



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4106567/2020

**Preliminary Hearing in Glasgow by Cloud Video Platform (CVP) on 2 August
2021**

10

Employment Judge: R McPherson

Mr Scott McCartney

15

**Claimant
In person**

Verdant Leisure 2 Ltd

20

**First Respondent
Represented by:
R Clement
Counsel
C Peel
Consultant**

25

1. The Judgment of the Tribunal is that the claimant, is a disabled person in terms of section 6 of the Equality Act 2010 and was so at the relevant time being from on or around Friday 9 October 2020.
2. The claim is appointed to a case management Preliminary Hearing to consider further Procedure.

30

35

REASONS

1. The claimant presented his claim to the Employment Tribunal on Thursday **22 October 2020** following events which he describes commencing on **Friday 9**

October 2020 when the claimant describes at page 7 (details of claim) a sequence of events commencing Friday 9 October 2021 including he alleges that he was required to wear a face mask, occurring during his then period of current employment with the respondent as a Maintenance Operative.

5 2. Presentation of the ET1 followed upon ACAS conciliation which commenced **Thursday 15 October 2020** and in respect of which ACAS certificate was issued **Wednesday 21 October 2020**.

3. The claimant's ET1, which does not describe any representative, described that his employment had commenced on **Thursday 20 February 2020** and
10 terminated on **Friday 23 October 2020**.

4. The respondent entered its response ET3 on **Tuesday 24 November 2020**. The respondent set out that it resists the claim arguing that the claimant had not sufficiently particularised his claim. The respondent further set out that it expressly denied that the claimant was disabled at the time of the alleged
15 discriminatory treatment. In addition, the ET3 describes that, actual knowledge was denied. While setting out that the claim was insufficiently particularised, in relation to any claim of Indirect Disability Discrimination (s 19 Equality Act 2010) the respondent argued that the requirement constituted a proportionate means of achieving a legitimate aim. The respondent further
20 resisted further possible claims which are not insisted upon. The period of employment is not described, and no specific response is provided to the alleged sequence of events commencing Friday 9 October 2020.

5. In **case management Preliminary Hearing on Thursday 7 January 2021** (Note of which was dated Thursday 7 January 2021 and issued to the parties
25 Monday 25 January 2021; the **January 2021 PH Note**) discussions included what was the statutory claim being insisted upon, the issues for Tribunal in respect of such being described. For the respondent it was asked at what stage they were expected to have knowledge the Note intimating that the respondent's representative indicated that the claimant had ticked a box on a
30 Health Questionnaire that he did not have a disability. The claimant was directed to provide a Disability Impact Statement confirm the type of disability

discrimination claim relied upon with the Tribunal setting out that it for the Tribunal to decide if a person has a qualifying disability.

5 6. On **Monday 18 January 2021**, claimant set out a request for extension of time to allow his doctors to extract information explaining that he had moved GP's. He provided 2 documents

1. letter to his GP putting certain questions regarding qualification under s6 of the Equality Act 2010; and
2. the set out his position on the issue of what his specific claims were in document headed "*Further Particulars*", which set out, in broad terms, that the claimant argues for Indirect Disability Discrimination (s19 Equality Act 2010) including describing a PCP as requirement to wear a mask. The claimant described physical impairments as:
 - a. Long term breathing difficulties (inhaler prescribed)
 - 15 b. Wrist fracture that required surgery
 - c. Labour intensive work, outside and in all weather. Effort level (Hard)

20 The claimant further described that he was asked to fill in a medical questionnaire form which he noted breathing problems, he had a visible scar from surgery which he had shown to his (named) supervisor and when he attended a grievance procedure, he informed his manager that he was unable to wear a face covering because of the impairments.

25

7. On **Tuesday 9 February 2021**, the Tribunal reminded the claimant that he should provide a Disability Impact Statement, it being described that such a statement was more helpful than any views his GP may have on the impact,

indicating that at the right time clarification of medication and duration of any condition can be sought from the GP.

8. On **Thursday 11 February 2021**, the respondent issued Further and Better Particulars (headed as Response to Claimant Further Particulars) in response to the claimant Further Particulars above, setting out that it was understood that the claimant only pursued a claim of Indirect Disability Discrimination (s19 EA 2010) however the claimant had not provided any information on why his alleged impairment has a substantial and adverse effect on his ability to do day to day activities, the respondent set out that it continued to deny that the claimant had a qualifying disability, further knowledge continued to be denied and on the asserted PCP and continued to resist the claim.
9. Following **case management Preliminary Hearing on Friday 23 April 2021**, Note was issued to parties **Wednesday 28 April 2021 (the April 2021 PH note)**. It was noted that the claimant insisted upon claims for Direct Disability Discrimination (s13 EA 2010) and Indirect Disability Discrimination (s19 EA 2010) and Harassment (s26 EA 2010) and that the disabilities he relied upon were asthma and an impairment sustained from a fractured wrist. It was noted that the respondent resisted the claims and disputes disability status at the relevant time. The claimant was ordered to disclose to the respondent the medical evidence he relied upon, and the respondents were ordered to confirm on receipt whether they accepted that the claimant was disabled within the terms of s 6 of Equality Act 2010.
10. On **Saturday 24 April 2021**, the claimant provided documents described as medical evidence with an explanation on (change of) surname and a schedule of loss.
11. On **Wednesday 12 May 2021**, the claimant intimated that that he wished to seek strike out of the respondent's response in full, as he had not received a response on whether disability status remained in dispute.

12. On **Tuesday 25 May 2021**, the respondent set out that it maintained that the claimant was not disabled at the material time of the alleged discrimination, describing that this position was maintained in respect of “*both the Claimant’s alleged disabilities, namely*

- 5
- *Breathing disabilities; and*
 - *Wrist problems following a fracture in December 2019”*

The respondent intimated that, if the claimant wished to continue with his application for strike out of the response the respondent would respond at the Preliminary Hearing on 4 June 2021.

10

13. At **case management Preliminary Hearing on Friday 4 June 2021 (the June 2021 PH)**, it was noted that the claimant had made application to strike out the respondent response, however, the claimant confirmed that application was not insisted upon, the respondents having confirmed that disability status remained in dispute. It was agreed that an Open Preliminary Hearing by CVP should take place to determine disability as a discreet issue with the date for same being confirmed as **2 and 3 August 2021** and various directions were issued. It was noted that the claimant intimated that he had some additional medical evidence and understood to provide same to the respondents’ representatives within 7 days (that is by **Friday 11 June**). If the respondents decided to concede disability status, based on that information, they undertook to confirm the position **by Friday 18 June 2021**.

15

20

25 14. On **Friday 18 June 2021**, the claimant sought **Order** from the Tribunal requiring the respondent to provide a Health Questionnaire which the claimant asserted was completed at the start of his employment with the respondent.

15. On **Wednesday 30 June 2021**, the Tribunal granted **Order** requiring disclosure of "*the health questionnaire that the claimant completed at the start of his employment*", requiring that it be disclosed before **12 July 2021 (the June 2021 Order)**.
- 5 16. On **Tuesday 6 July 2021**, the respondent's agents provided (what the respondent says) is the Health Questionnaire to the claimant and Tribunal.
17. On **Tuesday 6 July 2021**, the claimant responded setting out to the Tribunal that, in summary, the Health Questionnaire provided was not complete and sought Strike Out of the respondent's response. The claimant described that
10 he believed that documents had been doctored, the first document was, he said filled in June 2019 when commencing an earlier period of employment which concluded October 2019, describing that he started back in February 2020. The claimant set out that respondent had provide parts of both questions and missed section in relation to current medication and previous
15 surgery 12 months prior to the second period of employment (that being the period when the issue arose).
18. On **Wednesday 7 July 2021**, the respondent responded to the claimant's request for strike out, seeking strike out of the claim in terms of Rule 37(1) (b) and (e) of the 2013 Rules and provided 6 documents:
- 20
- 18.1 What was said to be claimant Health Questionnaire signed and dated 10 July 2019: and
- 18.2 What was said to be claimant Health Questionnaire signed and dated 22 February 2020: and
- 25 18.3 What was said to be claimant Employment Information in respect of 2019 employment: and
- 18.4 What was said to be claimant Employment Information in respect of 2020 employment: and
- 18.5 What was said to be document properties of the 2019
30 Employment Information: and
- 18.6 What was said to be document properties of the 2020 Employment Information.

The respondent set out that, in their view, the way proceedings had been conducted were scandalous, unreasonable, or vexatious and it was no longer possible to have a fair trial.

- 5 19. On **Tuesday 13 July 2021**, the claimant sought strike out in accordance referencing with rule 37(1) (c) of the 2013 Rules based on what was described as noncompliance. The claimant referred to the June 2021 Order for disclosure of the Health Questionnaire, arguing that the respondent had failed to provide the document completed at start of his employment. The claimant
10 noted the terms of para 10 of the **January 2021 PH Note**, it was described out that respondent's representative had indicated to the Tribunal that the claimant had ticked a box on a medical questionnaire at the start of his employment that he was not disabled. The claimant described that the provided Health Questionnaire did not ask that question. The claimant
15 described that the respondent and its representative had knowledge of a different questionnaire describing what he said were questions contained in same.
20. On **Thursday 15 July 2021** the Tribunal intimated that both strike out applications would be discussed at Preliminary Hearing on **2 August 2021**.
- 20 21. In advance of this Preliminary Hearing a file was provided by the respondent, with an updated file being provided by the respondent on **Friday 30 July 2021**. That file included ET1, ET3 Further particulars for the claimant and the respondent, claimant's Disability Impact statement and extract of what were described as GP records (around 18 pages), a medical report dated
25 Wednesday 5 May 2021 elements of which are redacted. Further the file contained what were said to be: claimant Health Questionnaires Wednesday 10 July 2019 and Saturday 22 February 2020, claimant job description Wednesday 6 May 2020, claimant's information file 2019 and 2020, properties of information file 2019 and 2020, The file also contained copy of
30 some of the parties communication with Tribunal including respondent's strike out application Wednesday 7 July 2021, claimant's strike out

application Tuesday 13 July 2021 and Tribunal's correspondence regarding both dated Thursday 15 July 2021.

22. As set out above, this Preliminary Hearing was appointed at the **June 2021 PH** to determine whether the claimant had a qualifying disability.

5 23. The sole witness arranged for this hearing was the claimant.

24. At the outset of this Preliminary hearing the respondent confirmed that were not insisting that Strike Out application be considered at the outset of this Open Preliminary Hearing and were reserving their position. The claimant considered that his application should proceed.

10 25. I concluded for reasons set out below that it was appropriate to proceed in accordance with overriding objective, with the question set out at the June 2021 PH, namely whether the claimant had a qualifying disability for the purpose of the claims before the Tribunal. In particular and notwithstanding the assertion, now made shortly before this hearing to the effect that there
15 was a second undisclosed February 2020 Health Questionnaire, I considered that it could not be said that there was a clear and obvious disobedience of the June 2021 Order

26. It could not be said, for the purpose of the issues of the present hearing that the production of the February 2020 Health Questionnaire, in response to
20 the June 2021 Order, to provide "*the questionnaire*" was to prevent to Tribunal from having the best evidence on which to base its findings of fact on whether the claimant had a qualifying disability.

27. After this hearing I issued directions to the effect that if the claimant had a
25 qualifying condition, it was a matter of agreement that the claim should proceed to a Final Hearing. Those directions require to be varied reconsidered in terms of Rule 71 of the 2013, in respect that it is presently understood that the claimant maintains that his application for Strike Out should be considered prior to further procedure.

28. In these circumstances I direct that a 1 Hour case management Preliminary Hearing be appointed to consider further procedure. Both applications for Strike Out are reserved meantime.

29. The above preliminary matters are, so far as material to the present issue also Findings of Fact, although not repeated below for the sake of brevity.

30. The following evidential findings of facts are found to be relevant to the question directed by the June 2021 PH for this Tribunal to consider.

31. No findings of fact as to the specific events of Friday 9 October up to Friday 23 October 2020 are made beyond noting that the claimant makes allegations regarding events on Friday 9 October, and it is not in dispute that his employment terminated on Friday 23 October 2020.

Evidential Hearing Findings of Facts

32. The claimant commenced his most recent period of employment with the respondent on **Thursday 20 February 2020** as a maintenance assistant and terminated on **Friday 23 October 2020**.

33. The relevant period is the period from **Friday 9 October 2020** to **Friday 23 October 2020** including when the claimant alleges that he received specific instructions around the use of face coverings.

34. The claimant has suffered from breathlessness from around June 2007 including the period from **Friday 9 October 2020** to **Friday 23 October 2020**

35. In **June 2007** and for a period thereafter until some point prior to January 2020 the claimant had a different surname but same NHS reference number (CHI Number).

36. In **June 2007** the claimant was admitted for medical examination at Raigmore Hospital as he was suffering breathlessness when undertaking

any physical activity. He had been using his then partner's inhaler to relieve same. He was diagnosed with the symptoms of asthma in July 2007.

- 5 37. In **March 2011**, the claimant's GP practice nurse invited him to make an appointment to discuss his inhaler and symptoms, describing that he needed a new inhaler every month for asthma symptoms, while the inhaler should last for a year.
- 10 38. In **April 2011**, the claimant was admitted for overnight attendance at the Arran War Memorial Hospital with asthma symptoms. He was provided with a preventative inhaler and steroid treatment for breathlessness as symptoms of asthma-related breathlessness. The admission and events which led to same were a frightening experience for the claimant.
- 15 39. In **August 2012**, the claimant attended his then GP seeking a prescription for an inhaler and was prescribed an inhaler with puffs to be taken up to 4 times a day.
- 20 40. In **September 2012**, the claimant was admitted to Arran War Memorial Hospital due to suffering wheezing since the early morning. That breathless was a frightening experience for the claimant. He was at the time using Salbutamol up to 8 times a day, although use had been recommended up to 8 times a day in August. His condition was identified as acute, and he was prescribed an inhaler, of which two puffs were to be taken once a day.
- 25 41. In **January 2015**, the claimant was prescribed Salbutamol breath-actuated inhaler for asthma symptoms, the attending Doctor diagnosing the condition as acute.
42. In **January 2016**, the claimant was prescribed Salbutamol breath-actuated inhaler for asthma symptoms, the attending Doctor diagnosing the condition as acute.
- 30 43. In **November 2016**, the claimant was prescribed a Salbutamol inhaler by his GP surgery.

44. Subsequently, following the loss of a family member, the claimant did not return to the GP. The claimant instead utilised/borrowed his partner's inhaler, which gave relief from symptoms of his rapid onset of asthma when he used it in the morning. The claimant has additionally required his partner to provide the partner's inhaler at other times, including when walking when he struggles to breathe. The claimant has continued to suffer symptoms of rapid onset of asthma, causing him to struggle to breathe since at least 20007. Since the claimant did not return to the GP to reduce the impact of the asthma, he took 2 puffs on the borrowed inhaler to control his breathing, which will also commonly take away tightness in his chest.

45. On **Wednesday 10 July 2019**, in relation to an earlier period of employment with the respondent, the claimant signed a respondent document headed Health Questionnaire (the July 2019 Health Questionnaire) responding to 6 (un-numbered) questions:

45.1 Have you ever left or changed a job for medical reasons? The claimant ticked no.

45.2 Do you have any physical or mental health problem which affected your ability to carry out normal day to day activities? The claimant ticked no.

45.3 Are you currently receiving advice or treatment from your General Practitioner or Medical Specialist or waiting to see one?

45.4 Do you suffer from any long term or recurrent medical condition requiring regular medication, treatment or therapy? The claimant ticked no.

45.5 Do you have any health issues that have been caused or could be made worse by work? The claimant ticked no.

45.6 Do you require any reasonable adjustments to enable you to perform the duties of your job role? The claimant ticked no.

46. No reference is made to asthma in the July 2019 Health Questionnaire, and the claimant's recollection is that he ticked no for quickness.
47. On **Wednesday 18 December 2019**, the claimant sustained a wrist fracture, underwent surgery at Crosshouse Hospital on Thursday 19 December, and was allowed home.
48. On **Monday 22 February 2020**, the claimant signed a respondent document headed Health Questionnaire (the February 2020 Health Questionnaire) responding to 6 (unnumbered) questions:
- 48.1 Have you ever left or changed a job for medical reasons? The claimant ticked no.
- 48.2 Do you have any physical or mental health problem which affected your ability to carry out normal day to day activities? The claimant ticked no.
- 48.3 Are you currently receiving advice or treatment from your General Practitioner or Medical Specialist or waiting to see one?
- 48.4 Do you suffer from any long term or recurrent medical condition requiring regular medication, treatment or therapy? The claimant ticked no.
- 48.5 Do you have any health issues that have been caused or could be made worse by work? The claimant ticked no.
- 48.6 Do you require any reasonable adjustments to enable you to perform the duties of your job role? The claimant ticked no.
49. The claimant's recollection is that he completed two forms in February 2020, the first of which the respondent has not provided. The June 2021 Order was expressed as requiring the respondent to provide *the health questionnaire that the claimant completed at the start of his employment*". The claimant accepts that the February 2020 Health Questionnaire is produced. The

claimant's recollection is that he incorrectly completed the February 2020 Health Questionnaire, having correctly completed the other (not provided Health Questionnaire) explaining that he had asthma, needed to use inhalers, and further referred to surgery in 2019.

5 50. In **March 2020**, the UK Government issued measures in connection with the onset of the Covid 19 pandemic. Those measures, including what has been described as lockdown, were subsequently modified.

51. From or about **Friday 9 October 2020**, the claimant describes a sequence of events that culminated in his employment termination on **Friday 23**
10 **October 2020**.

52. In **January 2021**, the claimant attended his GP for reasons unrelated to his breathlessness; when his inhaler technique was observed, it was noted that he was using his partner's inhaler.

53. In **April 2021**, the claimant attended for a medical report in connection with
15 the December 2019 wrist injury. While elements of that report are redacted, relevantly for the present claim, the Consultant Orthopaedic Surgeon reported the claimant being symptomatic for 2 or 3 months following the December 2019 injury. He offered his opinion that, on a balance of probabilities, nuisance level symptoms would be expected to continue for
20 some time longer than that, perhaps up to 12 months from the December 2019 injury.

25 **Submissions**

54. Both parties provided detailed written submissions. It was agreed that following the overriding objective, the respondent should give its draft submission to the claimant in the first instance. The claimant, after that

providing his draft submission to the respondent. Both parties were directed to provide their final submissions to the Tribunal subsequently.

55. **Submissions for the claimant** set out that the claimant was a disabled person at all material times by reason of both asthma and wrist injury. The claimant described that his medical history was explained in medical questionnaires and in a grievance meeting in October 2020 together with the provided medical records and argues, in summary, that he suffered from the symptoms of both throughout the relevant period.
56. The claimant insists upon his position in relation to Strike Out. The claimant refers to **National Grid Co Plc v Virdee** [1992] 1 WLUK 220 (**Virdee**); **De Keyser Ltd v Wilson** [2001] 3 WLUK 564 (**De Keyser**) **Essombe v Nandos Chickenland Ltd** [2007] 1 WLUK 294 (**Essombe**) para 19; **Bolch v Chipman** [2003] 5 WLUK 547 (**Bolch**) and **James v Blockbuster Entertainment Ltd** [2007] EAT/0385/05 (**James 2007**). The claimant argues that his Strike Out application should have been proceeded based on what he says is the respondent's non-compliance with the June 2021 Order.
57. **Submissions for respondents** invited the Tribunal to find the claimant was not a disabled person at the relevant time. The respondent provided a chronology of the claim. The respondent argues that there is no wrist injury impairment before the Tribunal. In the alternative, if such impairment was before the Tribunal, the respondent contends that it does not amount to a qualifying impairment referring to the Orthopaedic Medical Report.
58. The respondent argues that matters beyond the relevant period should be disregarded in accordance with **All Answers Ltd v W** [2021] EWCA 606 (**All Answers**).
59. The respondent further argues that the only live complaint before the Tribunal was s19 EA 2010, referencing the claimant's Further Particulars (provided to the respondent and Tribunal on Monday 18 January 2021) and set out what are said to be the issues for the Tribunal.

Relevant Law

60. S6 of the Equality Act provides:

Disability

5 (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.*

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

(3) *In relation to the protected characteristic of disability—*

(a) *a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*

15 (b) *a reference to persons who share a protected characteristic is a reference to persons who have the same disability.*

(4) *This Act ... applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly—*

(a) *a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*

20 (b) *a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*

61. Further Schedule 1 to the EA 2010 provides that:

25 (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.*

(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.”*

62. I have also had regard to the cases referred.

Fair Notice

63. The Tribunal notes that in **Chandhok and Another v Tirkey** [2015] IRLR 195 (**Chandhok**) Langstaff J, commented at para 18 parties are expected to set out the essence of their respective cases in writing and “... *a system of justice ... requires each party to know in essence what the other is saying, so they can properly meet it*”.

64. As the claimant has referred to case law in support of his position on Strike Out in his written submission, I consider appropriate to set out some comment of the cases referred to, and which I have considered.

Strike Out

65. Rule 37 of the 2013 Rules provides

Striking out

37. (1) *At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

(a) *that it is scandalous or vexatious or has no reasonable prospect of success;*

(b) *that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent*

(as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

5 *(d) that it has not been actively pursued;*

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

10 *(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.”

15 66. The issue between the parties on Strike Out is an evidential one of whether a document exists. It is considered in accordance with the overriding objective to note the terms of Rule 41 of the 2013 Rules;

20 *“41. The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the*
25 *courts.”*

67. Striking out a claim or response is a draconian measure.

68. Strike Out may be appropriate, as described in **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126 (**Ezsias**), where the facts sought to be established are inexplicably inconsistent with undisputed contemporaneous documentation. However, and while there is no rule that discrimination claim or response cannot be struck out, where the basis of the application to strike out is not one of jurisdiction, limitation, or another clear point of law, extreme hesitation would require to be exercised in doing so and may indeed be an error of law to pre-empt the determination of a full hearing, and the risk of injustice, to either party, is minimised if answers on fact-sensitive questions are deferred until the relevant facts are out [**Anyanwu v South Bank Student Union** [2001] ICR 391 (**Anyanwu**) para 24 and 37].

Discussion Decision

Amendment/Wrist Injury

69. The respondent, in its submissions, is critical that the claimant has not formally requested an amendment to include wrist injury in his claim.
70. At para 15 of his submission, the claimant, responding to the respondent submissions, sets out that he was unaware that an application was required to include (the wrist injury) in his claim.
71. I note that the claimant's Further and Better Particulars issued **Monday 18 January 2021**, set out that the physical impairments he considered affected him were
1. Long term breathing difficulties (inhaler prescribed)
 2. Wrist fracture that required surgery.
 3. Labour intensive work, outside and in all weather. Effort level (hard)
72. The **April 2021 Note** set out at paragraph 1 (page 2) that "*the disabilities he relies upon are asthma and a residual impairment from a fractured wrist.*"

73. On **Tuesday 25 May 2021**, in an email to the Tribunal, the respondent set out that it maintained that the claimant was not disabled at the material time of the alleged discrimination, describing that this position was maintained in respect of *“both the Claimant’s alleged disabilities, namely*

- 5
- *Breathing disabilities; and*
 - *Wrist problems following a fracture in December 2019”*

74. I do not accept that the claimant’s complaint of wrist injury was a matter of which the respondent lacked fair notice.

10 75. While parties are entitled to the fair notice of the position adopted by the other party, I have reminded myself that Tribunals should do their best not to place artificial barriers in the way of potentially genuine claims. I am satisfied those residual injuries from wrist injury were an impairment which notice had been given.

15

Discussion and Decision

Qualifying impairments

76. The claimant’s Disability Impact Statement is broadly drawn. Where the claimant’s evidence was contradicted by medical report, specifically that of the consultant orthopaedic surgeon report, I did not accept those aspects of the claimant’s evidence.

20

77. The July 2019 Health Questionnaire does not refer to asthma, and it would logically not contain any reference to the subsequent wrist injury.

25

78. As he reasonably accepts in his submissions (para 16) providing his responses to the disclosed February 2020 Health Questionnaire, the claimant did not describe his asthma condition.

79. It is the claimant's position that he completed two forms in February 2020, the first of which has not been provided (despite the June 2021 Order), the second of which is the Health Questionnaire in 2020, which he completed incorrectly having (he asserts) correctly completed the first, explaining that he had asthma, needed to use inhalers and referred to the 2019 surgery.
80. The issue before the Tribunal is whether the claimant had a qualifying disability at the relevant time.
81. I am not required to conclude whether the respondent had knowledge. That is a separate question not directed for this hearing.
82. Both the July 2019 Medical Questionnaire and the available February 2020 Medical Questionnaire (which is set out in the same terms as the July 2019 Medical Questionnaire) were completed before the Covid 19 pandemic and steps taken in consequence. I conclude that despite the absence of comment in both of asthma, he had that condition at the relevant time, and it was a condition which the claimant controlled with inhalers. I accept that on each occasion, noting that both were completed before the Covid 19 pandemic and the subsequent measures, the claimant did not identify asthma to employers in those two provided forms.
83. I am not required for the purpose of this hearing to conclude whether the claimant, as he argues, also completed a different 2020 Medical Questionnaire answering some of the questions in the affirmative.
84. I would not wish these reasons to be misunderstood as implying a finding that the claimant has lied.
85. The position is simply that, having reviewed contemporaneous documentation, I was unable to accept the accuracy of the claimant's honest, but I consider inaccurate recall of matters relating to his wrist injury at the relevant time when compared to the medical report by the consultant orthopaedic surgeon.

86. In light of subsequent events, I consider that the claimant's recall of whether he suffered wrist injury symptoms at the relevant time has become inaccurate.

5 87. I have had regard to the terms of s 6 of the EA 2010, which provides that
person has a disability or if s/he has a physical or mental impairment which
has a substantial and long-term adverse effect on her/his ability to carry out
normal day to day activities. I also had regard to the case to which I was
referred. I have had regard to the relevant period itself and have also, so far
10 as may be relevant to Schedule 1 above, had regard to the claimant's history
preceding the relevant period.

88. I accept that the claimant has suffered from asthma from at least 2007
through to the relevant period. That condition has been acute since at least
15 2011, and he had been prescribed with an inhaler to treat the symptoms of
that condition, being breathlessness. The claimant has elected for personal
reasons to utilise the inhaler provided to his partner and not present for re-
prescription after November 2016. Before the relevant period, the claimant
was prescribed steroid pills on a one-off occasion. The claimant's asthma
20 has a substantial day-to-day effect on the claimant's ability to breathe, which
is a day-to-day activity. The symptoms of asthma have further had a
substantial day to day effect on his ability to carry out routine exercise without
the use of medication (the inhaler) to relieve those symptoms.

89. While noting events following the relevant period for context as to the
25 claimant's recall of events at the relevant time, I have not had regard to events
occurring beyond the relevant date when considering the application of s6 EA
2010.

30

Physical impairments

90. The claimant has a physical impairment; he has asthma. I was entirely satisfied that this was a case in which the claimant suffers from asthma. There were significant asthma impairments from which the claimant has suffered but for the use of inhalers, whether prescribed or borrowed.

5

91. In addition, the claimant has suffered a wrist fracture.

Did the impairment have a substantial effect?

92. In relation to the impairments, I am required to determine whether the claimant's impairment has or indeed had a substantial and long-term adverse effect on his ability to carry out normal day to day activities. The term "*substantial*" is defined as "*more than minor or trivial*."

10

15

20

93. The claimant's asthma has manifested at times through breathlessness, and it has been consistently acute. The occurrence of the claimant's asthma has impacted on his ability to breathe onset of acute symptoms. I am satisfied from the evidence taken as a whole that the claimant's ability to breathe without reliance upon inhalers, both prescribed and borrowed, has also been affected at times during the rapid onset of its symptoms. I am satisfied that, taking the evidence as a whole, the claimant's impairment of asthma has or indeed had a substantial and long-term adverse effect on his ability to carry out normal day to day activities.

25

94. I have applied the same approach to the second condition raised, being the wrist injury. That condition is expressly identified in the **April 2021 PH note** and that the disabilities he relied upon were asthma and impairment sustained from a fractured wrist. The respondent argues that an application for amendment is required. For the reasons set out above, I disagree. The respondent had notice from at least the April 2021 PH that the claimant relied upon two conditions, the second of which is the wrist injury.

30

95. The consultant orthopaedic surgeon report does offer support for the claimant's position that the impairment was (at a time) potentially substantial,

reporting the claimant's description to him being most symptomatic (for a period), however as with asthma, that is not the final question here, and I address that below.

Were the substantial effects long-term?

5 96. I further considered whether the substantial effects were long-term. The claimant has had asthma since at least 2007 to the relevant period. The effect of an impairment is long-term if it has lasted for at least 12 months, is likely to last at least 12 months, or is likely to last long at rest of the life of the person affected.

10 97. I have applied the same approach to the second condition raised, being the wrist injury. As above, the effect of an impairment is long-term if it has lasted for at least 12 months, is likely to last at least 12 months, or is likely to last long at rest of the life of the person affected. The consultant orthopaedic surgeon report does not support the effect of the impairment as being likely
15 to last more than 12 months. His analysis is that the substantial effects (the most symptomatic) lasted two or three months is accepted.

98. There is nothing suggested by the consultant surgeon in his report that the wrist injury was likely to recur.

20 99. This is not a case in which I have required to consider the provisions in the Equality Act 2010, which provide that if an impairment ceases to have a substantial adverse effect on that person's ability to carry out normal day to day activities, it is treated as continuing if the effect is likely to recur (that is it could well happen).

25

100. In coming to this decision, I have not had regard to events after the relevant period.

30 101. In conclusion, I was satisfied that the substantial adverse effects of the asthma impairment were long-term because they had lasted and were likely to last at least 12 months and did so through the relevant period.

Decision

102. The claimant is a disabled person in terms of s 6 of the Equality Act 2010. He has a physical impairment (asthma) which has a substantial long-term adverse effect on his ability to carry out normal day to day activities. Those activities include the ability to breathe. The claimant was a disabled person by reason of his asthma.

Statutory Claims Relied upon.

103. No determination is made as to which specific statutory claims are relied upon. While the respondent in submission intimates that amendment is required to expand beyond s19 EA 2010 referencing the claimant's Further Particulars emailed on **18 January 2021**, parties are reminded of the terms of the subsequent **April 2021 PH note**, para 1.

Strike Out

104. In accordance with the overriding objective, I concluded that it was appropriate to proceed with the Open Preliminary as appointed at the June 2021 PH. The claimant sought and was granted the June 2021 Order.

105. The respondent has provided what is understood to be argued by the respondent, what the claimant sought in the June 2021 Order. It is said to be the February 2020 Health Questionnaire, and the claimant completed it. It is in the same term as the February 2019 Health Questionnaire, which the claimant completed. Representations were made at the January 2021 Preliminary Hearing summarised at para 10 of the January 2021 Note, that the claimant completed a medical questionnaire which he ticked that he was not a disabled person under the Equality Act. That may describe a separate document.

106. It could not be said, so far as relevant to the issue for this hearing, that there was a clear and obvious disobedience of the June 2021 Order.

107. It could not be said, for the present hearing, that the production of the February 2020 Health Questionnaire, in response to the June 2021 Order to

provide "*the questionnaire*" was to prevent the Tribunal from having the best evidence on which to base its findings of fact on whether the claimant had a qualifying disability.

5 108. The Tribunal acknowledges that the claimant's recollection is that there is a different questionnaire provided around the same date, which he completed giving information to the respondent which he considers would be of assistance to demonstrating knowledge, including from the outset of the relevant period.

10 109. The findings of fact here do not determine knowledge on the part of the respondent, and that matter is reserved. Whether the respondent acquired knowledge of disability and indeed circumstances and indeed period in which it may be argued that an employer may acquire such knowledge of a disability before, and indeed, during a relevant period is an evidential matter not relevant for this Hearing.

15 110. At the conclusion of this Open Preliminary Hearing, I issued directions (at para 2 of that Note) on **Monday 2 August 2021** to the effect that, if the claimant had a qualifying condition, it was agreed that the claim should proceed to a Final Hearing. Having reviewed the respective submissions, I vary that direction to allow parties to address the Tribunal at a case management Preliminary Hearing on a date to be appointed, following this judgment, on 20 whether both parties' application for Strike Out should be considered at a separate Open Preliminary Hearing. I make no determination on either party's reserved position on Strike Out.

25

111. The question of whether the parties respective Strike Out applications should be considered a separate Open Preliminary Hearing, or, whether it would be better to hear all the evidence and then decide the case in the round is reserved to the next case management Preliminary Hearing.

Further procedure.

112. A further telephone case management will be appointed to consider further procedure.

5 Employment Judge: Rory McPherson
Date of Judgment: 23 September 2021
Entered in register: 04 October 2021
and copied to parties

10

15