



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111648/2021 & 4101132/2022

Held in person in Glasgow and by Cloud Video Platform (CVP) on 29 July
2022

Employment Judge A Strain

Mr S Wilson

Claimant
Represented by:
Ms K Sutherland -
Solicitor

J Chandler & Company (Buckfast) Limited

Respondent
Represented by:
Mr J Waters -
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the Claimant had a qualifying disability as defined in section 6 of **Equality Act 2010** from the period 9 March 2021 to 21 November 2021.

REASONS

Background

1. The Claimant was represented by Ms K Sutherland, Solicitor. He asserted (amongst others) claims of Disability Discrimination under the **Equality Act 2010 (EA 2010)**.
2. The Respondent was represented by Mr J Waters, Solicitor.
3. The Parties had lodged a Bundle of Documents with the Tribunal for the purposes of the Open Preliminary Hearing extending to 453 pages.

4. The sole issue for determination of the Tribunal at the OPH was disability status in terms of section 6 of the Equality Act 2010 (**EA 2010**). In particular, whether from the period 9 March 2021 to 21 November 2021 the Claimant was disabled under section 6 of the EA 2010.
5. The Respondent conceded that the impairment had lasted for longer than 12 months. The issue for determination from the Respondent's perspective was whether or not the impairment had a substantial adverse effect on the Claimant's ability to perform day to day activities.
6. The Tribunal heard evidence from the Claimant. No witnesses gave evidence for the Respondent. Both Parties made submissions at the conclusion of the evidence.

Findings in Fact

7. Having heard the evidence of the Claimant and considered the documentary evidence before it the Tribunal made the following findings in fact:
- a. The Claimant was employed by the Respondent from 1 January 2012 as the Sales Manager. He was responsible for managing and growing sales for the Respondent. This involved his participation in and attendance at meetings with customers and potential customers. The Claimant also required to attend meetings with the senior management team, conferences and other work events. This involved travelling.
- b. The Claimant was diagnosed with Irritable Bowel Syndrome (**IBS**) and Irrital Bowel Disorder (**IBD**) or ulcerative colitis in 1996 (**conditions**).
- c. The symptoms of these conditions cause the Claimant extreme stomach pain and an urgent need to go to the toilet. This can come on at short notice and the Claimant can soil himself if unable to reach a toilet in time. He carries a "No Waiting Card" which states "The holder of this card has a medical condition which requires them to

use a medical appliance. Please allow him to use your toilet facilities urgently.” His bowels can move 3 to 7 times a day during flare ups.

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- d. The conditions also cause excessive production of gas and stomach extension/swelling. This causes him embarrassment as he can appear pregnant when his stomach is swollen.
- e. The conditions lead to the Claimant bleeding from the back passage and also inflames his intestine causing chronic pain.
- f. The Claimant has to maintain a careful diet and eat foods that he can tolerate. He has to avoid dairy, high fat and other products which can affect his condition. Eating some foods brings on extreme pain and an urgent need to go to the toilet. He needs to plan his diet and he is restricted in foods he can eat during client meetings/event, internal meetings/events, trade shows, christmas parties.
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- g. The Claimant had multiple episodes of loose bowels and fatigue 3 March to 17 June 2021 as confirmed by his GP (Production 12, Page 355).
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- h. The Claimant has had frequent admissions to hospital as a consequence of these conditions. In 2021 he was admitted 31 August to 3 September, 14 to 24 September, 5 to 30 October, 8-27 November due to flare ups in the conditions.
- 20
- i. The Claimant has to take regular medication to alleviate and control his symptoms as detailed in paragraph 6 of the letter from his GP of 25 January 2022 (Production 12 pages 355-7).
- j. Flare ups are likely to and do occur on a regular basis.
- 25
- k. He has had frequent periods of absence from work due to the conditions during flare ups. He has had to leave meals before finishing during flare ups.
- l. The conditions impact his sleep pattern. When flare ups occur the chronic pain disrupts his sleep and he will be up and down several

times through the night to empty his bowels. He has soiled himself through the night during flare ups.

- 5 m. The lack of sleep makes the Claimant lethargic and tired. This impacts upon his ability to concentrate on daily tasks. When he is working he will require to take regular breaks due to lapses in concentration. His mood is also affected resulting in him being short tempered and sharp.
- 10 n. As a consequence of these conditions the Claimant has to carefully plan his life around lifestyle changes, his diet and reduction of stress (which exacerbates the conditions). As his employment with the Respondent involves regular travel the Claimant needs to plan his daily routes in advance ensuring that there are public toilets on the route. He also carries a portable toilet in his boot for emergency use – which he has used on multiple occasions and continues to do so.
- 15 o. When the Claimant is travelling long distance, attending long meetings/events or flying he takes medication to stop him going to the toilet. The medication causes him constipation and chronic pain due to his conditions.
- p. The Claimant can only use public transport which has toilet facilities.
- 20 q. The conditions have significantly impacted upon his personal and social life. He has had to avoid social events such as his brothers stag. His condition has impacted his relationship with his partner and son.
- 25 r. The conditions constituted an impairment which had a substantial adverse effect on the Claimant's ability to perform day to day activities from the period 9 March 2021 to 21 November 2021.

The Relevant Law

Disability Discrimination

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

5 *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.*

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

Impairment

10. ***Royal Bank of Scotland v Morris UKEAT/0436/10*** at paragraph 63 and
15 55 the EAT emphasised the importance of expert medical evidence for the existence or not of a mental impairment where an alleged disability takes the form of “depression or (similar) a cognate medical impairment.” Further, that “the issues will often be too subtle to allow [the Tribunal] to make proper findings without expert assistance.” (paragraph 63)

20 11. In the case of ***J v DLA Piper UK LLP UKEAT/0263/09*** paragraph 42 noted that the distinction between symptoms of mood and anxiety caused by clinical depression and those that derive from a ‘medicalisation of work problems’ or ‘adverse life events’.

25 12. In ***Herry v Dudley Metropolitan Council and Governing Body of Hillcrest School UKEAT/0101/16*** at paragraph 56 the EAT noted: “Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched;

where the person concerned 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. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess."

Long-term effect

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

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.*

Substantial Adverse Effect

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

the Equality Act 2010 (published by the UK Government). It is not assessed on the balance of probabilities.

Normal day to day activities

15. The focus of the EA 2010 is things that the Claimant either cannot do or can only do with difficulty, rather than on the things the Claimant can do. The *Guidance on the Equality Act 2010* (published by the UK Government) states at page 34 “in general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.”
16. ***Aderemi v London and South Eastern Railway Ltd [2013] ICR 591 EAT***, Langstaff P said, “It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial.”

17. A tribunal considering the question of disability should ensure that each step is considered separately and sequentially and that tribunals and courts should give a purposive construction to the legislation, which is designed to confer protection rather than restrict it **Goodwin**.
- 5 18. A tribunal should look forward from the date of the alleged discriminatory act in considering whether the adverse effect was likely to last at least 12 months or recur. The position must be considered looking forward as at that date because likelihood is not something to be determined with the benefit of hindsight (**Parnaby v Leicester City Council**
10 **UKEAT/0025/19/BA**).

Submissions

19. Both Parties made oral submissions.

The Claimant

- 15 20. The Claimant's solicitor lodged a bundle containing the authorities upon which she relied.
21. The Claimant submitted that the fact of impairment was conceded as was the long term effect. The issue for determination by the tribunal was whether or not the long term effect was "substantial" and "adverse". Even if the substantial adverse effect had ceased it was to be treated as
20 continuing as it was likely to recur (**Goodwin**).
22. The fact that the Respondent's occupational health advisers had concluded that the Claimant was not suffering from a disability was neither here nor there. It was a matter for the tribunal to determine (**Vicary v BT PLC 1999EAT/1297/98**).
- 25 23. The fact that the Claimant was able to mitigate the effect by medical treatment and perform the duties of his employment did not mean he wasn't disabled (**Boyle v SCA Packaging Limited[2009] UKHL 37**).

24. The fact of the matter here was that the Claimant's impairment had a substantial adverse long term effect. Without medication the effect would clearly be more than minor or trivial.

The Respondent

5 25. The Respondent's solicitor submitted that the cases relied upon by the Claimant were fact specific. The issues for determination were whether or not the Claimant was disabled at the relevant time.

26. The Respondent accepted that the Claimant suffered from the conditions, which were physical impairments and lasted 12 months or more.

10 27. The Claimant's impairments did not have a substantial adverse effect. The Claimant accepted he could perform the duties of his role. The Claimant had not demonstrated a substantial adverse effect on his ability to perform his job.

15 28. The Respondent's occupational health advisers had investigated and confirmed that the Claimant did not have a qualifying disability (Production 22,Page 422).

Discussion and Decision

Disability

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

30. In this regard the Tribunal adopted and followed the approach in **Goodwin** that each step has to be considered separately and sequentially, and, that tribunals and courts should give a purposive construction to the legislation, which is designed to confer protection rather than restrict it.

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31. The tribunal considered that the Claimant's evidence was an honest account of events. He sought to underplay the impact of his physical impairments on him largely by reference to the coping mechanisms he

had adopted, meticulous planning of his day and the medication he received. The tribunal found his evidence of the impact of his physical impairments during the relevant period to be compelling.

5 32. The thrust of the Respondent's argument was to the effect that the physical impairments did not have a substantial adverse effect on his ability to perform the day to day activities of his work.

10 33. The tribunal accepted the Respondent's OH Report for what it was – a report detailing the OH Physician's views were at the time of assessment (19 July 2021). This included views on whether or not the Claimant had a disability under the EA 2010 (which is a mixed question of fact and law for the tribunal to determine).

34. The issues of impairment and long term effect were conceded.

Substantial Adverse Effect on normal day to day activities

15 35. The tribunal accepted the Claimant's evidence before the tribunal and within his Disability Impact Statement as to the effect upon his ability to perform normal day to day activities and tasks as defined in the **Guidance**.

20 36. The Tribunal accepted that the adverse effect was more than minor or trivial and was in fact substantial (following **Goodwin v The Patent Office**). Whilst clearly the effect varied from day to day during the relevant period he had multiple episodes and flare ups which required hospitalisation.

25 37. It was to the Claimant's credit that he mitigated the effect on him with the assistance of medication, planning and other coping mechanisms. He was able to perform the duties of his employment outwith episodes and periods of flare up. The "effect" was likely to and did recur. The Respondent's approach to this was ill founded. The fact that he could perform the duties of his employment did not mean that he wasn't disabled or that his impairments did not have a substantial adverse effect
30 on his ability to perform day to day activities.

38. The tribunal also took into account the fact that his impairments would be worse and the effect would be even more substantial without medication.

39. In the circumstances the Tribunal conclude that the Claimant had a qualifying disability as defined in section 6 of EA 2010 from the period 9
5 March 2021 to 21 November 2021.

Employment Judge: A Strain
Date of Judgment: 5 September 2022
Entered in register: 9 September 2022
and copied to parties