



EMPLOYMENT TRIBUNALS

Claimant

Mr J. Fogg

AND

Respondent

Autoglass (Belron UK Ltd)

HEARD AT:

Cambridge Tribunal
(by CVP)

ON: 31 May 2022

BEFORE:

Employment Judge Douse (Sitting alone)

Representation:

For Claimant: In person

For Respondent: Amanda Glover, Solicitor

RESERVED JUDGMENT AT A PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. At the material times the Claimant was not a disabled person by reason of his asthma;
2. At the material times the Claimant was not a disabled person by reason of his mental health (stress, depression, and anxiety).

Background

1. On 21 January 2022, Employment Judge Ord listed a public preliminary hearing on the issue of whether the Claimant was a disabled person.
2. The Claimant was also ordered to provide an Impact Statement and medical evidence by 4 March 2022. He did not do this.
3. The Respondent provided a summary of their attempts to obtain the information from the Claimant:

21 January 2022	Employment Tribunal Request for Comments
9 February 2022	Initial reminder letter requesting medical records too
4 March 2022	ET deadline for Claimant, nothing received
6 March 2022	Response from Claimant simply stating "the court have the details requested, as did my previous employer."
7 March 2022	Reminder letter from Respondent to Claimant, asking for responses to the ET's request
8 March 2022	Response from Claimant but with no answers to questions asked by ET
8 March 2022	Third reminder to Claimant asking him to respond to the specific questions, and take legal advice if unsure how to respond
8 March 2022	Response from Claimant with some answers provided but not all. No medical records
21 March 2022	Fourth prompt email from Respondent to Claimant, asking for full answers to be given
29 March 2022	Response to question 2.2 provided by Claimant, but does again not answer the question raised. Question 2.3 still not fully answered either

4. He did not do this in the terms requested, but provided some information by email on 29 March.
5. On 5 April, the Respondent requested that the Tribunal strike out the Claimant's claim on the grounds that it has no reasonable prospects of success and/or in the alternative that it be struck out for non-compliance with an order. Alternatively, they asked that an Unless Order be made stating that the claim would be dismissed unless the Claimant fully responded to Judge Ord's order within a specified timeframe.

6. On 10 May the Tribunal reminded the Claimant of the Orders from 21 January 2022, and specifically stated:

“If you intend to rely on any medical records or reports in support of your claim to be disabled, you must disclose them to the Respondent at once as the hearing on 31st May 2022 is fast approaching.”

Procedure, documents, and evidence heard

7. The Respondent prepared a bundle of documents of 63 electronic pages (the ‘Bundle’), which had been sent electronically to the Tribunal in advance of the CVP preliminary hearing.
8. The Respondent had also provided a skeleton argument, and legal authorities, but I noted that the email attaching these was not copied in to the Claimant. The Respondent checked and confirmed these had unfortunately not been provided to the Claimant in advance of the hearing.
9. Despite prompting from the Respondent and the Tribunal, the Claimant had not provided an Impact Statement by the time of the preliminary hearing, nor had he provided any medical records.
10. However, the Claimant had sent a number of hard copy documents to the Tribunal, received on 12 May 2022, copies of which had not been provided to the Respondent. I took some time to consider this paperwork and anything relating specifically to the Claimant’s health, that was not already in the bundle, was scanned and emailed to the Respondent by the Tribunal office. Excluded documents were those that were already in the bundle, or would have been in the Respondent’s possession as they originated from the Respondent or their representatives.
11. The issues with various documents, and the need for both parties to consider the new paperwork, meant the hearing could not start on time.
12. Given that the Claimant had not engaged with the previous orders regarding the impact statement and medical evidence, I was concerned that the Claimant was not aware of the purpose of today’s hearing. I asked him to confirm his

understanding, and he was not clear that the hearing was to determine whether or not he was disabled within the meaning of the Equality Act, and that one potential outcome was that his claim could be dismissed completely. Once I explained this to him, I allowed him some time to consider if he wanted to request an adjournment to allow him to be properly prepared. In particular, I asked him to consider if there were any medical records that he had, or would have liked to have obtained, if he had appreciated the purpose of the hearing.

13. After a short adjournment, where he was able to consider the Respondent's skeleton and his position, the Claimant confirmed that he wanted to proceed with the scheduled preliminary hearing.

14. As there was no Impact Statement, and the Claimant is a litigant in person, I asked the Claimant some questions by way of examination in chief.

Facts

General

15. The Claimant was employed by the Respondent as an Automotive Glazing Technician from 1 November 2016. His duties were to fit, repair and replace vehicle glass on a range of different vehicles, carrying this out at the Respondent's centre, at customer's homes, or their place of work.

16. The Claimant's claim for disability discrimination, made via a claim form presented on 26 July 2021, relate to issues over mask-wearing during the COVID-19 pandemic.

17. Taking judicial notice, in response to the pandemic, new laws came into effect in England on 24 July 2020 mandating the wearing of face coverings in 'relevant places', as set out within The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020. The Regulations set out a number of reasonable excuses, which would potentially exempt individuals from the requirement, such as where the individual was unable to wear a face covering because of a disability, within the meaning of section 6 of the Equality Act 2010.

18. The Respondent mandated mask wearing within their workplace from 24 September 2020. The Claimant told the respondent that he was exempt from this

because of asthma, and says that following this he was subjected to comments and shaming by his manager.

19. From October 2020 the Claimant began working as a mobile technician, which reduced the occasions where a mask would need to be worn.
20. In April 2021, the Respondent asked the Claimant for medical evidence of his exemption. He provided the Respondent with details of his medications, but did not sign the consent form for his GP to provide information directly. He told the Tribunal that this is because he did not think it applied to him.
21. On 13 May 2021, the Claimant made a complaint to his line manager.
22. On 2 June 2021, following an incident about mask-wearing, the Claimant was sent home from work, where he remained until he resigned on 16 December 2021. On the same date, he also raised a formal grievance.

Asthma

23. As referenced above, the Claimant only provided one substantive reply to the Tribunal's requests for more information regarding his alleged disability. This was an email dated 8 March 2022, which stated:

"1. I've suffered with asthma my whole life, and am now taking Citalipram for depression and anxiety.

2.1. Asthmatic I've had since birth. And depression stress and anxiety since mid 2020. Being asthmatic is something I've always tried to manage with clenil steroid inhaler morning and night. And always having a Ventolin inhaler on my person incase of flare ups or breathing problems arise. Thing to trigger my breathing to get bad can be sudden change in temperatures, stress, long fur animals, high pollen, certain detergents/washing powders and humidity. So it is something I've always been cautious of, my household has to use a certain type of non bio, so inhaling and exhaling into a face covering causing humidity was not acceptable as I am exempt. My stress and anxiety started as a result of being demonized, put on the spot, rude comments and embarrassed by my manager on almost a daily

basis. This was made aware of and I had asked to go and work alone, out of the workshop as a mobile tech. The ordeal went on for so long and even when I handed and letter of grievance to my manager underlining exactly why, he disposed of the letter and never escalated the matter with anyone. This caused me so much anxiety every morning, and did not even want to attend work, despite being very competent at my job and being recognized as one of the best technicians in the company. I was extremely depressed, embarrassed, being made out to be a bad guy when that is not my character in the slightest. I had been told many times I was a "threat" several times, pushed out and ultimately stop getting paid from the 1st of December 2021. In turn myself having to resign just before Xmas (16th dec) as I needed to try and continue to support my wife and 4 beautiful children. And has affected my marriage and family life massively.

2.3. As stated my asthma has been with me my whole life and I'm sure it will stay with me, so long as Im left to manage my own health conditions. And I'm still on anti depressants to this day, and have been ever since I broke down and my wife urged me to get help back in October 2020."

24. The Claimant did not answer question 2.2., which asked:

"What are/were the effects of the impairment on the claimant's ability to do day-to-day activities?"

The claimant should give clear examples. If possible, the examples should be from the time of the events the claim is about. The Tribunal will usually be deciding whether the claimant had a disability at that time."

25. The Respondent submits that the reason the Claimant left this unanswered is because there were no effects on his day-to-day activities. In his oral evidence the Claimant said that he did not answer what he thought was not applicable to him, that he did not consider himself 'disabled' until considering things more for the

hearing, and that he selected disability discrimination on his claim form because it was the closest

26. Although the Claimant did not provide any medical records, I accept that he has had asthma since birth, which he confirmed in oral evidence.
27. He confirmed the triggers were as described in his email of 8 March 2022, and that in particular he had to be conscious daily of humidity and going between hot and cold environments. In relation to stress, he told the Tribunal that this contributed a bit. He denied any negative effect as a result of exercise.
28. He also told the Tribunal that he has been prescribed a preventer inhaler – Clenil [60] - for around 10 years, which he takes each morning and evening as prescribed. Additionally, he has a reliever inhaler – Ventolin – which he always has with him and uses as needed.
29. The Claimant stated that if he did not take the preventer inhaler things would be ‘bad’ but did not expand on this.
30. In relation to the reliever inhaler, in the Occupational Health Assessment [62-63] the Claimant reported needing to use this one or two days a week, on one occasion each day, if he felt short of breath and was wheezing. He told the Tribunal that he used it 4 times per week, but under cross-examination clarified that it was usually 1-2 times per week, and this increased to 4 days, once a day, when wearing a mask.
31. Aside from the medication, the Claimant told the Tribunal that he has annual monitoring of his condition with his GP. The most recent was a few months prior to the preliminary hearing, but he could not recall when any monitoring in 2020/21 occurred. He described that he had managed his asthma well for years, and had not been hospitalised as a result of his condition.
32. Taking judicial notice, some people with asthma – that was a particular type or level of severity - were directed to shield during the pandemic. The Claimant was not one of these people.

Mental health

33. This was initially described as stress, but latterly anxiety and depression. I will refer to the Claimant's 'mental health condition' encompassing these symptoms.
34. The Claimant's email of 8 March 2022 states "*My stress and anxiety started as a result of being demonized...*", "*I was extremely depressed, embarrassed*", and "*I'm still on anti depressants to this day, and have been ever since I broke down and my wife urged me to get help back in October 2020.*"
35. In oral evidence, the Claimant said that his mental health symptoms started halfway through 2020, and presented as him: feeling really low; being snappy; being hard to be around; and struggling with sleep.
36. He also said that his eating was affected, along with his relationship with his children, and it put a strain on his marriage.
37. The Claimant described finding it hard to admit he was having problems as he had never had any issues before.
38. The Claimant was prescribed anti-depressants – initially Sertraline, and then Citalopram, but he could not recall the date it was changed. He was still taking this medication – 20mg daily – at the time of the preliminary hearing.
39. Additionally, his GP set up talking therapy once a fortnight for a couple of months. The Claimant did not find this helpful, and preferred to talk to his wife.
40. When asked if this affected his work, the Claimant said not so much but he did not want to go in. He did go in to work as usual, although he had a couple of days off at some point.

The Law

41. The Equality Act 2010 ("EqA") provides that a person has a disability if he or she has a 'physical or mental impairment' which has a 'substantial and long term adverse effect' on his or her 'ability to carry out normal day to day activities'.
42. Supplementary provisions for determining whether a person has a disability is contained in Part 1 Sch 1 EqA which essentially raises four questions:
- a. Does the person have a physical or mental impairment?

b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?

c. Is that effect substantial?

d. Is that effect long term?

43. Although these questions overlap to a certain degree, when considering the question of disability, a Tribunal should ensure that each step is considered separately and sequentially (**Goodwin v Patent Office [1999] IRLR (EAT)**).

44. In **Goodwin** Morison P, giving the decision of this Court, also set out very helpful guidance as to the Tribunal's approach with regard to the determination of the issue of disability. At paragraph 22 he said:

“The tribunal should bear in mind that with social legislation of this kind, a purposive approach to construction should be adopted. The language should be construed in a way which gives effect to the stated or presumed intention of Parliament, but with due regard to the ordinary and natural meaning of the words in question.”

45. The **EqA 2010 Guidance** states:

‘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’

46. The **EqA 2010 Guidance (D3)** indicates that normal day-to-day activities can include ‘general work.

47. The EAT in **Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763** concluded that ‘normal day-to-day activities’ must be interpreted as including activities relevant to professional life. It emphasised that the phrase is to be given a broad definition that can include irregular but predictable activities that occur in professional life.

48. Furthermore, a non-exhaustive list of how the effects of an impairment might manifest themselves in relation to these capacities, is contained in the Appendix to the Guidance on matters to be taken into account in determining questions relating to the definition of disability. Whilst the Guidance does not impose any legal obligations in itself, tribunals must take account of it where they consider it to be relevant.
49. The requirement that the adverse effect on normal day to day activities should be considered a substantial one is a relatively low threshold. A substantial effect is one that is more than minor or trivial (**s.212 EqA** and **B2 Guidance**).
50. **Para 5 Sch. 1 Part 1 EqA** provides that an impairment is treated as having a substantial adverse effect on the ability of the person to carry out normal day to day activities if measures, including medical treatment, are being taken to treat or correct it and, but for that, it would likely to be the effect. In this context, likely is interpreted as meaning 'could well happen'. The practical effect is that the impairment should be treated as having the effect that it would have without the treatment in question (**B12 Guidance**).
51. In determining the effects of an impairment without medication, the EAT has stated that:

'The tribunal will wish to examine how the claimant's abilities had actually been affected at the material time, whilst on medication, and then to address their minds to the difficult question as to the effects which they think there would have been but for the medication: the deduced effects. The question is then whether the actual and deduced effects on the claimant's abilities to carry out normal day-to-day activities [are] clearly more than trivial' — Goodwin

52. The question of whether the effect is long term is defined in Sch. 1 Part 2 as:
- a. Lasting 12 months;
 - b. likely to last 12 months;
 - c. likely to last the rest of the person's life.

53. Again, the Guidance at C3 confirms that in this context 'likely' should be interpreted as meaning it could well happen.
54. The Guidance (C4) also clarifies that in assessing likelihood of the effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything which took place after will not be relevant in assessing likelihood.
55. Finally, the burden of proof is on the claimant to show he satisfied this definition. The time at which to assess the disability i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities, is the date of the alleged discriminatory act (**Cruickshank v VAW Motorcast Ltd 2002 ICR 729**, EAT). This is also the material time when determining whether the impairment has a long-term effect.
56. In relation to mental health, the Respondent referred me to a number of authorities:

J v DLA Piper UK LLP UKEAT/0263/09

56.1 The tribunal is entitled to consider the effect of the impairment before determining the existence of an impairment producing that effect, particularly in cases where a mental impairment is disputed

Primaz v Carl Room Restaurants Ltd (t/a McDonald's Restaurants Ltd)
[2021] 7 WLUK 749

56.2 The impairment will only amount to a disability if it has a substantial adverse effect on the individual's ability to carry out "normal day-to-day activities". The test is an objective one of causation: the impairment must be found by the tribunal to have the adverse effect, it is not enough that the claimant subjectively believes this to be the case

Royal Bank of Scotland plc v Morris UKEAT/0436/10

56.3 Where an alleged disability takes the form of "depression or a cognate medical impairment" expert medical evidence is especially important. In such

cases, the issues will often be too subtle to allow a tribunal to make proper findings without expert assistance.

Herry v Dudley Metropolitan Council UKEAT/0100/16 and Herry v Dudley Metropolitan Council and Governing Body of Hillcrest School UKEAT/0101/16

56.4 The claimant was unable to establish disability because the difficulties they were encountering were due to a reaction to difficulties at work rather than a mental impairment. Although work-related problems can lead to mental impairment, particularly where there is a susceptibility to anxiety and depression, this will not always be the case.

56.5 The EAT in Herry expanded on this distinction drawn in J v DLA Piper and made the following observations:

- a. There is a class of case where the individual will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities.
- b. The usual requirement to show an adverse effect on normal day-to-day activities remains in stress cases, and even where an employee becomes so entrenched in their position that they will not return to work, this does not necessarily mean that they are suffering a mental impairment.
- c. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise, are not of themselves mental impairments: they may simply reflect a person's character or personality.

Submissions

57. The Respondent submitted that neither the Claimant's asthma or mental health condition, had a substantial adverse effect on day-to-day activities.

58. In relation to mental health, they additionally submitted that the Claimant's condition falls into DLA Piper & Herry category of cases in which the depression / anxiety is caused by a medicalisation of work problems.
59. The Claimant's submissions addressed the claim more generally, particularly his eligibility for a mask exemption. When encouraged to focus on the issue of disability, he stated that both conditions were long term because he had them for more than 12 months, and continued to take medication.
60. He further highlighted that wearing a mask made his conditions worse, so the effects must be substantial.

Conclusions

General

61. I do not draw any negative conclusions from the Claimant's comments about not identifying as disabled. Many people living with asthma would not consider themselves to be disabled people and I take judicial notice of the fact that many people living with asthma would not satisfy the definition of disability in EqA, taking into account the Guidance and relevant case law.
62. In relation to the Claimant's failure to provide the requested information, including medical records, I agree with the Respondent that the reason this was not provided is because it did not exist. However, in saying that I make no criticism of the Claimant – I do not believe that he has intentionally avoided the matter, or tried to deceive in any way. It is clear that he simply had a poor understanding of the importance of the disability issue to the case overall.

Asthma

63. This is clearly a physical impairment with long term effects as the Claimant has had the condition all of his life.

64. However, I was not satisfied that the Claimant had demonstrated that with medication, his asthma had any impact on his normal day to day activities and was not persuaded that there was any evidence before me to indicate that the stress he had faced through work, had exacerbated his asthma in that period.
65. What the Claimant described were mild and short-lived occasions of shortness of breath that he was able to resolve by using his inhaler. The claimant did not give the Tribunal any evidence of the effects which these events had on him. In the opinion of the Tribunal, the effects must have been relatively minor if they were resolved without the need for any medical advice and by the Claimant simply using his inhaler. The Claimant simply described to the Tribunal medical symptoms, but he was not describing how those medical symptoms had any effect on his normal day-to-day activities. In the absence of any evidence presented by the claimant the Tribunal concluded that there was no evidence of any substantial effects on normal day-to-day activities due to asthma.
66. I was therefore not satisfied that during the relevant period the Claimant had demonstrated that with medication, his asthma had any impact on his normal day to day activities, and was not persuaded that there was any evidence before me to indicate that the stress he had faced through work, had exacerbated his asthma in that period.

Medication and deduced effect

67. I then turned to the issue of deduced effects and the impact of both the reliever and preventer medication taking into account para 5 Sch.1 Part 1 EqA 2010, which provides that an impairment is treated as having a substantial adverse effect on the ability of the person to carry out normal day to day activities if measures, including medical treatment, were being taken to treat or correct it and, but for that, it would be likely to be the effect. In that context, I considered that likely is interpreted as meaning 'could well happen' and concluded that they could.
68. The only evidence before the Tribunal about the effect of not taking his medication, was that it would be 'bad. I was therefore not satisfied that there was evidence

before me of the effect of the asthma on the Claimant's ability to carry out normal day-to-day activities without that medication.

69. I was further not satisfied that any impact was adverse and substantial, taking account the low threshold of what is 'substantial'.

70. I therefore concluded that at the material time the Claimant had the physical impairment of asthma, that such an impairment did not have an adverse impact on his day-to-day activities when taking medication, and when considering the deduced effects, I was not persuaded that the Claimant's asthma was a physical impairment that adversely affected his ability to carry out day-to-day activities that were more than merely trivial and were long term.

71. The Claimant was not a disabled person at the material times by reason of his asthma.

Mental Health

72. I accept the Claimant's descriptions of the effect of his mental health conditions at the relevant time, and that some of those impacts related to day-to-day activities.

73. However, I do not find that any effect was substantial. Although the Claimant described elements of his life that were affected by his mental health, there was no evidence before the Tribunal that he was unable to do anything as a result of his condition. In the absence of any evidence presented by the claimant the Tribunal concluded that there was no evidence of any substantial effects on normal day-to-day activities due to stress, anxiety, or depression.

74. In any event, I agree with the Respondent's submissions, that the Claimant's circumstances fall squarely within the remit of the DLA Piper and Herry cases, in that what the Claimant experienced was due to a reaction to difficulties at work rather than a mental impairment.

75. The Claimant submitted that because he is still prescribed anti-depressants over a year later this means it satisfies the requirement of being long term. What I have to consider is whether the *effect* is long term.

76. There was no evidence before the Tribunal about the effect of not taking his anti-depressant medication. I was therefore not satisfied that there was evidence before me of the effect of the mental health condition(s) on the Claimant's ability to carry out normal day-to-day activities without that medication.

Cumulative effect

77. The Claimant had referenced stress being a trigger to his asthma, however qualified this as "a bit". When giving evidence about the frequency of using his reliever inhaler, he did not say that he had to use additional doses because of stress at the relevant time. He only referred to needing to use the reliever more because of mask wearing.

78. In light of this, I found no cumulative effect of his physical and mental health conditions.

Summary

79. Taking all the above factors into account, therefore, the Tribunal did not find that the claimant was disabled in the period March 2020 - 16 December 2021 by reason of the acknowledged physical impairment of asthma. The claimant did not satisfy the Tribunal that asthma had a substantial or long-term adverse effect on the ability of the claimant to carry out normal day-to-day activities.

80. Taking all the above factors into account, therefore, the Tribunal did not find that the claimant was disabled in the period March 2020 - 16 December 2021 by reason of mental health (stress, anxiety, or depression). The claimant did not satisfy the Tribunal that this amounted to a mental impairment, or that his condition(s) had a substantial or long-term adverse effect on the ability of the claimant to carry out normal day-to-day activities.

81. The claimant was not therefore disabled at the material time. The claimant's claims of disability discrimination therefore are dismissed.

82. The Respondent indicated that they would apply for costs against the Claimant if the Tribunal found that he was not disabled. Given that I was reserving judgment I advised that the Respondent could make a subsequent application if that was the outcome. They can do that if they wish, but should consider whether that is appropriate in all the circumstances.

Employment Judge K Douse

Dated: ...25 August 2022.....

Sent to the parties on:.....

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For the Tribunal Office

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