EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110601/2018

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Held in Glasgow on 7 January 2019 (Preliminary Hearing)

Employment Judge: Ian McPherson

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Mr Allan Hendry	**Claimant** **Represented by:** **Mr Stephen Connolly - Solicitor**

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AKP Scotland Limited	**Respondents** **Represented by:** **Mr Russell Eadie - Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that: -

25 (1) the claimant was, at the relevant time, a disabled person, within the meaning of **Section 6 of the Equality Act 2010**, and accordingly his complaints of unlawful disability discrimination by the respondents can therefore proceed to a full merits Hearing, before a full Tribunal, on dates to be hereinafter assigned by the Tribunal, following issue to both parties' 30 representatives, along with this Judgment, of date listing stencils to fix a Final Hearing in the proposed listing period of **June, July and August 2019** ; and

(2) with the exception of the emails of 23 and 28 March 2018, at page 125 of the Bundle, relating to the claimant's resignation, the other correspondence 35 produced to the Tribunal at this Hearing, at pages 116 to 132 of the Bundle,

is subject to the ***"without prejudice***" rule, and therefore is inadmissible at any further Hearing before the Tribunal.

REASONS

Introduction

1. This case called before me as an Employment Judge sitting alone, in private, on Monday, 7 January 2019, further to Notice of Preliminary Hearing (Preliminary Issue) issued by the Tribunal to both parties' representatives under cover of a letter dated 8 November 2018.

Claim and Response

2. Following upon ACAS Early Conciliation, between 6 April and 4 May 2018, the claimant, represented by Mr Stephen Connolly, solicitor with Miller Samuel Hill Brown LLP, Glasgow, presented an ET1 claim form to the Tribunal on 22 June 2018.

3. The claimant, who had been employed as a joiner with the respondents, until he resigned from his employment on 23 March 2018, complained that he had been discriminated against by the respondents on grounds of disability, in breach of **Section 39 (2) of the Equality Act 2010**.

4. In the event of success with his claim, the claimant sought a declaration that he had been subjected to unlawful disability discrimination, and an award of compensation for financial loss and injury to feelings.

5. That claim, which was accepted by the Tribunal, on 29 June 2018, and a copy served on the respondents, allowed the respondents until 27 July 2018, to lodge a response, and it also assigned the case to a Case Management Preliminary Hearing to be held on 7 September 2018.

6. On 17 August 2018, following initial consideration by Employment Judge Mary Kearns, a letter was sent by the Tribunal to both parties' representatives advising that the case would proceed to the listed Case Management Preliminary Hearing on 7 September 2018.

7. On that date, both parties' representatives having lodged completed Preliminary Hearing Agendas, the case called before Employment Judge Claire McManus, where the claimant was represented by his solicitor, Mr Connolly, while the respondents were represented by Mr Tim Wilkinson, barrister, as counsel instructed for the respondents.

8. Employment Judge McManus's written Note and Orders of the Tribunal, dated 19 September 2018, was thereafter issued to both parties' representatives, under cover of the Tribunal's letter dated 20 September 2018. By way of further procedure, Judge McManus directed that the case be listed for 1 November 2018, for a further Case Management Preliminary Hearing to be conducted by telephone conference call.

9. Thereafter, when the case called again, before Employment Judge Mary Kearns, by way of telephone conference call, on 1 November 2018, the claimant was again represented by his solicitor, Mr Connolly, and the respondents by Mr Wilkinson of counsel.

10. As per Judge Kearns' written Note and Orders of the Tribunal, dated 5 November 2018, issued to both parties' representatives under cover of the Tribunal's letter of 5 November 2018, this Preliminary Hearing on Monday, 7 January 2019, was fixed to determine the following issues: -

    i. ***The claimant's disability status; and***

    ii. ***Whether certain "without prejudice" correspondence between the parties dated February and March 2018 is privileged.***

<u>Preliminary Hearing before this Tribunal</u>

11. At this Preliminary Hearing, the claimant was accompanied by his solicitor, Mr Connolly. His signed disability impact statement, dated 7 January 2018, was contained within the Bundle of Documents, at pages 41 to 44 inclusive.

12. The claimant had appeared personally to give evidence regarding the disputed matter of his disability status and, in particular, to speak to his

disability impact statement provided to the Tribunal, by his solicitor, Mr Connolly, by email of 6 December 2018, further to Order (2) made by Employment Judge Kearns on 1 November 2018. Judge Kearns had then ordered that, within 4 weeks of that Hearing, the claimant was to send a statement setting out the effect of his unstable angina on his ability to carry out normal day to day activities.

13. The respondents had previously been represented by a Ms Janine Lawton, from Rradar Limited, Leeds, as per the ET3 response, albeit she had not appeared, and they had been represented by counsel, Mr Wilkinson, at the two earlier Case Management Preliminary Hearings, before Employment Judges McManus and Kearns respectively.

14. However, at this Preliminary Hearing, the respondents were this time represented by Mr Russell Eadie, solicitor with Rradar Limited, Glasgow, who took over as the respondents' representative, as per email of 29 October 2018 sent to the Tribunal by Ms Lawton.

15. At the Case Management Preliminary Hearing before Employment Judge Kearns, on 1 November 2018, and as per her paragraph 3 of her written Note, Mr Connolly had prepared a Joint Bundle, and this was presented to me, at the start of this Preliminary Hearing, in a black, A4 ring binder folder, running to some 133 pages.

16. The Bundle comprised ET papers, at pages 1 to 40; disability status papers, at pages 41 to 115; and "***without prejudice***" correspondence papers, at pages 116 to 132.

17. While the enclosed Inventory of Documents referred to a page 133, being the claimant's specification of his Reasonable Adjustments claim, intimated to the Tribunal on 31 October 2018, as per paragraph 5 of Employment Judge McManus' Note (issued following the first Case Management Preliminary Hearing on 7 September 2018), that copy document was not included in the Bundle presented to me, albeit I had access to it in the Tribunal's casefile.

18. Again, as per paragraph 3 of the written Note to Employment Judge Kearns' Case Management Preliminary Hearing Orders, of 1 November 2018, Mr Connolly confirmed that the only witness being led on behalf of the claimant, was Mr Hendry himself, who was in attendance for that purpose, and Mr Eadie confirmed that no witness would be led on behalf of the respondents, and that he would simply be cross examining the claimant on the basis of his disability impact statement, previously intimated to the Tribunal, and the claimant's oral evidence to this Preliminary Hearing.

19. While the Joint Bundle included a copy of an Occupational Health report by a Dr Robert Phillips, dated 1 June 2017, reproduced at pages 45 to 48 of the Bundle, neither party led evidence from Dr Phillips, and indeed, other than this Occupational Health report being referred to in the ET1 claim form and ET3 response, no reference to its terms was made whatsoever by the claimant in his evidence to this Tribunal.

20. Further, while the Joint Bundle contained, at pages 49 to 115, copy of the claimant's medical records from March 2014 to September 2018, other than a few references by the claimant to some of those many pages in the Bundle, in particular at pages 52 and 53, as regards his medication, and at page 115, as regards a discharge letter dated 14 March 2014 (which the claimant advised he had never seen before), again there was no reference made to any of the other medical records produced in this Joint Bundle whatsoever by the claimant in his evidence to this Tribunal.

21. In addition to the claimant's disability impact statement, dated 7 January 2019, and signed by him, as included in the Joint Bundle, at pages 41 to 44 inclusive, the only other document to which the claimant was referred in evidence was not a document in the Bundle at all, but, in cross examination, Mr Eadie, the respondents' solicitor, put to the claimant several questions arising from item no. 5 in the claimant's solicitor's list of authorities, provided by Mr Connolly, being the **Equality Act 2010** guidance on matters to be taken into account in determining questions relating to the definition of disability, being pages 53 to 55 from the appendix to that guidance.

Clarification of Issues before the Tribunal

22. Given Employment Judge Kearns' Preliminary Hearing Note dated 5 November 2018 assigning this Preliminary Hearing to determine two issues, namely (1) the claimant's disability status, and (2) whether certain "***without prejudice***" correspondence between the parties dated February and March 2018 is privileged, I raised with both parties' representatives, at the start of this Preliminary Hearing, how this Preliminary Hearing should be conducted, given that the Notice of Preliminary Hearing issued by the Tribunal had stated that this Preliminary Hearing would be conducted in private, rather than in public.

23. Mr Connolly, solicitor for the claimant, stated that it was appropriate to conduct the Preliminary Hearing in private, as the claimant's evidence in chief was to be given by him speaking to his disability impact statement provided on 6 December 2018, and he anticipated evidence in chief, plus some supplementary questions, taking around 20 to 30 minutes.

24. Mr Eadie, solicitor for the respondents, anticipated that his cross examination of the claimant's evidence might take around a further 15 to 20 minutes. There was no objection to the Hearing being in private, and I considered that appropriate in terms of my powers under **Rule 50 of the Employment Tribunals Rules of Procedure 2013.**

25. Parties' representative agreed that if the claimant cannot establish disability status, then his claim falls away, but they were hesitant to have the "***without prejudice"*** correspondence point left hanging, as if the case was to proceed to a Final Hearing, it would still need to be dealt with by another Judge, other than the Judge taking the Final Hearing, and in advance of that Final Hearing.

26. There was thereafter some discussion about whether the Tribunal should invite written submissions on the "***without prejudice***" correspondence point, and deal with on that basis, but I observed that, since both parties' representatives were present, and prepared to deal with that point at this Preliminary Hearing, it being one of the two items on the agenda, I would hear their oral submissions and, if required, I could make a ruling in my Judgment

to follow on from this Preliminary Hearing, rather than having parties' representatives lodge written representations, and have to deal with them at a later date.

27. To help clarify the matters in dispute between the parties, Mr Eadie, solicitor for the respondents, helpfully stated that the respondents concede physical impairment, and long-term effects, but argue that the claimant has not shown substantial adverse impact on his ability to carry out day to day tasks. Further, he added, the respondents' ET3 response had accepted knowledge of the claimant's illness, and Mr Connolly, solicitor for the claimant, stated that the matter of the respondents' state of knowledge of the claimant's disability was to be determined at any future Final Hearing.

Findings in Fact

28. The Tribunal heard sworn evidence from the claimant, speaking to the terms of his disability impact statement. He was cross examined by the respondents' solicitor, and I asked him some questions of clarification arising from his evidence to the Tribunal.

29. In terms of the claimant's disability impact statement, and his oral evidence, the Tribunal has made the following essential findings:

    1. The claimant aged 59 as at the date of the Hearing before the Tribunal, and a joiner to trade, is not presently working. He was previously employed by the respondents until he resigned from their employment on 23 March 2018.

    2. He provided a disability impact statement for the Tribunal, in terms of an Order of the Tribunal, made by Employment Judge Mary Kearns, dated 5 November 2018, requiring the claimant to provide a statement setting out the effect of his unstable angina on his ability to carry out normal day to day activities.

    3. His disability impact statement, dated December 2018, was originally intimated to the Tribunal, unsigned, and copied to the respondents'

solicitor, by the claimant's solicitor on 6 December 2018. A signed copy, dated 7 January 2019, was produced at this Preliminary Hearing, at pages 41 to 44 of the Bundle used at this Hearing, and spoken to in evidence by the claimant.

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4. Formerly employed by the respondents, as a joiner, until his employment with them was terminated on 23 March 2018, by way of him submitting his resignation, the claimant advised the Tribunal that he was unemployed as at the date of this Hearing.

5. His claim before the Employment Tribunal is one of disability discrimination. In these Tribunal proceedings, unstable angina is the health condition which he is relying upon as amounting to a disability for the purposes of the relevant statutory test.

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6. In their ET3 response, the respondents accepted that, during the course of his employment, the claimant advised the respondents that he suffered from unstable angina, but they do not admit that the claimant was disabled for the purposes of **Section 6 of the Equality Act 2010,** nor do they accept that they knew or ought to have known that he was disabled, although they accept that he had, on various occasions since March 2014, been absent from work due to his unstable angina.

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7. In his evidence to the Tribunal, and as per his disability impact statement, the claimant stated that he was initially diagnosed with this condition on 10th March 2014. It was on that date where he experienced his initial attack, while he was working on a job in Troon.

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8. He had attended for work, and he had not yet undertaken any tasks when he experienced what he described as a hot flush. This lasted for around 1 minute before it went away. He had no real understanding of what had happened. However, around a minute or so after this hot flush passed, he began to experience a severe crushing pain in his chest. This was debilitating. He collapsed on the floor. He was in significant pain and he was unable to function physically. He could not

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stand up or walk. He was unable to carry out any physical activities during the period of the attack. This attack lasted for approximately 15 to 20 minutes.

9. Following this attack, the manager of the site he was working at that day took him to an Ayrshire hospital. The claimant was admitted to hospital and he was not released for 5 days. It was during this hospital stay he was first diagnosed with unstable angina. Unstable angina is a heart condition associated with spasm of the arteries supplying the heart rather than a blockage.

10. The claimant suffered from 3 subsequent attacks in the 48 hours following discharge from the hospital on 15th March 2014. While attending his GP on the 17th March 2014, he was transferred by ambulance to Glasgow Royal Infirmary where he remained for 3 days. He was then transferred to the Golden Jubilee Hospital, Clydebank on the 20th March 2014.

11. It was following an angiogram, that he was diagnosed with Coronary Artery Spasm. This was the cause of his unstable angina. During his admission to hospital, the claimant began to take medication, and he was subsequently absent from work for 6 weeks. The reason for his absence at this time was fully known to the respondents.

12. Since March 2014, the claimant has experienced further attacks caused by his unstable angina at semi-regular intervals. Including the first 2, he estimated that he had had around 20 attacks in total. The majority of these occurred during his employment with the respondents, with only 2 of these taking place since my employment with them ended on 23rd March 2018.

13. According to his evidence to the Tribunal, the claimant is likely to be affected by his condition for the rest of his life. He stated that he is always susceptible to attacks, even now he takes daily mediation which does seem to control his condition. There does not appear to be one particular trigger which results in an attack and while he has

followed medical advice to try and reduce the risk of future attacks (stopping smoking, and changes to his diet) this will not remove the risk of future attacks.

14. Following his attendance at the Golden Jubilee National Hospital on 20th March 2014, the claimant was prescribed a number of drugs to manage his condition. At that time, he was prescribed 6 different tablets which had to be taken once or twice daily. That list included aspirin, isosorbide mononitrate, Ramipril, simvastatin, tildiem LA and ticagrelor.

15. While his medication has been adjusted since March 2014, he has usually been required to take 5 tablets once or twice a day to manage his condition. The dosage of some of his medication had to be increased (in some cases doubled) as the initial prescriptions were not managing the condition properly. The claimant advised that his medications work in combination to thin his blood, or relax his muscles, and while he no longer takes Ramipril or ticagrelor, he still takes the other 4 medications, morning and night.

16. However, following one major adjustment to his medication in April 2015, which seemed to address things properly for a while, since an attack in June 2016 (and not 2017, as stated wrongly in his statement) his medication has been settled and now appears to be allowing him to control his condition and deal with attacks when they occur. He advised the Tribunal that his consultant cardiologist, at Glasgow Royal Infirmary, a Mr Goodfield, has told him that his condition is chronic, that is permanent, and that he will have to take medication for the rest of his life.

17. When he has suffered attacks, the impact upon the claimant is always the same. He experiences pain which manifests itself as a severe tightening in his chest. His attacks usually last around 10 minutes. During the attacks, he is floored, and he cannot function physically at all. He needs to lie down. He cannot stand up. He cannot walk, nor lift

objects. He cannot carry out any physical activities involving manual dexterity. He gets shortness of breath and breathing becomes rapid. He needs to gasp for air.

18. On one occasion in June 2017, an attack caused him to lose consciousness, but that is the only occasion that was a symptom of his attack.

19. The claimant further stated that until he is able to take medication, an attack will continue. Once he has taken the necessary tablets, the attack begins to subside. It takes around 2 to 3 minutes for the medication to take effect. However, on some occasions, taking medication does not work initially. If there is no improvement in his symptoms after 2 to 3 minutes, the claimant requires to take a second dose.

20. Where a second dose of medication is required, it takes him around 10 minutes to recover from the attack. Throughout the period from an attack commencing until his medication has resolved this, the claimant is impacted by the symptoms described above: in short, he physically cannot function until his medication takes effect.

21. The claimant also spoke of taking a glycerine GTN spray, under his tongue, if he has an attack. He understood it to widen the coronary artery to let blood though, and so stop pain of an attack and he further stated that his cardiologist, Mr Goodfield, had advised him that if he does not take that spray, its perfectly possible an attack could lead to a heart attack and death.

22. After an attack, the claimant stated that he is completely exhausted. He finds it difficult to do anything that involves physical exertion. While he could walk once an attack has ended, he advised the Tribunal that he would not be able to walk any significant distance, and he would also be unable to do anything that would involve any greater physical exertion (e.g. run, climb stairs, etc.).

23. He requires to lie down and sleep to allow his body to recover. This usually involves a sleep of around 2 to 3 hours. However, even then the claimant stated that he is still significantly tired, and it would only be the following day where he would say he is completely recovered from the symptoms of an attack.

24. Further, the claimant advised the Tribunal that, if he did not take his daily medication, then he would be likely to suffer from an attack within 24 hours of stopping to take his tablets. If he could not take medication when an attack starts, then the symptoms would continue and there could be fatal consequences for him.

25. In cross-examination, the claimant agreed that there are gaps between his attacks, and he has had 20 plus attacks in the last 5 years, but while he has had attack free periods, he still cannot work above his head, and look down, as he goes dizzy, and he gets breathless carrying weights for any time.

26. He also explained that his condition can affect him at his house, with family, and with friends. If he can avoid things, he will do so, if he can, but he finds stairs, carrying weights, or walking for a great distance, an issue.

27. Having had an adjournment, to allow him to read the **Equality Act 2010** guidance referred to, at pages 53 to 53, as put to him by Mr Eadie, solicitor for the respondents, the claimant confirmed that he had read the guidance, and he stated that, when not having an attack, he cannot walk up and down stairs, as that ids fatiguing for him, and while he can walk a short distance, that changes if he is carrying something, but he did not identify any other bullet point from the guidance's list of examples.

28. The claimant clarified his medications over the last year, and confirmed that he is still on 4 of his original medications, and he felt his condition is drug controlled, but when having an attack, he stated he cannot do anything as, literally, he is incapacitated, and on the floor.

Tribunal's Assessment of the Evidence

30. The claimant was the only witness heard by the Tribunal. I found him to be a credible and reliable witness, who gave his evidence in a straightforward, matter of fact way, and without any evident exaggeration or overplaying of the impact which his unstable angina has on his health and ability to function physically.

31. Given the respondent's concession about accepting there was a physical impairment, namely unstable angina, and that substantial adverse effect on normal day-to-day activities was disputed, the claimant's evidence in chief was not seriously challenged in cross-examination, where Mr Eadie's questions to the claimant were principally to enquire of the claimant about aspects of the **Equality Act 2010** guidance which Mr Eadie wished to question him about on matters to be taken into account in determining questions relating to the definition of disability.

Claimant's List of Authorities on Disability Status

32. The claimant's solicitor, Mr Connolly, produced the following authorities for the Tribunal, as follows: -

    (i) **Equality Act 2010** guidance on matters to be taken into account in determining questions relating to the definition of disability – **Section D: Normal day-to-day activities:** Sections **D1 – D24** (at pages 34 to 47)

    (ii) **Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763 (EAT)**

    (iii) **Swift v Chief Constable of Wiltshire Constabulary [2004] IRLR 540 (EAT)**

    (iv) **Leonard v South Derbyshire Chamber of Commerce [2001] IRLR 19 (EAT)**

(v) **Equality Act 2010** guidance on matters to be taken into account in determining questions relating to the definition of disability (**Appendix** (at pages 53 to 55) being an illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities.

(vi) **Woodrup v London Borough of Southwark [2002] EWCA Civ 1716; [2003] IRLR 111 (CA)**

(vii) **Fathers v Pets at Home Limited & another [2014] UKEAT/0424/13 (EAT)**

Claimant's Submissions on Disability Status

33. In addressing the Tribunal, the claimant's solicitor, Mr Connolly, commenced his oral submissions at around 11.10am. He referred to the list of authorities lodged with the Tribunal, as detailed in paragraph 32 of these Reasons, and invited the Tribunal to find that the claimant's evidence satisfies the elements of the statutory test of disability which the respondents had not conceded.

34. He noted how the respondents were not prepared to accept that the claimant's impairment caused by unstable angina has a substantial adverse effect on his ability to carry out day to day activities, and they had also required the claimant to satisfy the Tribunal whether any effect is substantial.

35. Referring, in brief, to the claimant's own evidence, Mr Connolly referred to the disability impact statement, at pages 41 to 44 of the Bundle, and submitted that that evidence establishes unstable angina has adverse impact on the claimant's ability to carry out day to day activities, and that the impact is substantial.

36. Accepting that an impairment can only amount to a disability if it affects normal day to day activities, Mr Connelly referred to the **Equality Act 2010** guidance, at section D, in particular at section **D3**, and that when suffering from an attack, the claimant is literally floored, and unable to function, he is immobile,

and he cannot carry out any tasks. He described the claimant's evidence as stark, speaking of being floored, and unable to function.

37. Referring to **Section 212 (1) of the Equality Act 2010**, and the definition of "***substantial***", as meaning "***more than minor or trivial***", Mr Connolly referred
5 to the Judgment from the EAT in **Paterson**, in particular at paragraphs 24 and 27, and also referred to the matter of "***recurrence***", as per **paragraph 2, in Schedule 1, to the Equality Act 2010**, being relevant to the claimant's situation, and whether the effect is likely to recur. He also referred to the EAT's Judgment in **Swift**, at paragraphs 19 to 27, and the four questions
10 posed there, being:

    i. ***Was there at some stage an impairment which had a substantial adverse effect on the applicant's ability to carry out normal day to day activities?***

    ii. ***Did the impairment cease to have substantial effect on the***
15 ***applicant's ability to carry out normal day to day activities, and if so when?***

    iii. ***What was the substantial adverse effect?***

    iv. ***Is that substantial adverse effect likely to recur?***

38. In Mr Connolly's submission, the claimant's evidence to the Tribunal provides
20 a positive answer to the four questions posed in **Swift** and, as per paragraph 9 of the claimant's disability impact statement produced to the Tribunal, there had been 20 occasions since the initial diagnosis, and the symptoms had always been the same, bar for one exception (in June 2016) in that the claimant is literally floored. Accordingly, as per paragraphs 6 and 7 in the
25 claimant's disability impact statement, Mr Connolly submitted that substantial adverse effect is likely to recur.

39. Further, Mr Connolly submitted that the adverse effect is, as shown by the evidence led at the Tribunal, more than minor and trivial, and referring to paragraph 27, of the EAT's Judgment in **Leonard,** whilst it is essential that a
30 Tribunal considers matters in the round, and makes an overall assessment of

whether the adverse effect of an impairment on an activity is substantial, it has to bear in mind that it must concentrate on what the employee cannot do or can only do with difficulty rather than on the things they can do.

40. This focus avoids the danger of a Tribunal concluding that as there are still many things that an employee can do the adverse effect cannot be substantial. In Mr Connolly's submission, on the evidence from the claimant in this case, that established substantial adverse effect, and that the matters were more than minor or trivial.

41. Continuing his submission, Mr Connolly submitted that it is more likely that the claimant will have further attacks in the future, being the same substantial adverse effects as per his disability impact statement at paragraph 9. Referring to **paragraph 2 of Schedule 1 to the Equality Act 2010**, Mr Connolly further stated that if it ceases, it is to be treated as if likely to recur.

42. Referring then to the claimant's medication, Mr Connolly referred to **paragraphs 5 (1) and (2) of Schedule 4 to the Equality Act 2010**, and to paragraphs 20 and 21 from the Court of Appeal's Judgment in **Woodrup.** He stated that while the claimant's condition was different to the condition of the applicant in the **Woodrup** case, applying the rationale of the **Woodrup** Judgment to the claimant's situation, the claimant's evidence to this Tribunal is clear, that if he stops taking his medication, then the medical advice is that a further attack would be likely.

43. Referring to paragraph 12 of the claimant's disability impact statement, Mr Connolly highlighted that fatal consequences could arise, resulting in death, and referring to paragraph 8 of that disability impact statement, the claimant had stated that since an attack in June 2016, his medication had been settled and now appeared to be allowing him to control his condition and deal with attacks where they occur.

44. Although he had included it as item number 7, at his list of authorities lodged with the Tribunal, Mr Connolly stated that he was not referring to the EAT Judgment in **Fathers v Pets at Home Limited**, as the matter raised in that case law authority had not arisen in the claimant's evidence to this Tribunal.

45. In closing his oral submissions, Mr Connolly invited the Tribunal to find that the claimant has established disability status and, to allow him to proceed to a full merits Hearing, reserving the respondents' knowledge point.

Respondents' Submissions on Disability Status

46. Mr Eadie, solicitor for the respondents, in opening his oral submissions, at around 11.34am, invited the Tribunal to dismiss the claim, on the basis that he submitted the claimant has not satisfied the Tribunal that he is covered by the **Equality Act 2010**.

47. On the matter of normal day to day activities, the claimant, in his cross examination, leaving aside weights, had only referred to difficulty in going up or down stairs, and there had been no other evidence of substantial adverse effect on his normal day to day activities.

48. The main issue for the respondents, submitted Mr Eadie, is the issue of what happens during the claimant's attacks, and while he did not dispute that an attack is a traumatic experience for the claimant, the issue for the Tribunal is not the claimant's status during an attack, but his state for the rest of the time.

49. By way of analogy, Mr Eadie stated that if somebody had food poisoning, and was suffering, they would be sick, go to the toilet, and during that time, not be capable of doing anything else. However, once it had passed, it would not then be a disability, and, he submitted, that it is equally relevant here, in the present case, where during attacks, the claimant is floored, and unable to do anything.

50. Further, submitted Mr Eadie, if the claimant meets the statutory test for being a disabled person, then this case needs to be considered at a full merits Hearing, and the respondents denying discrimination, there will be a need to hear evidence, reserving the disputed matter of the respondents' state of knowledge of the claimant's disability.

51. Mr Eadie stated that Mr Connolly had very helpfully provided case law authorities for the Tribunal, and that there was nothing further that he wished

to refer the Tribunal to in that regard, which contradicted the legal principles highlighted by Mr Connolly.

52. Mr Eadie further stated how he had taken the claimant through the Appendix to the statutory guidance on matters to be taken into account in determining questions relating to the definition of disability, and he referred the Tribunal to the claimant's answers in that regard.

Documents in the Bundle

53. Mr Eadie's submissions having concluded at around 11.39am, I enquired of Mr Connolly, the claimant's solicitor, about the documents produced to the Tribunal in the Bundle. He stated that it was a Joint Bundle, but prepared by him as the claimant's representative.

54. As the claimant's Occupational Health report, included as part of that Bundle, had not been referred to in evidence, Mr Connolly stated that it could be disregarded but, otherwise, as regards the claimant's medical records, except those referred to in evidence, likewise they too could be disregarded.

55. On this matter, Mr Eadie, for the respondents, stated that he did not dispute that the claimant was on the current medications, shown at pages 52 and 53 of the Bundle, but otherwise it was not appropriate for the Tribunal to refer to the Occupational Health report produced in the Bundle as, at its best, he submitted that it is inconclusive, and he was not surprised that it had not been referred to by Mr Connolly.

Relevant Law: Disability Status

56. It was common ground, between Mr Connolly and Mr Eadie, that the **Equality Act 2010**, at **Section 6 (1),** contains the statutory definition of disability, as follows:

> ***"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."***

57. **Section 6 (5)** empowers a Minister of the Crown to issue statutory guidance about matters to be taken into account in deciding any question for the purposes of **Section 6 (1),** and **Schedule 1 to the Equality Act 2010** sets out a various supplementary provision including, at paragraph 2 (1) that:

> ***"the effect of an impairment is long term if:***
>
> ***(a) it has lasted for at least twelve months,***
>
> ***(b) it is likely to last at least 12 months, or***
>
> ***(c) it is likely to last for the rest of the life of the person affected."***

58. **Paragraph (5) of that Schedule 1** provides that: "***an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if – (a) measures are being taken to treat or correct it, and (b) but for that, it would be likely to have that effect."*** **Paragraph 5 (2)** provides that "***measures***" includes, in the particular medical treatment.

59. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability, and the standard of proof is on the civil balance of probabilities. H M Government has issued statutory guidance on matters to be taken into account in determining questions relating to the definition of disability, under **Section 6 (5) of the Equality Act 2010**, and a copy of excerpts from the 2011 statutory guidance was included as part of the list of authorities provided to this Tribunal by Mr Connolly, the claimant's solicitor.

60. As that guidance makes clear, the different sections of that guidance should not be read in isolation but must be considered together, and whether or not a person satisfies the definition of a disabled person for the purposes of the

legislation will depend upon the full circumstances of the case, i.e. whether the adverse effect of a person's impairment on the carrying out of normal day to day activities is substantial and long term.

61. The time at which to assess the disability is the date of the alleged discriminatory act, following the Employment Appeal Tribunal's Judgment in **Cruickshank v VAW Motorcast Limited [2002] ICR 729**. In the present case, the relevant time is the period ending on 23 March 2018 when the claimant resigned from the respondents' employment.

62. Further, following an earlier Judgment of the Employment Appeal Tribunal, in **Goodwin v Patent Office [1999] ICR 302**, the words used to define disability require a Tribunal to look at the evidence by reference to four different questions, or "***conditions***" as the EAT held them in **Goodwin**, as follows:

    (***1)*** ***Did the claimant have a mental and / or physical impairment? (the "impairment condition");***

    (2) ***Did the impairment affect the claimant's ability to carry out normal day to day activities? (the "adverse effect");***

    (3) ***Was the adverse condition substantial? (the "substantial condition") and;***

    (4) ***Was the adverse condition long term? ("the long-term condition")***

63. In **Paterson v Commissioner of Police of the Metropolis [2007] ICR 152**, the Employment Appeal Tribunal held that in order to be substantial, the effect must fall outwith the normal range of effects that one might expect from a cross-section of the population, but when assessing the effect, the comparison is not with the population at large, but what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired (at paragraph 27, per Mr Justice Elias, President).

Discussion and Deliberation: Disability Status

64. Having carefully considered the claimant's whole evidence to the Tribunal, in light of his pre-prepared written disability impact statement, and his oral evidence at this Preliminary Hearing, tried and tested by cross examination by Mr Eadie, solicitor for the respondents, and questions of clarification from myself as the presiding Employment Judge, my first observation is that this was a case where no expert medical evidence was presented to the Tribunal on the claimant's behalf.

65. As His Honour Judge David Richardson held, in **Joseph v Brighton & Sussex University Hospitals NHS Trust [2015] UKEAT/0001/15**, an Employment Tribunal is not bound to adopt a purposive, or inquisitorial approach to the question of disability.

66. In **Joseph**, where the claimant did not prove their case, it was argued that the Employment Tribunal ought to have had some regard to some documents in the Bundle, potentially supportive of the claimant's case, to which it was not referred during the Hearing. The Employment Appeal Tribunal held that the fact-finding Tribunal did not err by failing to find, and rely upon the documents in question.

67. In that case, there was an agreed Bundle running to some 580 pages, prepared for the Tribunal, and within that Bundle there was medical evidence upon which the claimant placed a particular reliance in the appeal to the EAT. In that case, the claimant's witness statement made no reference to the questions necessary to establish he had a disability in the sense of an impairment which had a substantial adverse effect on her normal day to day activities, and her impact statement was not relied on during the Tribunal hearing, and as there was no evidence given at all on the question of day to day activities, counsel for the respondents did not cross examine on the subject.

68. In **Joseph**, counsel for the respondents took the EAT Judge to the leading authorities on the extent of the Employment Tribunal's duty to assist litigants and lay representatives and held that the mere fact that documents are in the

Bundle of some 580 pages does not mean the Employment Tribunal is bound to find them and consider them.

69. In the present case, of course, the claimant did give evidence, and he was cross examined, on his disability impact statement. As such, I had direct evidence from him, on the matter of his disability, and the effect of his disability on his normal day to day activities.

70. While, included within the Bundle, there were many other documents, including GP records, and an Occupational Health report, I was, somewhat surprisingly, not referred to them by the claimant, through evidence in chief solicited by his solicitor Mr Connolly, except with the very minor exception of a couple of pages dealing with his medication.

71. Given the other medical documents in that Bundle were not referred to or not relied upon in the claimant's evidence to the Tribunal, it does beg the question why they were ever lodged in the first place.

72. That said, having carefully analysed the evidence before me, and considered the competing submissions made to me by parties' solicitors, and applied the relevant law to the facts as I have found them to be, I am satisfied that it has been established that the claimant was, at the relevant time, being the period ending on 23 March 2018 when he resigned from the respondents' employment, a disabled person, within the meaning of **Section 6 of the Equality Act 2010.**

73. In particular, I satisfied that the claimant has a physical impairment, namely unstable angina, which meets all of the 4 **Goodwin** conditions, and while episodic, the evidence before me clearly shows that it is likely to recur in the future. Further, I am satisfied that the adverse effect on his ability to carry out normal day to day activities is substantial, and long term, and accordingly his complaints of unlawful disability discrimination by the respondents can therefore proceed to a full merits Hearing, before a full Tribunal in due course.

'Without Prejudice' Correspondence

74. The second matter dealt with at this Preliminary Hearing was whether certain ***"without prejudice***" correspondence between the parties dated February and March 2018 is privileged, as per paragraph 2 of Employment Judge Kearns' Note and Orders dated 5 November 2018, issued following the telephone conference call Case Management Preliminary Hearing held before her on 1 November 2018.

75. When parties' representatives' oral submissions on the disability status issue concluded, at around 11.42am, I reserved my Judgment on that matter to be issued in a reserved written Judgment with Reasons, in due course, and discussion then focused on this second preliminary issue for the Tribunal.

76. The correspondence in question was included in the Bundle produced to the Tribunal, at pages 116 to 132, and the matter had previously been raised by the respondents' counsel, at the Case Management Preliminary Hearing before Employment Judge Kearns. As such, I invited Mr Eadie, solicitor for the respondents, to address the Tribunal first.

77. He did so, by taking me through the copy correspondence, as produced in the bundle, being: -

    (a) Letter of 21 September 2017 from Mr Connolly, the claimant's solicitor, to Graham Millar, at Gilson Gray LLP, solicitors, Glasgow, then acting for the respondents;

    (b) Letter of 14 February 2018 from Mr Connolly to Martin Rowley, the respondents' Managing Director;

    (c) Letter of 27 February 2018 from Mr Rowley to Mr Connolly; and

    (d) Email exchange between Mr Rowley and Mr Connolly on 27 February, and 1, 6, 13, 16, 23 and 28 March 2018.

78. With the exception of the latter part of the letter of 14 February 2018, at pages 117 and 118 of the Bundle, which he submitted is clearly "***without prejudice***", the respondents' solicitor, Mr Eadie, submitted that everything else is not only not "***without prejudice***", but it is very important evidence given the timing of

the claimant's resignation from the respondents' employment on 23 March 2018.

79. He submitted that the majority of the correspondence made no concessions, but discussed factual elements to the claim and, even where marked "***without prejudice",*** Mr Eadie disputed it is truly "***without prejudice***", within the legal definition, particularly when Mr Rowley, the respondents' Managing Director, is not a solicitor, and where the correspondence had a focus on a return to work for the claimant.

80. Each correspondence was entirely factual, with no attempt to settle a claim, and all to do with practical issues, submitted Mr Eadie. Such correspondence, which is entirely factual, should be admissible as evidence at any Hearing before the Tribunal, he argued.

81. When I enquired of Mr Eadie whether he had any case law authorities to refer me to, on the matter of "***without prejudice***" correspondence, given none had been provided to me at the start of this Preliminary Hearing, he explained that he was aware of a Sheriff Court Judgment in a case which he identified as **Geraldine McWilliams v Richard Russell** ,but he then explained that he did not have a copy of the Judgment here, for handing up to me, at this Hearing, although he had read about this Judgment in an article elsewhere.

82. Further, Mr Eadie advised that he was aware of a Judgment from the Supreme Court, in **Oceanbulk Shipping and Trading SA v TMT Asia Limited & others [2010] UKSC 44,** where there was a discussion about the "***without prejudice***" rule, but he added that, as he did not have a copy of that either to hand up, he was entirely in the Tribunal's hands, as he had no copy Judgments to hand up, and he acknowledged that this was entirely his fault.

83. Given this case had been listed for this Preliminary Hearing, with this as a specific subject matter, I stated that it was disappointing to the Tribunal that no authorities had been produced by him as solicitor for the respondents, given this preliminary issue has been raised by his client's counsel.

84. In reply, Mr Connolly, solicitor for the claimant, submitted that he disagreed with Mr Eadie's breakdown of the letter of 14 February 2018 to the respondents' Managing Director, and he highlighted that it is headed as being "***without prejudice***", and the letter sets out a background to what the claimant is saying, and the respondents concede there is a proposal raised to resolve the dispute.

85. Mr Connolly described the letter as a genuine effort to try and come to a resolution of the dispute, and it was clear that there was a dispute between the parties at that point in time. He explained that the claimant had been invited to, and had attended, two capability meetings, at the request of the respondents, and there was therefore an ongoing formal procedure and dialogue between the respondents and the claimant.

86. Further, Mr Connolly described the entire letter of 14 February 2018 as "***without prejudice***", being a genuine effort to resolve a dispute, and he stated that it was the trigger for all future correspondence, it amounting to a rejection of a financial settlement, although it did not say that expressly. Further, he added, the email chain in March 2018 followed on from that letter attempting to resolve the dispute on a "***without prejudice***" basis, and as it was headed "***without prejudice***" that showed a deliberate intent, and that it was not a fluke.

87. Mr Connolly then referred to his email of 6 March 2018 to Mr Rowley, marked "***without prejudice***", which he submitted clearly sets out that the claimant was still seeking to resolve the dispute by genuine negotiations and that was supported by Mr Rowley's reply of 13 March 2018, stating that they did not see any need for a settlement, which, Mr Connolly submitted, was evidence of the parties seeking to resolve a dispute between them.

88. Further, Mr Connolly submitted that this was a matter of ***"trite law"***, and that he had no case law authorities to refer me to, and as Mr Eadie had not produced any authorities for the respondents, he could not comment on any such authorities as cited by name only by Mr Eadie.

89. As the claimant did not agree to "***without prejudice***" correspondence being produced, and such correspondence can only be produced if both parties agree, Mr Connolly submitted that this correspondence should not be admissible in any future Hearing before the Tribunal.

90. Further, he added, he had no issue with the two emails of 23 and 28 March 2018, about the claimant's resignation, which were not marked as "***without prejudice",*** as produced at page 125 of the Bundle, and while he did not dispute that you cannot simply say "***without prejudice***", and the privilege attaches, Mr Connolly submitted that all of the emails, with the exception of those two emails about their resignation, fall within the "***without prejudice***" exception, and that includes the original letter of 14 February 2018.

Case Law cited by the Respondents on "*Without Prejudice*" Correspondence

91. Having heard both Mr Eadie and Mr Connolly, I adjourned proceedings at 12.25pm, to resume at 2.00pm, having stated that I wanted to hear from both parties' representatives on the caselaw authorities identified by Mr Eadie, but not produced by him.

92. In discussion with both parties' representatives, it was agreed that by no later than 1.30pm, Mr Eadie would email to the Tribunal, with copy to Mr Connolly, the authorities he intended to rely upon, on the matter of "***without prejudice correspondence***", and, at 2.00pm, the Preliminary Hearing would resume, but by way of telephone conference call, rather than in person, as Mr Connolly did not wish to have his client detained, longer than was necessary, if no further evidence was to be led, nor for Mr Connolly to charge his client unnecessarily for unnecessary attendance at the Tribunal.

93. By email sent to the Tribunal, at 1.32pm, with copy to Mr Connolly for the claimant, Mr Eadie stated that, in advance of the conference call at 2.00pm, he was enclosing copy of the Supreme Court decision in **Oceanbulk Shipping,** discussing the "***without prejudice***" rule, from paragraph 19 onwards, and the Glasgow Sheriff Court decision in **McWilliams v Russell**,

where he identified paragraphs 45 and 46 as the relevant references, and confirmed that the Sheriff agreed with the decision in **Oceanbulk**.

94. The principal point, Mr Eadie identified, relying on **Oceanbulk**, is that in general terms, the scope and purpose of the "***without prejudice***" rule can be described as excluding all negotiation genuinely aimed at settlement whether oral or in writing from being given in evidence. The case also makes it clear that it is the concessionary purpose of the correspondence rather than the expression "***without prejudice***" that attracts the privilege.

95. When the case called again, proceeding by telephone conference call at 2.00pm, both parties' representatives were in attendance, and Mr Eadie stated, somewhat briefly, that he was relying on the Sheriff Court case, particularly at paragraph 45, and the Supreme Court, from paragraph 19 onwards.

96. In reply, Mr Connolly stated that he had no comment to make on the Sheriff Court case cited by Mr Eadie, and he did not take issue with what Sheriff Aisha Y Anwar had stated in her Judgment of 4 October 2017, reported at **[2017] SC GLA 64.**

97. At paragraph 45, Sheriff Anwar, in **McWilliams**, had stated as follows:

> ***"[45] In general terms, the scope and purpose of the "without prejudice rule" can be described as excluding "all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence" (per Lord Griffiths in Rush & Tompkins Ltd v Greater London Council [1989] AC 1280 at page 1299, quoted with approval recently by the Supreme Court in Oceanbulk Shipping and Trading SA v TMT Asia Ltd and others [2010] UKSC 44). It is the concessionary purpose of the correspondence rather than the expression "without prejudice" that attracts the privilege (Daks Simpson Group v Kuiper 1997 SLT 689). The effect of the words "without prejudice" requires to be judged on the facts of each situation, which may include the terms of other correspondence and the issue to which the***

evidence is relevant (Richardson v Quercus Ltd SLT 596 per Lord Justice General Rodger at page 600). The "without prejudice rule" is not absolute; the rule does not apply to render inadmissible evidence of communications designed to act as "a cloak for perjury, blackmail or other unambiguous impropriety" (per Robert Walker LJ in Unilever plc v Proctor & Gamble [2000] 1 WLR 2436)."

98. Further, added Mr Connolly, he felt Sheriff Anwar's paragraph 45 represented his general position as stated to me earlier in the course of this Preliminary Hearing while, with reference to the **Oceanbulk** Judgment, from the Supreme Court, he referred me, in particular, to paragraph 26 and the quote from Lord Justice Robert Walker in **Unilever plc v Procter & Gamble Co [2000] 1 WLR 2438** at 2448 and 2449, as reproduced in the Supreme Court's Judgment, at paragraph 26, as follows:-

".. [they] make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties in the words of Lord Griffiths in Rush & Tompkins [at p 1300] 'to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts'. Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders."

99. In closing his reply, Mr Connolly stated that Mr Eadie had referred to a factual commentary on the dispute but, even if so, that did not mean that ***"without prejudice"*** privilege is lost. He submitted that his initial letter of 14 February

2018, and correspondence thereafter, were a genuine attempt to resolve the dispute, and therefore all that correspondence, with the exception of the last two emails of 23 and 28 March 2018, ought to attract "***without prejudice***" privilege.

5 100. Having heard Mr Connolly's submissions, Mr Eadie confirmed he had nothing further to say, and so I concluded the Preliminary Hearing, at 12.11pm, reserving my Judgment also on the "***without prejudice***" correspondence point.

Relevant Law: "Without Prejudice" Correspondence

10 101. For present purposes, I am content to gratefully adopt the legal principles on the "***without prejudice***" rule, helpfully set out by Lord Clarke, in delivering the Judgment of the Supreme Court in **Oceanbulk**, at paragraphs 19 to 29, and in his further narrative of the exceptions to the rule, set forth at paragraphs 30 to 32 of the Supreme Court's Judgment, drawing from the Judgment of Lord
15 Justice Robert Walker in **Unilever.** This shows that the "***without prejudice***" rule is not absolute, the point noted by Sheriff Anwar in paragraph 45 of her Judgment in **McWilliams**.

Discussion and Deliberation: "Without Prejudice" correspondence

102. Having carefully considered the copy correspondence produced to me, at
20 pages 116 to 132 of the Bundle, and the competing submissions of both parties' solicitors, I have decided that the arguments presented by Mr Connolly, solicitor for the claimant, are to be preferred.

103. It is clear that, with the exception of the emails of 23 and 28 March 2018, at page 125 of the Bundle, relating to the claimant's resignation, the other
25 correspondence produced to the Tribunal at this Hearing, at pages 116 to 132 of the Bundle, is subject to the ***"without prejudice***" rule, and therefore is inadmissible at any further Hearing before the Tribunal. I have so ordered in my Judgment above.

Further Procedure

104. Given my decision that I am satisfied that the claimant was, at the relevant time, a disabled person, within the meaning of **Section 6 of the Equality Act 2010**, and that his complaints of unlawful disability discrimination by the respondents can therefore proceed to a full merits Hearing, before a full Tribunal, on dates to be hereinafter assigned by the Tribunal, I have instructed the clerk for the Tribunal, in issuing this Judgment to both parties' representatives, to also issue to them date listing stencils to fix a Final Hearing in the proposed listing period of **June, July and August 2019.**

Employment Judge	**I McPherson**
Date of Judgment	**18 April 2019**
Entered in register and copied to parties	**24 April 2019**