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## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105265/2020 (V)

Hearing Held by Cloud Video Platform (CVP) on 2 August 2021

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Employment Judge - A Strain

15 **Mr A Formella**

**Claimant  
Represented by:  
Ms Kwiatowska**

20 **Nor-Sea Foods Limited**

**Respondent  
Represented by:  
Strzyzewska  
Solicitor**

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## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

- (1) the Claimant did not have a disability in terms of section 6 of the **Equality Act 2010**;
- (2) The Tribunal dismisses the claim of disability discrimination.

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**Background**

1. The Claimant was represented by his partner, Ms Kwiatowska. He asserted claims of Disability Discrimination under the **Equality Act 2010 (EA 2010)**.
2. The Respondent was represented by Ms Strzyzewska, Solicitor.
- 5 3. An interpreter was provided to interpret for the Claimant.
4. The Parties had lodged a Bundle of Documents with the Tribunal for the purposes of the Open Preliminary Hearing.
5. The sole issue for determination of the Tribunal was disability status.
6. The Tribunal heard evidence from the Claimant, Ms Kwiatowska and Ms  
10 Emma Smith for the Respondent.
7. Both Parties made submissions orally.

### **Findings in Fact**

8. Having heard the evidence of the Claimant, Ms Kwiatowska and Ms Smith and considered the documentary evidence before it the Tribunal  
15 made the following findings in fact:
  - 8.1 The Respondent is a limited company which operates in the fish processing sector. The Respondent operates from premises in Fraserburgh.
  - 8.2 The Claimant was employed by the Respondent from 6 July 2018 as  
20 a General Operative. He worked mainly in the Respondent's High Care Department undertaking tasks such as filleting, cutting, packing and lifting boxes of fillets onto and off of trolleys, pushing trolleys full of boxes of fillets. When full, the trolley could weigh in the region of 370kgs. These activities involved high levels of pushing, pulling,  
25 bending, twisting, turning and lifting. The Claimant would push a full trolley to his work station and lift each box off. He would then "brush" the fillets and move them on to the next station.

8.3 The Claimant's duties were physically demanding.

8.4 The Claimant regularly worked overtime.

5 8.5 The Claimant suffers from back pain. 7 years ago he had an operation for curvature of the spine. He takes pain killers in the form of codine, voltaran gel for his back and also sleeping tablets to assist with sleeping. He had been taking this medication for some time prior to 8 June 2020 on an as required basis and constantly for the 2 weeks prior to 8 June 2020.

10 8.6 Before 8 June 2020 the Claimant was able to work without issue and deal with any pain by taking painkillers. When he had episodes of pain in his back it restricted his activities such as lifting and walking. If he bent down he couldn't straighten up. He had problems sleeping. His partner had to undertake all the household chores. All of these symptoms were addressed and dealt with by taking painkillers.

15 8.7 The Claimant had between 2-4 periods of absence due to back pain during his employment with the Respondent. The Claimant did not disclose the reason for his absence as being back pain to the Respondent.

20 8.8 Prior to commencing employment with the Respondent the Claimant completed a medical health questionnaire on 4 July 2018 which did not disclose any back condition, medical condition or treatment.

8.9 The Claimant submitted a health declaration on 6 July 2018 which did not disclose a back condition, medical condition or treatment.

25 8.10 The Claimant submitted a further health declaration on 20 October 2019 which did not disclose a back condition, medical condition or treatment.

8.11 The Claimant did not disclose his back condition, medical condition or treatment as he wished to work.

8.12 The Claimant submitted a self certification form dated 8 June 2020 in which he stated that he suffered from sudden stress burning in the chest pain radiating through to the back and numbness in the hands.

5 8.13 The Claimant remained on sickness absence from 8 June 2020 until the termination of his employment on 1 July 2020.

## The Relevant Law

### *Disability Discrimination*

9. The starting point for a Tribunal is whether or not a Claimant has a qualifying disability under section 6 of the EA 2010. Section 6 provides:

### 10 *Disability*

(1) A person (P) has a disability if—

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

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

15 10. The onus of proof of impairment is upon the Claimant on the balance of probabilities.

### *Long-term effect*

11. Schedule 1 paragraph 2.(1) of the EA 2010 provides:

The effect of an impairment is long-term if—

20 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.

### *Substantial Adverse Effect*

12. Substantial means more than minor or trivial (*Goodwin v The Patent Office [1999] IRLR 4 EAT*). If an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur (Schedule 1, paragraph 2.(2) of EA 2010).

*Normal day to day activities*

13. The focus of the EA 2010 is things that the Claimant either cannot do or can only do with difficulty, rather than on the things the Claimant can do. The *Guidance on the Equality Act 2010* (published by the UK Government) states at page 34 "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 and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern."

**Submissions**

14. Both Parties made submissions orally.

**Discussion and Decision**

*Disability*

15. The Tribunal considered whether or not the Claimant had a disability as defined in section 6 of EA 2010.

*Impairment*

16. The Tribunal noted that there was a lack of any medical evidence of the Claimant's back condition. No medical report had been produced (the Claimant said he could not afford to pay for this as he was on benefits), medical records produced did not substantiate the nature or extent of his back condition. No disability impact statement had been produced.

17. The Tribunal appreciated and understood that the Claimant was unrepresented and the Claimant's candour that he wished to work so had not disclosed his back condition to the Respondent.
18. The Tribunal and the Respondent's solicitor questioned the Claimant and his partner about his back condition, its duration, treatment, symptoms and impact upon his day to day activities at some length.
19. The Claimant considered he was able to work whilst managing any symptoms of his back condition with medication. The Claimant's position appeared to be that his condition deteriorated after 8 June 2020 and had a material impact on his ability to work and day to day activities through to 17 July 2021.
20. The Tribunal accepted that the Claimant's back pain was an impairment for the purposes of the EA 2010. However, the Tribunal were not satisfied that the back pain had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.
21. The Tribunal accepted that the Claimant's back pain had endured sporadically for several years prior to his employment with the Respondent, during that employment and afterwards. The Tribunal also accepted that he had been able to undertake physically demanding work for the Respondent during the period of his employment with them. He had not disclosed the back pain to the Respondent. On his own evidence he was able to work fully with the use of pain killers as and when required. The Tribunal did not accept his evidence that it was only in the 2 weeks prior to 8 June 2020 and thereafter that his condition deteriorated significantly and endured until 17 July 2021. The Tribunal did not find that evidence credible or reliable. It was contradicted by his own self certification form of 8 June 2020.
22. The Tribunal considered that his evidence (and that of his partner) of the impact on the Claimant's day to day activities taken, at its highest, did not constitute a substantial adverse effect. On the Claimant's evidence (and that of his partner) episodes of back pain were sporadic and managed by pain killers. The impact on his day to day activities were addressed by the use of

pain killers when he had episodes of pain. The fact that he had been able to perform such physically demanding work for so long and without issue for the Respondent was significant and telling.

23. In the circumstances the Tribunal conclude that the Claimant's back pain did not constitute a disability as defined in section 6 of EA 2010.

24. The claim of disability discrimination is accordingly dismissed.

10	<b>Employment Judge</b>	<b>A Strain</b>
	<b>Date of Judgment</b>	<b>19 August 2021</b>
	<b>Date sent to parties</b>	<b>23 August 2021</b>

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