



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4101358/2020 (V)
Held remotely on 11 January 2021
Employment Judge: W A Meiklejohn

10 **Mr D McGhee**

Claimant
Represented by:
Mr C Howie – Solicitor

15 **Cornerstone Community Care**

Respondent
Represented by:
Mr E Stafford – Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was at the relevant time for the purpose of his disability discrimination claim against the respondent a disabled person within the meaning of section 6 of the Equality Act 2010.

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REASONS

1. This case was listed for an open preliminary hearing, conducted remotely by means of the Cloud Video Platform, to determine the issue of disability status. Mr Howie represented the claimant and Mr Stafford represented the respondent.

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Procedural history

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2. The claimant submitted an ET1 claim form on 6 March 2020 in which he intimated a complaint of disability discrimination. His claim form did not specify under which provisions of the Equality Act 2010 (“EqA”) his complaint was brought. The respondent lodged an ET3 response form resisting the

claim, indicating that it was not accepted that the claimant was disabled for the purpose of the EqA.

- 5 3. A closed preliminary hearing (before Employment Judge Hendry) took place on 11 May 2020. Mr Stafford confirmed that the respondent did not accept that the claimant was disabled for the purpose of the EqA. It was accepted that the claimant had a diagnosis of autism but not that this had an adverse effect on his ability to carry out normal day-to-day activities. The outcome was that a number of Orders were made, including that the claimant should
- 10 provide written further particulars of his discrimination complaint to include, in effect, a disability impact statement. I understood that the claimant complied with this although unfortunately the written particulars were not included in the papers provided to me.
- 15 4. A second closed preliminary hearing (again before EJ Hendry) took place on 30 September 2020. The respondent's position remained as stated at the first preliminary hearing and the outcome was that the case should proceed to a hearing on disability status. EJ Hendry observed that what the claimant had provided by way of an impact statement was not sufficiently focussed on
- 20 his day-to-day activities. That hearing on disability status was duly listed for 11 January 2021.

Evidence

- 25 5. I heard evidence from the claimant. His evidence in chief was contained in an affidavit dated 23 December 2020 which was treated as his witness statement and taken as read in terms of Rule 43 of the Tribunal Rules. I had a bundle of documents extending to 55 pages, to which I refer by page number.

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Findings in fact

- 35 6. The claimant was employed by the respondent between 20 August 2019 and 11 November 2019. This period of employment was the relevant time for the purpose of his disability discrimination claim.

7. Prior to commencement of his employment the claimant completed a Job Applicant Health Screening Questionnaire (52). In this he indicated that he did not feel any adjustments or assistance were necessary to enable him to carry out the position he had been offered.

8. Also prior to commencement the claimant was referred by the respondent to Alpha Health Screening Services Ltd for an occupational health report (53-55). This was done because the claimant had disclosed at interview that he had been diagnosed with Asperger's syndrome which is an autistic spectrum disorder.

9. The occupational health report contained a number of recommendations and, at the section dealing with the applicability of the EqA stated –

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“This is a legal decision to be made by a tribunal or court of law but I can confirm that your employee named above has a long-term chronic health problem which would have a substantial effect on every day activities disallowing the effects of medication.”

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10. Following a meeting with the claimant on 3 July 2018, Dr A Keenan of Aberdeenshire Clinical Psychology produced a report on the claimant dated 13 August 2018 (32-51). This report had been instructed in connection with a hearing before the General Teaching Council for Scotland scheduled for September 2018. The claimant agreed that Dr Keenan's report was accurate.

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11. That report contained various extracts from the claimant's medical records. At section 4.2.1 of her report Dr Keenan stated –

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“Mr McGhee exhibits behaviours in keeping with an autistic spectrum disorder (ASD). This neurodevelopmental condition leads to persistent deficits in social communication and social interaction across multiple contexts, including deficits in social reciprocity, non-verbal communicative behaviours and skills in developing, maintaining, and understanding social relationships. Mr McGhee is likely to have had these difficulties all his life, but they have been exacerbated at various points by situational stressors. If detected early in life people with ASD are more likely to be able to learn coping strategies to manage their difficulties.”

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12. The claimant described having panic attacks. He said that simple things could upset him intensely. He gave examples of not getting an answer on the phone, a shop not having the right product or a car park surface not being gritted. He said that he would start “*stimmering*” – I think he might have meant “*stimming*” although I may have misheard him. According to Wikipedia “*stimming*” is self-stimulatory behaviour, the repetition of physical movements, sounds, words or moving objects, especially frequent in people on the autistic spectrum. I understood this was what the claimant was referring to.
13. The claimant said that when having a panic attack, he would have to take himself off and sit or lie down. A panic attack might last 20/30 minutes but could be much longer. The claimant would have to leave what he was doing until later. He would find it impossible to concentrate. He would lose interest in things in which he was usually interested. He referred to having to leave a supermarket and sit in the car.
14. The claimant described having difficulties with public transport if things did not go to plan, for example if a ticket machine was not working properly or seat reservations were wrong. If this happened he might decide to travel later, or refuse to travel at all. It might depend on who was travelling with him or the reason for the travel.
15. The claimant said he found it difficult to make or sustain friendships. He chose not to socialise. If he had to attend a party he would “*show face and leave*”. He was unable to maintain a conversation about mundane things such as television programmes or football. He found it hard to concentrate on documents or reading but compensated by having a good memory.
16. The claimant consulted his GP regularly to have his medication reviewed. He was prescribed citalopram. This was an anti-anxiety medication which he described as an emotion suppresser. He normally took one 10mg tablet daily but he recalled the dosage being doubled after a trip to Murrayfield around

the end of August 2019. The claimant said that if he did not take this medication he would turn into a “*shut in*”. By that he meant he would not be able to function or go out at all, would be constantly on edge and in a constant state of fear and panic.

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Submissions for claimant

17. Mr Howie reminded me of the definition of disability in section 6(1) EqA. “*Substantial*” meant “*more than minor or trivial*” (per section 212 EqA). “*Measures*” including medical treatment were to be disregarded (per Schedule 1, paragraph 5 EqA). The issue was the effect of the claimant’s impairment if he was not on his medication.

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18. That the claimant had a mental impairment was not in dispute. That it was long-term was confirmed by Dr Keenan’s report. The key questions were (a) did his impairment have an adverse effect on the claimant’s day-to-day activities and (b) was that effect substantial?

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19. Mr Howie referred to various paragraphs in the Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) (the “Guidance”). I deal with these in my decision below and so I will not repeat them here.

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20. Mr Howie said that the claimant’s panic attacks prevented him from doing any other activities, including normal day-to-day activities. He would be stressed by things that would not affect someone without Asperger’s syndrome. Even at the shortest duration of 20 minutes, his panic attacks were not minor or trivial.

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21. The claimant found public or enclosed spaces frightening, particularly supermarkets. Accordingly, he had difficulty shopping which was a normal day-to-day activity. He had difficulty with conversation and socialising which were part of normal social interaction. He did not make or sustain friendships. He had difficulty with getting confused and being unable to concentrate. He had difficulty with reading. He had difficulty with public transport.

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22. There were not matters of choice for the claimant. A person without the claimant's impairment could choose not to be sociable or to go to the supermarket. The adverse effects of his impairment were consistent with Dr Keenan's diagnosis. Mr Howie argued that any one of the claimant's symptoms should be regarded as having a substantial adverse effect, and all the more when viewed cumulatively.

Submissions for respondent

23. Mr Stafford stressed the need to look at the relevant time which was the period of the claimant's employment with the respondent. It was accepted by the respondent that the claimant had a mental impairment. He agreed that the focus was on whether (a) that impairment had an adverse effect on normal day-to-day activities and (b) that effect was substantial.

24. Mr Stafford highlighted the quotation within Dr Keenan's report from Ms K Smith, Primary Care Mental Health Worker, dated 21 November 2017 (44) where she referred to the claimant "*feeling that he's getting there*" and being "*able to go out in public and not having panic attacks for a while now*". This contrasted with the claimant's reference in evidence to daily panic attacks.

25. Under reference to ***Goodwin v The Patent Office [1999] IRLR 4*** Mr Stafford acknowledged that the focus should be on what the claimant could not do rather than what he could do. The claimant had given a list of the things he said he could not do but, Mr Stafford argued, the true position was that he could do these things when not suffering a panic attack. There was therefore no adverse effect.

26. Being able to do something with difficulty did not necessarily mean that the effect of the claimant's impairment was substantial. The respondent's position was that the claimant had not shown that any adverse effect of his impairment on his ability to carry out normal day-to-day activities was substantial. Accordingly, he did not come within the statutory definition of disabled.

Applicable law

27. Section 6(1) EqA provides as follows –

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“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.”

28. Section 212 EqA includes –

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“substantial” means more than minor or trivial.”

29. Paragraph 5 of Schedule 1 EqA provides as follows –

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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

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(a) measures are being taken to treat or correct it, and

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(b) but for that, it would be likely to have that effect.

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

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Discussion and disposal

30. It was not in dispute that (a) the claimant had a mental impairment and (b) that the effect of that impairment was long-term. The parties’ representatives agreed that the issues for me to decide were –

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- Did the claimant’s impairment have an adverse effect on his normal day-to-day activities?
- Was that effect substantial?

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31. The Guidance deals with normal day-to-day activities at section D. Paragraph D3 provides –

5 *“In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities....”*

10 32. At paragraph B4 the Guidance recognises that while the adverse effect of an impairment on a particular activity might not be substantial when viewed in isolation, there may be a need to consider the effects on more than one activity. That was relevant in the present case. The claimant described how his Asperger’s syndrome affected him when he suffered a panic attack. He
15 also described his difficulties with going to a supermarket, engaging in conversation, making and sustaining friendships, socialising, concentrating on documents and using public transport.

20 33. Paragraph B7 of the Guidance deals with coping strategies –

*“Account should be taken of how far a person can **reasonably** be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter
25 the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.”*

30 34. Mr Howie’s point that the effects of his impairment on the claimant were not a matter of choice was well made. It would not be reasonable to expect the claimant to avoid any normal day-to-day activity in the context of which he might be adversely affected by his impairment. The avoidance of a normal day-to-day activity because of an impairment is in itself an adverse effect of
35 the impairment. That is supported by paragraph B9 of the Guidance. The difficulties described by the claimant (as listed in paragraph 32 above) were adverse effects of his mental impairment on his ability to carry out those normal day-to-day activities. I found the claimant’s evidence about these

difficulties to be credible. I noted that some of the claimant's difficulties were included within those listed in the Appendix to the Guidance.

5 35. The threshold for "*substantial*" is not high – "*more than minor or trivial*". I had no difficulty in finding that the effects of his mental impairment on the claimant were substantial. Any one of those difficulties could be argued to be substantial, for example engaging in conversation or socialising. When viewed cumulatively, it was in my view entirely clear and self-evident that the effects were substantial.

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36. If it were necessary to put matters beyond doubt, the application of paragraph 5 of Schedule 1 EqA would do so. Without his medication the claimant would not be able to function. I accepted his evidence to that effect as recorded at paragraph 16 above.

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37. Accordingly, I found that the claimant was disabled within the meaning of section 6(1) EqA at the relevant time and his claim may proceed. The case should be listed for a further closed preliminary hearing for the purpose of case management with a view to discussing arrangements for a final hearing. Date listing stencils should be sent to the parties in advance of that preliminary hearing so that dates may be identified at the hearing.

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Employment Judge

W A Meiklejohn

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Dated

12th January 2021

Date sent to parties

12th January 2021

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