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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110593/2021

Open Preliminary Hearing held in Dundee by Cloud Based Video
Platform (CVP) on 20 May 2022

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Employment Judge Tinnion

Mr. Kevin Sneddon

Claimant

Rep: Mr. Crammond
(Counsel)

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Versalis UK Ltd.

Respondent

Rep: Mr. Price
(Counsel)

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RESERVED JUDGMENT

1. The material time for the purpose of the Claimant's disability-related claims under the Equality Act 2020 was 1 January 2020 – 30 July 2021.
2. During the material time, the Claimant was a disabled person under s.6 of the Equality Act 2010 because of a physical impairment - acromioclavicular arthritis affecting his left shoulder - in the period 15 February 2020 – 19 July 2021.

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REASONS

Claim

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1. By an ET1 and Paper Apart [4-19] presented on 30 July 2021, the Claimant presented claims against his current employer of (i) discrimination arising from disability under s.15(1) of the Equality Act 2010 (**EqA**) (ii) failure to make reasonable adjustments under ss.20-21 EqA (further particulars provided) (iii) harassment related to disability under s.26 EqA (further particulars provided).

The disability the Claimant relies upon is acromioclavicular arthritis affecting his left shoulder.

2. In its ET3 and Grounds of Resistance [24-40], the Respondent denied the claims,
5 denied the Claimant was disabled at the material times, accepted it had aware that the Claimant suffered from left shoulder pain, but denied it had been aware that the Claimant was diagnosed with arthritis until 22 February 2021.
3. By para. 4 of a Case Management Order dated 30 March 2022 [55], the Tribunal
10 (EJ Jones) ordered that an Open Preliminary Hearing (**OPH**) be listed on 20 May 2022 to determine “*whether the Claimant was a disabled person at all material times for the purposes of the Equality Act 2010*”.
4. In advance of the OPH, the Respondent lodged a ‘Position Statement’ dated 19
15 May 2022 which:
 - (a) conceded the Claimant had a physical impairment by reason of acromioclavicular arthritis;
 - (b) conceded C’s impairment adversely affected his ability to carry out activities
20 at work, but denied his work activities constituted normal day-to-day activities given the specialist nature of the tasks he undertakes;
 - (c) denied there was reliable evidence that normal non-work day-to-day activities – painting, changing lights bulbs, climbing a ladder, riding a bike, going to the gym – were adversely affected;
 - 25 (d) denied any adverse effects on the Claimant were substantial;
 - (e) (in terms) put the Claimant to proof that any substantial adverse effect on his ability to carry out normal day-to-day activities was long-term.
5. The OPH was held on 20 May 2022. Both parties were represented by counsel.
30 An electronic bundle of c.155 pages was produced (references in square brackets are to that bundle). The Claimant gave evidence and was cross-examined. The Respondent did not call witnesses. The Tribunal was satisfied the Claimant sought to assist the Tribunal by giving his honest, best recollection

of events. At the OPH, the Respondent (through counsel) accepted that from August 2020 onwards, the Claimant was restricted in the work duties he performed at work because of his left shoulder problem.

Findings of fact

- 5 6. The Tribunal makes the following findings of fact, including any contained in the other sections of this document, on the balance of probabilities.

Work history

- 10 7. The Respondent processes and manufacturers rubber products. The Claimant joined in 2018 (he says 2017) as a Process Operator at its Grangemouth site. His role involved operating, monitoring and cleaning plant and machinery used in the process of 'desolventising' (removing solvent from a solid by thermal means) and drying synthetic rubber.

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8. In December 2019, following a visit to the gym, the Claimant began to experience a problem with his left shoulder/left arm. He continued to attend work. He visited his GP on 14 January 2020, but did not complain about problems with his left shoulder [100]. The Tribunal infers that at this early stage any left shoulder problems the Claimant was experiencing were initially minor and manageable.
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9. On or around March 2020, following the onset of the Covid-19 pandemic, the Claimant was put on furlough, and remained on furlough until early June, when he returned for a brief period (possibly 8-10 June). However, he struggled to perform his work duties because of left shoulder pain.
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10. The Claimant started a further period of absence from 11 June 2020 due to left shoulder pain which continued until 14 August 2020 [67]. On about 17 August 2020 the Claimant returned to work, and signed an Employee Statement of Sickness [67] which his shift manager co-signed stating his absence dates.
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11. On 25 February 2021, the Claimant began a further period of absence from work due to work-related stress which continued past 30 July 2021 (the Claimant remained off work up to the date of the OPH).

5 12. On 11 August 2021, the Claimant signed a 'Group Income Protection' employee claim form [74-82] which represented (the Tribunal finds truthfully) that (i) his usual working environment was a factory floor (ii) the essential duties of his Process Operator post were drying and bailing rubber (iii) his job involved the following activities:

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- a. operating special machinery
- b. walking
- c. prolonged periods in one posture
- d. climbing ladders
- 15 e. climbing stairs
- f. bending
- g. reaching/stretching
- h. kneeling
- i. lifting items in excess of 25kg
- 20 j. lifting/moving bulky items
- k. frequent lifting of smaller/lighter items
- l. working with hazardous materials

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13. On 28 October 2020, the Claimant attended a physiotherapy appointment with Mr. Rob Storey [93]. The Claimant saw Mr. Storey again on 2 November 2020, who was concerned that there was a temperature difference between the Claimant's hands, and advised him to attend Minor Injuries at hospital.

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14. By a discharge letter dated 3 December 2020 [120-121], physiotherapist Mr. Redding noted the Claimant had had extensive physiotherapy since June 2020 regarding his left shoulder issue. Mr. Redding's opinion was that the Claimant had undergone an improvement which had now plateaued, and felt his own input was actually making the left shoulder worse. In Mr. Redding's opinion,

physiotherapy had taken the Claimant as far as it could and he would benefit from orthopaedic review.

Medical evidence

5 15. Fitnotes. Following visits to his GP, the Claimant was diagnosed with left shoulder pain, and certified as unfit for work or fit for work on restricted duties on 11 June 2020 [64] 10 July 2020 [65] and 6 August 2020 [66]. The Claimant was certified as not for work due to shoulder pain/stress on 25 February 2021. The Claimant was certified as not for work due to stress on 26 February 2021 [68] 25 March 2021 [69] 21 April 2021 [70] 19 May 2021 [71] 16 June 2021 [72] 15 July 10 2021 [73] and 19 August 2021.

16. Occupational Health. On 25 June 2020, the Claimant attended an in-person occupational health assessment by Dr. Johnston, a Senior Occupational Physician, who prepared a report dated 29 June 2020 [83-84] which stated 15 (i) the Claimant had significant left shoulder pain requiring regular medication (ii) on examination there was asymmetry and substantially reduced movement in his left shoulder (iii) the Claimant tended to hold his arm as in in a sling position for comfort and struggled to move his left shoulder in most directions due to pain (iv) the Claimant was not fit for any manual handling duties (v) the condition had 20 persisted for 5 months (vi) any return to normal duties might be at least 2 months away if not longer if surgery was required (vi) *“the reality is that the Claimant cannot undertake any of the physical duties of his role, shovelling, lifting bales, climbing ladders”* (vii) *“he therefore is only fit if you can accommodate a post that avoids physical duties involving the use of this [left] arm”*.

25 17. On 27 August 2020, the Claimant saw Dr. Johnston again, who prepared a second report dated 1 September 2020 [85-86] which stated (i) the tightness around his left shoulder and arm had loosened a bit since 25 June, but (ii) the Claimant still had a considerably reduced range of movement in his left 30 shoulder, particularly with movement above shoulder height, and had reduced strength in his left arm (iii) the Claimant recognises he is unable to undertake a number of activities due to his left shoulder problem including lifting activities

above shoulder height (iv) the Claimant is fit for work only if restricted duties can be accommodated (v) due to Covid-19 the Claimant had not seen an orthopaedic surgeon (vi) the timescale for these restrictions were likely to be measured in months.

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18. Following a telephone consultation on 26 November 2020, by a third report dated 1 December 2020 [87-88] Dr. Johnston states (i) the Claimant reported improvement in the range of movement in his left arm (ii) the Claimant's left shoulder was still troubling him (iii) certain left shoulder movements still trigger pain (iv) the Claimant had been at work managing his work activities through a combination of annual leave, assistance from colleagues and pain medication (v) the Claimant remains fit for work only if restricted duties or assistance from a colleague could be accommodated.

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19. Following a consultation on 29 April 2021, by a fourth report dated 4 May 2021 [90-91] Dr. Johnston stated (i) there had been some improvement in the Claimant's left shoulder from last year, but (ii) the Claimant was still not physically able to do tasks such as cage bars and shoulder height shovelling (iii) the Claimant remained unfit to undertake the job for which he is employed.

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20. Diagnosis/surgery. By letter typed on 16 February 2021, Mr. Moses (Consultant Orthopaedic Surgeon) diagnosed the Claimant's pain as coming from his arthritic left AC (acromioclavicular) joint, and put the Claimant on the waiting list for surgery (arthroscopic excision of the left AC joint). By letter dated 9 February 2021, Mr. Moses noted that the Claimant had degenerative changes.

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21. By letter dated 5 May 2021, GP Dr. Scott stated the Claimant had had an ultrasound scan which showed an arthritic AC joint for which he was awaiting an operation.

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22. On 29 June 2021, Mr. Moses operated on the Claimant under general anaesthetic by way of an open excision of his left AC joint. By letter dated 29 June 2021, Mr. Moses noted that post-operative recovery should be uneventful,

with the Claimant to wear a poly sling for 4-6 weeks (in the event it was closer to 2 weeks).

23. GP records. The Claimant had (in person or remote) GP appointments regarding
5 his left shoulder on 13 May 2020 (3 month history of shoulder pain) [100] 26 May
100 (ongoing left shoulder pain) [99] 8 June 2020 (very painful) [99] 11 June
2020 (chronic left shoulder pain) [99] 22 June 2020 (ongoing shoulder pain) [98]
10 July 2020 (left shoulder pain) [65] 23 July 2020 (ongoing pain, no
improvement) [97] 6 August 2020 (left shoulder pain) [66, 97] 9 October 2020
10 (return of left AC pain and popping) [97] 15 January 2021 (patient uses co-
codamol for AC pain) [97] 29 January 2021 [96] 19 February 2021 (wondering if
steroid injection to AC may be useful) [96] 25 February 2021 (shoulder pain) [96].

Relevant law

24. Section 6 of EqA provides:

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- 6 **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.
 - (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;
 - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
 - (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability, accordingly (except in that Part and that section)—
 - (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
 - (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.
 - (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
 - (6) Schedule 1 (disability: supplementary provision) has effect.

Duration

25. The effect of an impairment is “long-term” if it (a) has lasted for at least 12 months (b) is likely to last at least 12 months or (c) is likely to last for the rest of the life of the person affected. EqA, Schedule 1, para. 2(1).

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Date of assessment of disability

26. The date to assess whether a person’s impairment constitutes a disability is the date of the discriminatory act. Cruickshank v VAW Motorcase [2002] ICR 729, EAT. That is the correct date to determine whether the impairment had, or is likely to have, a long-term effect. All Answers Ltd v W [2021] EWCA 606, CA.

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Substantial

15 27. “*Substantial*” means more than minor or trivial. EqA, s.212(1).

Ability to carry out normal day-to-day activities

28. The EqA does not define “normal day-to-day activities”. In 2011, the Government issued ‘Equality Act 2010 Guidance – Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (2011) (Guidance), which the Tribunal should take into account where it considers it to be relevant. EqA, s.6(5). Section D of the Guidance notes:

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25 “D2. *The Act does not define what is to be regarded as a ‘normal day to-day activity’. It is not possible to provide an exhaustive list of day to-day activities, although guidance on this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.*

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D3. *In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing,*

5 *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.”*

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Relevance/effect of medical/corrective treatment

15 29. An impairment is to be treated as having a substantial adverse effect on a person's ability to carry out normal day-to-day activities if (a) measures are being taken to treat or correct it, and (b) but for those measures, the impairment would be likely to have that effect. EqA, Schedule 1, para. 5(1). The word “likely” means “*could well happen*” not “*more likely than not to happen*”. SCA Packaging Ltd v Boyle [2009] UKHL 37.

20 30. Para. B7 of the Guidance states:

25 “B7. *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 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. For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should*

30 *be taken of the degree to which a person can reasonably be expected*

to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities.”

5 31. As a general rule, it is not enough for a claimant to maintain that they would be adversely affected if their treatment were to stop – medical evidence to that effect is usually necessary. Woodrup v London Borough of Southwark [2002] EWCA Civ. 1716 (claimant claimed her mental condition would deteriorate if her medical treatment for anxiety were to stop, making her a disabled person; Court of Appeal
10 affirmed ET’s judgment that claimant had not done enough to prove that stopping treatment would result in the relevant adverse effect). Per Brown LJ at para. 13:

15 *“In any deduced effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this peculiarly benign doctrine under para 6 of the schedule should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary.”*

20 *Progressive conditions – deemed substantial adverse effect*

32. If (a) a person has a progressive condition (b) as a result of that condition, that person has an impairment which has (or had) an effect on that person’s ability to carry out normal day-to-day activities, but (c) the effect is not (or was not) a
25 substantial adverse effect, that person is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in that person having such an impairment. EqA 2010, Schedule 1, para. 8(1)-(2).

33. Paras. B18-20 of the Guidance state:

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“B18. Progressive conditions, which are conditions that have effects which increase in severity over time, are subject to the special provisions set out in Sch1, Para 8. These provisions provide that a person with a

progressive condition is to be regarded as having an impairment which has a substantial adverse effect on his or her ability to carry out normal day-to-day activities before it actually has that effect. B19. A person who has a progressive condition, will be treated as having an impairment which has a substantial adverse effect from the moment any impairment resulting from that condition first has some adverse effect on his or her ability to carry out normal day-to-day activities, provided that in the future the adverse effect is likely to become substantial. Medical prognosis of the likely impact of the condition will be the normal route to establishing protection under this provision. The effect need not be continuous and need not be substantial. [] The person will still need to show that the impairment meets the long term condition of the definition. (Sch1, Para 2).

B20. Examples of progressive conditions to which the special provisions apply include systemic lupus erythematosus (SLE), various types of dementia, and motor neurone disease. This list, however, is not exhaustive.”

Burden of proof

34. The burden of proof rests on the employee claiming disability to establish that they were disabled at the relevant time.

Issues

35. First, what is the material time for the purpose of the Claimant’s disability-related claims under the EqA?

36. Second, at the material time, was the Claimant’s acromioclavicular arthritis in his left shoulder a physical impairment?

37. Third, at the material time, did the Claimant’s acromioclavicular arthritis in his left shoulder and its symptoms have an adverse effect on his ability to carry out

normal day-to-day activities?

38. Fourth, at the material time, was any such adverse effect substantial?

5 39. Fifth, at the material time, was any such substantial adverse effect long term, ie, had that substantial adverse effect lasted at least 12 months, or likely to last at least 12 months, or likely to last for the rest of the Claimant's life?

Discussion / Conclusions

10 40. First, the material time to determine whether the Claimant was disabled for the purpose of his disability-related claims under the EqA is the period 1 January 2020 – 30 July 2021. This conclusion was agreed by the parties' counsel at the beginning of the OPH and is endorsed by the Tribunal.

15 41. Second, during the material time the Claimant had acromioclavicular arthritis in his left shoulder which was a physical impairment. This issue is not in dispute (the Claimant had successful surgery on 29 June 2021, but it has not been suggested that the surgery removed the arthritis in his left shoulder).

20 42. Third, the Tribunal is satisfied that in the period 15 February 2020 – 19 July 2021 (ie, most but not all of the material time), the Claimant's acromioclavicular arthritis in his left shoulder and its symptoms had an adverse effect on the Claimant's ability to carry out normal day-to-day activities:

25 a. the Claimant's first visit to a GP where he complained of a problem in his left shoulder was on 13 May 2020 [100], and during that visit he stated (and the Tribunal accepts) that he had by that point already had a 3 month history of left shoulder pain, which dates the beginning of his problems with his left shoulder to roughly the middle of February 2020;

30 b. the Tribunal is satisfied that in the period 15 February 2020 – 29 June 2021 (date of surgery), the Claimant continued to experience pain and discomfort in his left shoulder arising from his acromioclavicular arthritis,

which he addressed by a combination of medication, physiotherapy, steroid injections, leave and assistance from work colleagues;

5 c. the Tribunal is satisfied that in the period 15 February 2020 – 29 June 2021, the Claimant’s physical ability to use his left arm to hold or lift objects above shoulder height without pain and discomfort was seriously impaired – the Tribunal accepts the Claimant’s evidence that he struggled to do normal day-to-day activities like reaching for groceries at the supermarket [49], climbing ladders [49], painting/decorating [49], changing lightbulbs [49], or going to the gym [49], all of which would ordinarily require someone to be able to lift/use their left arm above shoulder height;

10 d. on 29 June 2021, the Claimant had surgery on his left shoulder, and under cross-examination the Claimant accepted that by the 3rd week of July 2021 – ie, around 19 July 2021 – his post-surgery bandages were removed, he was now able to do all exercises, and had made an excellent recovery (*“They couldn’t believe how well I’d healed (when they took off the bandages) in such a short period of time. I missed follow-up appointments because I felt a lot better by this time.”*).

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43. The Tribunal accepts the Respondent’s case that the Claimant’s job - involving the use of cage bars, engaging in “shoulder-height shovelling” - were specialised work activities, not the type of ‘normal’ work most people do. However, the Claimant’s inability to do his specialised work activities in this period arose from his inability to do *any* normal physical day-to-day work activities in this period which required him to hold or lift objects above shoulder height using his left arm.

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44. Fourth, the Tribunal is satisfied that during the period 15 February 2020 – 19 July 2021, the adverse effect the Claimant’s impairment had on his ability to carry out normal day to day activities was clearly substantial, not minor or trivial. It was plainly not a trivial or minor effect that the Claimant was incapable or struggled to lift objects above his shoulders using his left arm (and if he managed to do so, experienced pain and discomfort).

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45. Fifth, the Tribunal is satisfied that during the period 15 February 2020 – 19 July 2021, the serious adverse effect the Claimant’s impairment had on his ability to carry out normal day-to-day activities was long-term:

5 a. the substantial adverse effects manifested on around 15 February 2020 –
although not diagnosed then, the Claimant’s left shoulder problems arose
from acromioclavicular arthritis [117] (“*One must now assume that his*
symptoms are all coming from the AC joint”). The Tribunal finds that on
that date and during the following period 16 February 2020 – 14 February
10 2021 it was likely – ie, “*it could well happen*” - that the substantial adverse
effect the Claimant’s impairment was now having on his ability to carry out
normal day-to-day activities would continue in the absence of orthopaedic
review/surgery – a point canvassed in numerous medical attendances. cf
[121];

15 b. by 15 February 2021 (and after), the substantial adverse effect the
Claimant’s impairment had on his ability to carry out normal day-to-day
activities had lasted 12 months or more.

20 46. For the reasons stated above, the Tribunal concludes that in the period 15
February 2020 – 19 July 2021 the Claimant was a disabled person under s.6 of
EqA.

Employment Judge: A Tinnion

25 **Date of Judgment: 20 June 2022**

Date Sent to parties: 20 June 2022