal record til now, forgetting things, runs a lot, cannot remember where he went to run the same day, also forgot the way to rugby club where he played for years." At page 413 is an entry dated 5 July 2016 which states, "Received penalty – August 24<sup>th</sup> 2015 for leaving Boots with a sandwich and not paying for it. Needs letter – at the time and date suffering from PTSD to expunge charges".
- 8.2 With the support of the Cleveland Police Occupational Health & Welfare Department, the claimant was examined by an occupational health physician (Dr Adejoro), who prepared a report dated 8 September 2016, a copy of which appears at page 226-228 in the bundle. The letter records that the claimant was off work in August 2014 with stress, poor concentration and an inability to cope with his job and that this coincided with his son being mugged at knifepoint in Bristol. In July 2015 the claimant noticed that his symptoms were getting worse and he saw a psychologist and underwent cognitive testing. He was diagnosed in December 2015 with post traumatic stress disorder. At page 227 the report records that there was an incident in August 2015 in which the claimant took a sandwich out of Boots without remembering that he had done so and was given a fixed penalty notice by the police and that he forgot to take any action on the notice and as a result was unable to pass vetting to carry on his job and was dismissed. It records that the claimant was on Citalopram, Diazepam and Zopiclone as medication for his condition. The physician concluded "Mr Wood is disabled by his mental health problems".
- 8.3 In the current Employment Tribunal proceedings, it was agreed that the claimant would be examined by an independent expert who will then prepare a joint report into the claimant's medical condition. Dr Elizabeth Robinson, Psychotherapist from Durham, was instructed on 5th April 2017 and produced a report on 5 May 2017, following an assessment of the claimant on 2 May 2017. A copy of the report appears at page 552-574 in the bundle. Dr Robinson confirmed that she regarded the claimant as "suffering from severe self rated depression, severe self rated anxiety and had high levels of disassociation." Her opinion was that the claimant's depression is severe on the clinical rating scale. She records that he was exposed to multiple traumas over a number of years as a police officer. She confirmed that he fulfils the diagnostic criteria for

“dissociative amnesia” and has high levels of disassociation on the clinical rating scale. With particular reference to the current proceedings, Dr Robinson confirmed:-

“ Mr Wood’s action in attempting to take items from Boots without paying on 24 August 2015 could have been caused and/or influenced by his mental impairment.

I believe that Mr Woods’s failure to inform Durham Constabulary and the respondent is not due to his mental impairment.”

8.4 Certain specific questions were asked of Dr Robinson by the Respondent and for the purposes of today’s hearing the relevant questions and answers are as follows:-

- In your opinion is any of the following behaviour indicative of someone who suffers from periods of disassociation?

1 Placing items in his own carrier bag rather than a Boots shopping basket?

*This could be an action taken by someone who is suffering from a period of disassociation.*

2 Sufficient awareness to remove and hide an identity lanyard/badge when approached by the security officer outside Boots the Chemist on 24 August 2015.

*I believe it may be possible but it is my opinion it is less likely that Mr Wood would have sufficient awareness to remove and hide his identity badge.*

3 Would a person undergoing a period of disassociation be likely to misinform another person such as a security guard or a police officer about the nature of their occupation?

*This depends on the type and nature of dissociative disorder. A feature of dissociative identity disorder (previously known as multiple personalities) and dissociative fugue lead to the formation of no identity, or switching between identities. Mr Wood does not have either of these types of dissociative disorder.*

8.5 These questions were raised on 10 May and Dr Robinson replied on 16 May. Dr Robinson confirmed that the details she had provided in her report were those given to her by the claimant in response to her questions. Dr Robinson confirmed that Mr Wood informed her that he had called the solicitors the day following the incident on 24 August 2015. Dr Robinson confirmed that her diagnoses of post traumatic stress disorder and dissociative amnesia were based upon her clinical assessment of Mr Wood, taking into account the diagnostic criteria for each of his disorders. In Dr Robinson’s opinion, the claimant’s actions in attempting to take items from Boots without paying on 24 August 2015 were influenced by his mental impairment. Mr Wood’s decision not to inform Durham Constabulary and his employer about the Boots incident and the fixed penalty notice were stressors which contributed to his mental health difficulties. His medical records indicate that there was stress at work which was reported on 27 June 2014 and the next

comment in his medical notes about a psychological problem was on 28 August 2015. Dr Robinson records that the claimant's diary entry leading up to 24 August and after this time, indicate deterioration in his mental health.

9 **The Statutory Provisions**

The relevant statutory provisions engaged by the claims brought by the claimant are set out in the Equality Act 2010, together with Statutory Instruments and Guidance issued pursuant to that primary legislation. The relevant provisions are:-

**Section 6 Equality Act 2010**

**Disability**

- (1) 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.
- (2) The reference to a disabled person is a reference to a person who has a disability.
- (3) In relation to the protected characteristic of disability –
  - (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability.
- (5) In the Ministry of the Crown they issue guidance about matters to be taken into account in deciding any question for the purposes for subsection (1).
- (6) Schedule 1 (Disability: supplementary provision) has effect.

**Schedule 1 Part 1 Equality Act 2010**

(1) **Impairment**

Regulations may make provision for a condition of a prescribed description to be, or not to be, an impairment.

**PART 2 – GUIDANCE**

**12 Adjudicating bodies**

- (1) In determining whether a person is a disabled person, an adjudicating body must take account of such guidance as it thinks is relevant.

**The Equality Act 2010 (Disability) Regulations 2010**

**4 – Other conditions not to be treated as impairments**

- (1) For the purposes of the Act the following conditions are to be treated as not amounting to impairments:-
  - (a) a tendency to set fires;
  - (b) a tendency to steal;
  - (c) a tendency to physical or sexual abuse of other persons;
  - (d) exhibitionism; and

- (e) voyeurism.

**GUIDANCE ON MATTERS TO BE TAKEN INTO ACCOUNT IN DETERMINING QUESTIONS RELATING TO THE DEFINITION OF DISABILITY (2011)**

**Status and purpose of the guidance**

This guidance is issued by the Secretary of State under Section 6(5) of the Equality Act 2010. In this document any reference to “the Act” means the Equality Act 2010.

This guidance concerns the definition of disability in the Act. Section 6(5) of the Act enables the Ministry of the Crown to issue guidance about matters to be taken into account in determining whether a person is a disabled person. The guidance gives illustrative examples.

This guidance does not impose any legal obligations in itself, nor is it an authoritative statement of the law. However Schedule 1 paragraph 12 to the Act requires that an adjudicating body which is determining for any purpose of the Act whether a person is a disabled person, must take into account any aspect of this guidance which appears to be relevant.

**PART 2 – GUIDANCE ON MATTERS TO BE TAKEN INTO ACCOUNT IN DETERMINING QUESTIONS RELATING TO THE DEFINITION OF DISABILITY**

**Section A – the definition**

**Main elements of the definition of disability**

**A1** The Act defines a disabled person as a person with a disability. A person has a disability for the purposes of the Act if he or she has a physical or mental impairment and the impairment has a substantial and long term adverse effect on his or her ability to carry out normal day to day activities.

**Meaning of “impairment”**

**A3** The definition requires that the effects which a person may experience needs to amount to a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.

**A7** It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. For example, liver disease as a result of alcohol dependency would count as an impairment, although an addiction to alcohol itself is specifically excluded from the scope of the definition of disability in the Act. What it is important to consider is the effect of an impairment, not its cause – provided that it is not an excluded condition. (See also paragraph A12 – exclusions from the definition).

**Exclusion from the definition**

**A12** Certain conditions are not to be regarded as impairments for the purposes of the Act. These are:-

- Addiction to or dependency on alcohol, nicotine or any other substance (other than in consequence of the substance being medically prescribed).
- The condition known as seasonal allergic rhinitis (hay fever) except where it aggravates the effect of another condition.
- Tendency to set fires.
- Tendency to steal.
- Tendency to physical or sexual abuse of other persons.
- Exhibitionism.
- Voyeurism.

**A13** The exclusions apply where the tendency to set fires, tendency to steal, tendency to physical or sexual abuse of other persons, exhibitionism, or voyeurism constitute an impairment in themselves. The exclusions also apply where these tendencies arise as a consequence of or a manifestation of, an impairment that constitutes a disability for the purposes of the Act. It is important to determine the basis for the alleged discrimination. If the alleged discrimination was a result of an excluded condition, the exclusion will apply. However, if the alleged discrimination was specifically related to the actual disability which gave rise to an excluded condition, the exclusion will not apply. Whether the exclusion applies will depend on all the facts of the individual case.

The guidance then goes on to give an example of what may or may not be an excluded condition.

“A young man has attention deficit hyperactivity disorder (ADHD) which manifests itself in a number of ways, including exhibitionism and an inability to concentrate. The disorder, as an impairment which has a substantial and long term adverse effect on the young man’s ability to carry out normal day to day activities, would be a disability for the purposes of the Act. The young man is not entitled to protection of the Act in relation to any discrimination he experiences as a consequence of his exhibitionism, because that is an excluded condition under the Act. However, he would be protected in relation to any discrimination that he experiences in relation to the non excluded effects of his condition, such as inability to concentrate. For example, he would be entitled to any reasonable adjustments that are required as a consequence of those effects”.

**A14** A person with an excluded condition may nevertheless be protected as a disabled person if he or she has an accompanying impairment which meets the requirements of the definition. For example a person who is addicted to a substance such as alcohol can also have depression, or a physical impairment such as liver damage, arising from the alcohol addiction. Whilst the person would not meet the definition simply on the basis of having an addiction, he or she may still meet the definition as a result of the effects of the depression or the liver damage.

1 – **Basic definition of theft.**

- (1) A person is guilty of theft if they dishonestly appropriate property belonging to another with the intention of permanently depriving the other of it, and “thief” and “steal” shall be construed accordingly.

2 - “Dishonesty”

- (1) A person’s appropriation of property belonging to another is not to be regarded as dishonest –
- (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person, or
  - (b) if he appropriates the property in the belief that he would have the owners consent if the other knew of the appropriation and the circumstances of it, or
  - (c) except where the property came to him as trustee or personal representative (if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.)
- (2) A person’s appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.

11 **Legal authorities**

Mr Anderson and Mr Stubbs handed up a number of authorities for my consideration. In addition to those I drew counsels` attention to the decision of the Employment Appeal Tribunal in **Power v Panasonic UK Limited [2003] IRLR 151** and **Murray v Newham Citizens Advice Bureau Limited [2003] ICR 643**. Both Mr Anderson and Mr Stubbs referred to the Employment Appeal Tribunal decision in **Edmund Nuttal Limited v Butterfield [2006] ICR 77**. Mr Stubbs referred to the High Court decision of Mr Justice Lloyd Jones in **Governing Body of X Primary School v Special Educational Needs and Disability Tribunal – CO/6346/2008** and of the Supreme Court judgment in **Ivey v Genteng Casinos UK Limited [2017] UKSC-67** (a decision handed down only last week).

- 12 In **Power v Panasonic UK Limited**, an area sales manager suffered from depression and was drinking heavily. Following her dismissal she complained to an Employment Tribunal that she had suffered disability discrimination. The Tribunal dismissed the claim, holding that the core issue of the case was whether she became clinically depressed and turned to drink, or whether her alcohol addiction led to her depression. The Tribunal concluded that the regulations then in force and the contemporaneous version of the Guidance were in conflict – the former stating that an addiction is excluded from the definition of disability and the latter that it is not necessary to consider how an impairment was caused. The Tribunal determined that the approach of the Regulations was to be preferred. In overturning that decision, the Employment Appeal Tribunal found that the Regulations and the Guidance were different, but not in conflict. The cause of the impairment in issue was not material when deciding whether a person was disabled within the meaning of the Act. The Tribunal should have considered whether the alleged disability fell within the

definition contained in the Act and then moved on to consider whether it was excluded by the regulations.

13 In **Murray v Newham Citizens Advice Bureau Limited**, the Employment Appeal Tribunal held that the excluded conditions which were then contained in the Regulations referred only to “free-standing conditions”, and not to those conditions that are a direct consequence of a physical or mental impairment. That view was doubted in the later decision of the Employment Appeal Tribunal in **Edmund Nuttal Limited v Butterfield**. In that case, the claimant was employed as a mechanical and electrical coordinator. In 2003 he committed an offence of indecent exposure and before he was sentenced, his solicitors produced medical evidence indicating that he was suffering with a moderately severe depressive illness at the time of the offence. When his employer found out about the criminal conviction it dismissed him and he subsequently brought claims of disability discrimination. The Tribunal upheld the claim, holding that when he committed the offence of indecent exposure, he was suffering from depression, which was a mental impairment that fell within the Act. It also took the view that he had committed offences of indecent exposure because of his underlying depression. Therefore, in dismissing him for committing those offences, the employer had effectively treated him less favourably for a reason related to his disability. The Employment Appeal Tribunal referred to **Murray v Newham Citizens Advice Bureau Limited** and was not persuaded by the concept of the excluded condition as being “free-standing”. The critical question is one of causation. In other words, what was the reason for the less favourable treatment? If, in this case, the legitimate impairment was the reason for the employee’s dismissal, then there was prima facie discrimination that needed to be justified. If, on the other hand, the reason was an excluded condition, then the claim failed. Where both legitimate impairment and the excluded condition form the employer’s reason for the less favourable treatment, the legitimate impairment is thus an effective cause of the less favourable treatment, and discrimination is made out, notwithstanding that the excluded condition also forms part of the employer’s reason for that treatment. Applying that legal analysis to **Butterfield’s** case, the Employment Appeal Tribunal concluded that his depressive illness was not the reason for the less favourable treatment. It was only when his employer learned that he had been convicted of an offence of indecent exposure that it took the decision to dismiss him. Therefore the sole reason for the less favourable treatment was the excluded condition.

14 Those cases were further examined by Mr Justice Lloyd Jones in the Queen’s Bench Division of the High Court in the **Governing Body of X** case. At paragraph 48, Mr Justice Lloyd Jones said this:-

“In my judgment, having regards to the words of the statute, its scheme and its legislative purpose, the effect of the provisions read together is that the protection of the legislation is not intended to extend to the excluded conditions, whether or not they are manifestations of an underlying protected impairment. This reading is consistent with paragraph A14 of the Guidance, which contemplates situations in which excluded conditions and protected disabilities co-exist in the same person.”

At paragraph 65 he went on to say:-

“The fact that the tendency is, as the tribunal found, a manifestation of a condition entitled to protection under the Act, does not remove from the scope of Regulation 4(1).”

At paragraph 66 he went on to say:-

“It then becomes necessary to consider whether the discrimination found by the tribunal in fact related to the excluded condition or to the protected disability or to both. It seems to me the correct approach must be based on that adopted by the employment tribunal in **Edmund Nuttal Limited v Butterfield**. The question for consideration in **Butterfield** was whether the less favourable treatment was for a reason related to a protected disability.”

15 **Submissions**

Mr Anderson’s submission for the claimant is that there is a clear distinction in Mr Wood’s case between his impairment and any excluded condition. The claimant does not suggest that he has the excluded condition. It is the respondent who suggests that the claimant has the excluded condition. Mr Anderson submits that the distinction which arises from **Edmund Nuttal Limited v Butterfield** is not relevant to the present case. The suggested difference is that there was clear evidence in Mr Butterfield’s case of preparation and the medical evidence indicated that he was at all times aware of what he was doing. HHJ Peter Clark held in that case that it was not necessary to rely upon the concept of a “free-standing condition” and that it was possible to have both a legitimate impairment and an excluded condition. Mr Anderson argues that the claimant does not have the excluded condition of “a tendency to steal”. His case is that the claimant suffers from dissociative amnesia and memory loss, which can on occasions cause him to suffer from forgetfulness. Such forgetfulness will include forgetting to pay for items before leaving a shop. Mr Anderson argues that such forgetfulness cannot fairly or reasonably be categorised as a “tendency to steal”.

16 Mr Anderson in his skeleton argument specifically states:-

“(a) to steal has a specific meaning. Theft requires the dishonest appropriation of property with the intention of permanently depriving the other of it. The claimant lacked any intent to steal. The claimant lacked any dishonesty. By the objective standards of ordinary decent people, the behaviour would not be considered to be dishonest;

(b) the claimant does not have a tendency to steal. A “tendency” is an inclination towards a particular type of behaviour. The specific behaviour for these purposes would need to be “stealing”. One act on one occasion is not a tendency.”

17 Mr Stubbs for the respondent points out that both the **Edmund Nuttal Limited v Butterfield** and **Governing Body of X** cases were decided before the Equality Act 2010 came into force and particularly before the Equality Act Guidance 2010 at A13 came into force. Mr Stubbs carefully pointed out that paragraph A13 in the Guidance reflects the decisions of those two cases when stating:-

“The exclusions apply where the ... tendency to steal constitutes an impairment in itself. The exclusion applies where those tendencies arise as a consequence of, or a manifestation of, an impairment that constitutes a disability for the purposes of the Act.”

18 Mr Stubbs points out in his skeleton argument that in **Butterfield** the Employment Appeal Tribunal held:-

- “(a) it was possible to have both a legitimate impairment and an excluded condition at the same time;
- (b) the critical question is causation – what was the reason for the less favourable treatment. If the reason was an excluded condition, the claimant fails by reason of disability;
- (c) that a legitimate medical impairment may underlie an excluded condition, where the excluded condition is a reason for the treatment, does not mean that disability is the reason for the treatment, as so to find would render the exclusions nugatory.”

19 Mr Stubbs submitted that the Guidance draws the case law together and makes it clear that where the excluded condition is a consequence of or manifestation of a legitimate impairment, that condition is excluded from the section of the Act.

20 An issue which both counsel agreed I would have to decide is whether someone in the claimant’s position with a tendency to forget to pay for things, is someone with a tendency to steal. Both Mr Anderson and Mr Stubbs made submissions about the requirement for “intent”. The definition of “theft” in section 1 of the Theft Act 1968 refers to the “dishonest appropriation” of property belonging to another. Section 2 deals with the definition of “dishonesty”. Mr Stubbs at paragraph 21 of his skeleton argument says as follows:-

- “(a) the person with ADHD is excluded from protection regardless of his mental state and lack of intent to be an exhibitionist;
- (b) the child in **Governing Body of X** no doubt had no intention to physically assault a teacher;
- (c) the claimant in **Butterfield** was acting due to his depression rather than his normal state of mind;
- (d) none of these elements allow protection under the Act.”

21 It was agreed by both Mr Anderson and Mr Stubbs that the question of “dishonest intent” is to be established by reference to the objective standards of ordinary decent people in possession of the relevant facts. Mr Stubbs referred to the judgment of the Supreme Court in **Ivey v Genteng Casinos**, at paragraph 48:-

“Where it applies as an element of a criminal charge, dishonesty is by no means a defined concept. On the contrary, like the elephant, it is characterised more by recognition when encountered than by definition. Dishonesty is not a matter of law, but a jury question of fact and standards. Judges go not and must not attempt to define it. Dishonesty cannot be regarded as a concept which would bring to the assessment of behaviour a clarity or certainty which would be lacking if the jury were left

to say whether the behaviour under examination amounted to cheating or did not. It is ultimately for the court to decide whether conduct amounted to cheating and that the standard is objective.”

22 At paragraph 53 Lord Hughes said:-

“Dishonesty is something which laymen can easily recognise when they see it. Whilst there have undoubtedly (and inevitably) been examples of uncertainty or debate in identifying whether some conduct was dishonest or not, juries appear generally to have coped well with applying an uncomplicated lay objective standard of honesty to activities as dispirited as sophisticated banking practices or the removal of golf balls at night from the bottom of a lake on a private golf course. Since 1982 in criminal cases the judge has been required to direct the jury to apply a two stage test. Firstly, it must ask whether in its judgment the conduct complained of was dishonest by the lay objective standards of ordinary, reasonable and honest people. If the answer is no, that disposes of the case in favour of the defendant. But if the answer is yes, it must ask secondly whether the defendant must have realised that ordinary, honest people would so regard his behaviour and he is to be convicted only if the answer to the second question is yes.

23 Finally, at paragraph 62, it was said:-

“Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant’s mental state would be characterised as dishonest, it is irrelevant that the defendant himself judges it by different standards.”

24 Finally, at paragraph 63, it was said:-

“Dishonesty is a simple, if occasionally imprecise, English word. It would be an affront to the law if its meaning differed according to the kind of proceedings in which it arose. It is easy enough to envisage cases where precisely the same behaviour, by the same person, falls to be examined in both kinds of proceedings.”

25 It was agreed by both Mr Anderson and Mr Stubbs that the tests to be applied to the claimant in the present case is to ask whether the claimant was dishonest by the lay objective standards of ordinary, reasonable and honest people, armed with all of the relevant information. That information includes:-

25.1 The medical report of Dr Robinson together with her answers to the questions put to her.

25.2 The fact that the claimant had placed the items of shopping into his own shopping bag.

25.3 The fact that the claimant left the Boots store without paying for the goods.

25.4 The fact that the claimant removed his identification lanyard when approached by the security guard.

25.5 The fact that the claimant lied about his occupation.

25.6 The notes contained in the police officer’s notebook.

- 25.7 The fact that the claimant had signed those notes.
- 25.8 The claimant spoke to two different solicitors the following day.
- 25.9 The claimant failed to report the matter to his employer.
- 25.10 The claimant failed to report the matter to the police.
- 25.11 When subsequently challenged about the matter, the claimant could only remember telling a member of staff at the Boots make-up counter that he intended to go to a cash point to obtain some cash, that being something which may exculpate him, but could not remember anything which may be held against him.
- 26 I am satisfied that, applying the objective standards of ordinary, reasonable and honest people armed with all the information, the claimant's conduct is to be regarded as dishonest.
- 27 The question of whether or not the claimant satisfies the definition of disability must be considered in the light of the basis for the alleged discrimination. I am satisfied in the claimant's case that the alleged discrimination is as a result of an excluded condition. The withdrawal of his police accreditation was caused by the commission of an offence which led to the issue (and acceptance) of the PND. The issue of the PND and failure to report the incident to his employer led to the suspension, disciplinary hearing and dismissal. As a matter of causation, I am satisfied that the reason for the less favourable treatment is the issue of the PND which in turn was caused by the claimant stealing goods from the Boots store. I am satisfied that the claimant's mental impairment (post traumatic stress disorder) amounts to a legitimate medical impairment which manifests itself in what ordinary, decent people in possession of the facts would objectively consider to be a tendency to steal. That is an excluded condition under Regulation 4 of the 2010 Regulations as is clearly explained by paragraph A13 in the 2011 Guidance. The claimant's tendency to steal is either a consequence of, or a manifestation of, his impairment which constitutes a disability for the purposes of the Act. The alleged discrimination is therefore a result of an excluded condition and the exclusion in Regulation 4 therefore applies.
- 28 For those reasons, the claimant was not at all material times suffering from a disability as defined in Section 6 of the Equality Act 2010. As a result, the claimant's complaints of unlawful disability discrimination cannot proceed and are dismissed.

### **CONSEQUENCES OF NON-COMPLIANCE**

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

**Employment Judge Johnson**

**Date 10 November 2017**

**Sent to the parties on:**

**10 November 2017**

**For the Tribunal:**

**M Charters**