

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**PRELIMINARY HEARING**

**Case No: S/4104852/2017**

**Held in Glasgow on 21 February 2018**

**Employment Judge: Mary Kearns (sitting alone)**

**Mr P Docherty**

**Claimant  
In person**

**Houston Bottling & C-Pack Ltd**

**Respondent  
Represented by:  
Ms J Rae  
Trainee Solicitor**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL FOLLOWING  
PRELIMINARY HEARING**

The Judgment of the Employment Tribunal following the Preliminary Hearing was that **the claimant was a disabled person at all relevant times by reason of diabetes but not by reason of depression.**

**Case management orders**

Parties are referred to the case management orders issued following the Preliminary Hearing of 8 December 2017 (pages 3, 4 and 5 of the PH Note). The claimant is to comply with these orders within 28 Days from the date of this Note. The respondent has 21 days to answer from the date the claimant sends them his additional information. A further Preliminary Hearing (one hour) will be fixed for a date in May or June 2018 to discuss preparation for the final hearing.

## REASONS

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1. The claimant who is aged 41 years was employed by the respondent as a team leader in its bottling factory from 21 February 2011 until his dismissal on 1 August 2017. On 3 October 2017, having complied with the early conciliation requirements he presented an application to the Employment Tribunal in which he claimed that his dismissal was unfair and amounted to discrimination arising from disability contrary to section 15 Equality Act 2010. He also claimed that the respondent had failed to comply with a duty to make reasonable adjustments and had subjected him to harassment. The claimant has suffered from type 1 diabetes since February 2014 and was diagnosed with depression by his GP on 26 June 2017. He claimed that both were disabilities for the purposes of section 6 Equality Act 2010. This was disputed by the respondent and a Preliminary Hearing was fixed for today to determine the issue.

### 20 **Evidence**

2. The claimant lodged a small bundle of documents ("C") and referred to them by page number. He gave evidence on his own behalf. The respondent called their Operations Manager, Ms Elizabeth Pryde.

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### **Findings in Fact**

3. The following facts were admitted or found to be proved:
4. In or about early 2014 the claimant began to experience the following symptoms: sudden weight loss, frequent urination (13 times in an eight-hour shift), having to get up several times a night to urinate, tiredness, low energy levels and irritability. In or about February 2014 he was diagnosed with type 1 diabetes. From that time, he has required to monitor his sugar levels and inject himself with insulin four times a day. His daily glycaemic medication regime at all relevant times has included Humalog Kwikpen disposable syringes, which he has had to inject daily at

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breakfast, lunch and dinner and Lantus Opticlik, which he injects each night. (C6 & 7). In type 1 diabetes the pancreas gradually stops producing the hormone insulin which controls the amount of glucose in the blood. Without his medication the claimant would suffer from hypoglycaemia if his blood sugar became too low or hyperglycaemia after eating. In the latter event, his blood sugar would 'go through the roof'. Left untreated either condition can lead to unconsciousness or even death. Diabetes is a life-long impairment.

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5. The claimant's diabetes was not always well controlled, particularly from about the end of 2015 (C2). Even when controlled by medication the effect of his diabetes on his day-to-day activities was that he found it more difficult to do heavy physical work and became tired more easily, resulting in him having to swap jobs on occasions with colleagues. He had more difficulty getting up in the mornings and motivating himself to get going. In or about February 2017 the claimant went through a period when he was late to work. He was spoken to about it and managed to improve. When he came home from work in the evening he needed to sleep. On three occasions between February 2014 and 1 August 2017 the claimant suffered hypoglycaemic attacks. Two of these occurred at work in June 2017. During these attacks the claimant experienced an empty stomach feeling and felt his whole body shaking uncontrollably and sweating profusely. During one attack the claimant's colleague Alice Pollock took him to the respondent's canteen and gave him some coke and a chocolate biscuit. During the other attack, the claimant could not bring his glucose levels under control and he had to go home.

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6. It is relatively common for patients with diabetes to struggle with the chronic stress associated with the condition and to suffer from depression (C2). From around April 2017 the claimant began to suffer from the following symptoms: He found it increasingly difficult to get up in the morning, withdrew from company and became anxious in social situations. His mood changed and he was more irritable. On 26 June 2017 he was diagnosed with depression. He was prescribed citalopram 20mg. He was reviewed on 17 July and subsequent dates which post-dated his dismissal (C3). On 24 July 2017 he suffered a panic attack for the first time. On 1 August 2017 the claimant was dismissed.

**Applicable Law**

7. Section 6 Equality Act 2010 states so far as relevant:-

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***“6 Disability***

*(1) A person (P) has a disability if –*

*(a) P has a physical or mental impairment, and*

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

*(2) A reference to a disabled person is a reference to a person who has a disability....”*

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8. Schedule 1 to the Act contains supplementary provisions regarding the definition of disability. For present purposes, the relevant paragraphs are:

***“2. Long term effects***

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*(1) The effect of an impairment is long-term if –*

*(a) It has lasted for at least 12 months,*

*(b) It is likely to last for at least 12 months, or*

*(c) It is likely to last for the rest of the life of the person affected.*

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*(2) If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.”*

***“5. Effect of medical treatment***

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- (1) *An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if –*
- (a) *measures are being taken to treat or correct it, and*
- (b) *but for that, it would be likely to have that effect.*

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- (2) *“measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.....”*

9. In 2011 the Secretary of State issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability'. I take this into account where relevant below.

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### **Discussion and Decision**

10. It is for the claimant to establish that he was a disabled person in terms of the Equality Act 2010 at the relevant dates. What are the relevant dates? In this case, the claimant claims that his dismissal was unfavourable treatment for the purposes of section 15 of the Act (discrimination arising from disability). The dismissal occurred on 1 August 2017. He also claims harassment at (so far unspecified) dates between February 2014, when he was diagnosed with type 1 diabetes and 1 August 2017, when he was dismissed. Finally, he claims that the respondent failed to comply with a duty to make reasonable adjustments, which first arose when he notified them of his type 1 diabetes in or about February 2014 and which continued until his dismissal on 1 August 2017. Thus, in summary, for the section 15 claim, the relevant date at which the claimant's disability status must be considered is 1 August 2017 and for the other claims the period under consideration is 1 February 2014 to 1 August 2017.

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11. The definition of disability in Section 6 of the Equality Act 2010 (as supplemented by Schedule 1) raises the following four questions. In Goodwin v Patent Office [1999] IRLR 4 the EAT made clear that these must be considered separately and sequentially.

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- a. Does the claimant have a physical or mental impairment?
- b. Does that impairment have an adverse effect on his ability to carry out normal day-to-day activities?
- c. Is the effect substantial?
- 5 d. Is the effect long-term?

12. I address each of these questions in turn.

- 10 a. *Does the claimant have a physical or mental impairment?*

13. In this case I have concluded on the basis of the claimant's evidence and the medical records and reports he lodged that he has suffered from type 1 diabetes from February 2014 and that this is a physical impairment. I have also concluded  
15 that he has suffered from depression from around the end of April 2017 and that this is a mental impairment.

- b. *Does that impairment have an adverse effect on his ability to carry out normal day-to-day activities?*

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14. Paragraph A7 of the Guidance makes clear that "*What it is important to consider is the effect of an impairment, not its cause.*" The claimant testified and I accepted that the effects of his diabetes on his day-to-day activities prior to diagnosis were sudden weight loss, frequent urination (13 times in an eight-hour shift), having to  
25 get up several times a night to urinate, tiredness, low energy levels and irritability. Once the condition was diagnosed and treated, the remaining effects were that he found it more difficult to do heavy physical work and became tired more easily, resulting in him having to swap jobs on occasions with colleagues. He also had more difficulty getting up in the mornings and motivating himself to get going. This  
30 briefly affected his timekeeping in February 2017. On three occasions between February 2014 and 1 August 2017 the claimant suffered hypoglycaemic events. With regard to his depression, from around April 2017 the claimant's symptoms

were that he found it increasingly difficult to get up in the morning, withdrew from company and started to become anxious in social situations. His mood changed and he was more irritable.

5 15. On behalf of the respondent Ms Rae accepted that the claimant had diabetes and depression. However, she argued that neither impairment had an adverse effect on his ability to carry out normal day-to-day activities. In support of this she referred to evidence from Ms Pryde to the effect that she did not notice any change in his behaviour, abilities or output at the relevant times. Ms Rae submitted that had the effects on the claimant's day-to-day activities been as he stated, this would have been noticeable to Ms Pryde.

16. The focus is upon what the claimant cannot do, not on what he can do. However, paragraph 5 of Schedule 1 to the Act states that an impairment is to be treated as having a substantial adverse effect on the ability of the person to carry out normal day-to-day activities if 'measures' (which specifically include medical treatment) are being taken to treat or correct it and but for that it would be likely to have that effect. Thus, in determining the effects of the impairment, the effects of medical treatment should be ignored. The effects of diabetes must be judged by reference to the condition without insulin. The effects of the depression should be judged without the citalopram. Ms Rae suggested that there was insufficient evidence before me to make that assessment. However, the claimant testified at some length about his pre-treatment symptoms in relation to his diabetes. He also described his hypoglycaemic events. With regard to both hypoglycaemia and hyperglycaemia, the basic facts about what happens when a diabetic person goes without insulin are within judicial knowledge. I have therefore concluded that I have sufficient findings in fact to enable a judgment to be made on the matter of the claimant's diabetes. I have concluded that without insulin, the claimant's diabetes would have been likely to have an adverse effect on his ability to carry out normal day-to-day activities at all relevant times as he would have been likely to become hypoglycaemic or hyperglycaemic, leading to uncontrollable shaking, sweating, and eventual unconsciousness. With regard to the claimant's depression, I did not

conclude that I had heard sufficient evidence regarding the likely effect of the untreated condition on his day to day activities.

c. *Is the effect substantial?*

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17. "Substantial" is defined in Section 212(1) Equality Act 2010 as "*more than minor or trivial*". The Act does not create a spectrum. Rather, unless the adverse effect can be classified as "trivial" it must be treated as substantial. That is a relatively low standard. It appears to me that judging the effects on the claimant described in the findings in fact above and allowing for the effects of the treatment, both the diabetes and the depression had a substantial effect on his ability to carry out normal day-to-day activities.

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d. *Is the effect long term?*

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18. As set out above, an impairment will have a long-term effect only if:

i. *"It has lasted for at least 12 months,*

ii. *It is likely to last for at least 12 months, or*

iii. *It is likely to last for the rest of the life of the person affected."*

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19. On the evidence before me the claimant's diabetes had lasted around three and a half years at the time of dismissal. Diabetes is a life-long impairment. It obviously satisfies this requirement.

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20. With regard to his depression, this had not lasted 12 months at the relevant time (1 August 2017) and there was no evidence that it was likely to last for the rest of claimant's life.

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21. I considered whether the claimant's depression which began around April 2017 was likely to last for at least 12 months. As paragraph C3 of the Guidance makes clear, "likely" in this context should be interpreted as meaning that 'it could well happen'. The Guidance also states at C4:



5 *"C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood."*

10 22. The fact that a condition has, since the date of the alleged discrimination, lasted for 12 months is not relevant to the question whether these eventualities were likely at the time of the discrimination. A tribunal must determine the hypothetical question of what the prognosis would have been in the light of the information available at the time of the alleged act or acts of discrimination. I have no evidence before me on that issue. The onus is on the claimant to establish disability and his depression at the relevant time does not meet the test. I have therefore concluded that the claimant was a disabled person at all relevant times but in relation to his diabetes  
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20 23. Case Management orders were issued in the Preliminary Hearing Note that followed the PH on 8 December 2017. These should now be complied with. Thereafter, a one hour further Preliminary Hearing will be held to list and review preparations for the Full Hearing

25 **Employment Judge: M Kearns**  
**Date of Judgment: 26 February 2018**  
**Entered in register: 06 March 2018**  
**and copied to parties**