



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4101719/2022**

**Open Preliminary Hearing Held in Edinburgh on 3 October 2022**

**Employment Judge M Sangster**

**Dr A Ashworth**

**Claimant  
In person**

**The UK Offshore Energies Association Limited**

**Respondent  
Represented by  
Mr Hay  
Advocate**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is that:

- the claimant was not a disabled person, at the material times, for the purposes of section 6(1) of the Equality Act 2010; and
- the respondent is not a qualifications body, as defined in section 54 of the Equality Act 2010.

The Tribunal accordingly do not have jurisdiction to consider the claim, which is dismissed.

### **REASONS**

**Introduction**

**E.T. Z4 (WR)**

1. The case was listed for a one day open preliminary hearing to determine the following preliminary issues:
  - a) Disability status and knowledge;
  - 5 b) Whether the claim ought to have been rejected under Rule 12 of the Employment Tribunals Rules of Procedure (the **Rules of Procedure**);
  - c) Whether the respondent is a qualifications body, as defined in s54 EqA; and
  - d) If an application to amend the claim is lodged and the respondent objects to that, that application.
- 10 2. These issues were discussed at the outset of the preliminary hearing. It was noted that:
  - a) the claimant claims that he was, at the relevant times, a disabled person in terms of s6 of the Equality Act 2010 (**EqA**), as a result of dyslexia; and
  - 15 b) there was no application to amend, so that issue no longer required to be determined.
- 20 3. An email from the claimant, dated 22 September 2022, was also discussed at the outset of the preliminary hearing. In that email the claimant asserted that the respondent had, on 7 September 2022, breached s26 EqA. He requested that this alleged further breach of the EqA be addressed at the preliminary hearing. It was explained to the claimant that the complaint before the Tribunal was under s15 EqA and if he wished further issues to be included, he would require to apply to amend his claim. Otherwise, no further action would be taken in relation to his email of 22 September 2022.
- 25 4. A joint bundle of documents was lodged prior to the preliminary hearing, extending to 326 pages.
5. The claimant gave evidence on his own behalf at the preliminary hearing. The respondent called one witness, Dr Graham Furnace.

### **Findings in fact**

6. The Tribunal found the following facts, relevant issues to be determined, to be admitted or proven.
7. The respondent is a representative body for the UK offshore energy industry. They have approximately 400 member companies, who are involved in various aspects of offshore energy.
8. For the assistance of the offshore industry, the respondent maintains and manages a list of doctors who it views as being suitable to assess an individual's medical fitness to work in the offshore environment (the **Register**). The Register is published on the respondent's website.
9. Dr Furnace is the respondent's Medical Adviser. He manages the Register and revises the respondent's 'Guidelines for Medical Aspects of Fitness for Offshore Work' (the **Guidelines**), which set out what is considered to be good practice regarding the assessment of health of people working, or intending to work, offshore. The Guidelines state that *'Operators may choose to use alternative methods of assessment for their own installations. However, an individual having passed such assessment would not be acceptable for unrestricted work in the North Sea unless the assessment also meets the requirements of these guidelines.'*
10. Anyone who wishes to join the Register must complete an application form, pay the requisite application fee and agree that they will abide by the Guidelines. Their application is then assessed by Dr Furnace, to ascertain whether the individual is suitable to be placed on the Register. This is assessed by reference to a number of factors, including their facilities and 4 stated criteria, namely whether the individual:
  - a) Has experience of offshore oil and gas (or remote) medicine;
  - b) Has other relevant/transferrable experience in occupational medicine;
  - c) Will be working under the direct supervision of a doctor already on the Register; or
  - d) Has other relevant applicable experience.

11. If Dr Furnace believes that the individual meets the criteria and is suitable to be placed on the Register, the individual then requires to attend a one-day training course, run by Dr Furnace. Following the conclusion of that training course, the individual is then placed on the Register and provided with a unique PIN, which is also included on the Register. The PIN is then inserted onto any certificate of fitness for offshore work issued by the doctor, as an administrative means of verifying that the individual is on the Register.
12. To maintain their position on the Register, individuals require to apply annually to remain on the Register, and pay a fee to do so. An individual may be suspended, or removed, from the Register for a number of reasons, including if they fail to follow the Guidance. The decision on whether an individual should be suspended or removed from the Register is made by Dr Furnace.
13. The claimant was added to the Register in 2006 and he applied, annually, to remain on the Register. In November 2021 a dispute arose, between the claimant and one of the respondent's member companies (the **Company**), in relation to a medical which had been scheduled for one of their employees. On 10 November 2021, a complaint was submitted by the Company to Dr Furnace, in relation to the claimant's professional conduct. This arose following a series of emails between the claimant and the Company/individual, 4 of which were from the claimant. On 11 November 2021, the claimant sent an email to Dr Furnace, setting out his response to the complaint received.
14. On Saturday 13 November 2021, at 22:36, the claimant sent a further email to the Company. The email contained numerous errors in spelling and grammar. None of the previous emails from the claimant, which are referred to above, contained errors of this nature. The Company submitted a further complaint to Dr Furnace, in relation to that email, the following day. Dr Furnace, in turn, raised this with the claimant on 15 November 2021. The claimant was suspended from the Register during that conversation. The claimant could not, during that conversation, recall the email he had sent on 13 November 2021. Following their discussion however, he sent an email to Dr Furnace in which

he stated that he did not recall the email and that the errors in the email were *'probably related to failing to put on my computer specs'*.

- 5 15. Dr Furnace asked the claimant to undertake a facilitated reflection with a senior colleague in relation to the matters giving rise to the complaints. The claimant did so and forwarded a document setting out the conclusions reached, as a result of that facilitated reflection, to Dr Furnace on 18 November 2021. It made no mention of any medical conditions, such as near exophoria or dyslexia. In his response Dr Furnace highlighted that *'As supplied to me, the [reflection document] has the 'track changes' visible, and I can see from these that you have indeed had significant input to the reflection process from your facilitating colleague.'*
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16. In the course of ongoing correspondence with Dr Furnace, the claimant stated to him, on 2 December 2021, *'I realise that I have not previously raised this before, but I should at this point declare that I have a recognised disability, in that I have a 23 Dioptre latent divergent squint that can lead to a form of dyslexia that can inadvertently adversely affect written communication, especially when stressed'*.
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17. Early conciliation took place from 16 February to 29 March 2022 and the claimant lodged a claim form with the Tribunal on 2 April 2022. At section 8.2 of the ET1 Form the claimant stated *'Please see attached document'*. The claimant had attempted to upload the document referred to at 8.2, but did not realise he had been unsuccessful in doing so.
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18. On 6 April 2022, the Tribunal accepted the claim and provided confirmation of this to both parties in their correspondence entitled 'Notice of Claim'. The respondent was provided with a copy of the ET1 Form.
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19. On 12 April 2022, the respondent wrote to the Tribunal requesting a copy of the 'attached document' referred to in the ET1 Form. They were informed, on 14 April 2022, that the Tribunal *'currently does not possess the ET1 paper apart for this claim but will be contacting the claimant and will forward it to you once it has been received as a matter of urgency.'*
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20. The claimant provided the document he had intended to attach to his ET1, to the Tribunal and the respondent, on 23 April 2022.
21. The respondent lodged their ET3 on 4 May 2022.
22. The claimant was diagnosed with a near exophoria when he was at university in the 1970s. On 13<sup>th</sup> June 2022 the claimant was examined by an optometrist who concluded that he had a near exophoria which was measured to be 11 dioptres. He wears middle distance glasses as a corrective measure, which resolves the adverse effect of the condition. The wearing of middle distance glasses enables him to, for example, read the text on a computer screen, which he would otherwise find it difficult to do. He also does exercises to strengthen his eye muscles.
23. No medical evidence was produced regarding the condition of dyslexia. The claimant has not, at any stage, been assessed by a psychologist to ascertain if he has dyslexia. He has never received a formal diagnosis of dyslexia. He believes however that there is a link between near exophoria and dyslexia and that he has dyslexia as a result of that link.

## Submissions

### *Claimant's submission*

24. The claimant, in summary, submitted that:

- a) It is clear that he was a disabled person and the respondent had knowledge of this. He has used the term dyslexia to describe the impairment which he has, which results in him having difficulty scanning documents on a computer screen, without his glasses.
- b) The respondent accepted that it provides authorisation, recognition and registration of individual doctors on the Register. They accordingly fall within the scope of s54 EqA.
- c) The claim was accepted correctly accepted, it should not now be struck out.

*Respondent's submission*

25. The respondent's submission, in summary, was that:

- 5 a) The claimant has failed to demonstrate each of components of the test set out in s6 EqA in relation to the impairment relied upon, namely dyslexia. The burden is on him to do so.
- b) If disability status has been established, it has not been established that the respondent knew, or ought to have known, that the claimant was a disabled person.
- 10 c) The respondent is not a qualifications body. The cases of ***Patterson v Legal Services Commission*** 2004 ICR 312, CA, ***Cox v General Medical Council*** EAT 0076/01, ***Kulkarni v NHS Education Scotland & anor*** EATS 0031/12 and ***Tattari v Private Patients Plan Limited*** 1998 ICR 106, CA were referred to.
- 15 d) The Tribunal ought to have rejected the claim, the terms of Rule 12 are mandatory.

**Relevant law***Disability Status*

26. Section 6(1) EqA provides:

*'A person (P) has a disability if —*

- 20 (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.'*

27. Schedule 1 EqA contains supplementary provisions in relation to the determination of disability. Paragraph 2 states:

25 *'The effect of an impairment is long-term if-*

- (a) *it has lasted 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.'*

28. Paragraph 5 of the schedule states

5        '*5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –*

*(a) measures are being taken to treat or correct it; and*

*(b) but for that, it would be likely to have that effect...*

*(3) Sub paragraph (1) does not apply-*

10        '*(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed.'*

15        29. The 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (the **Guidance**) does not itself impose legal obligations, but the Tribunal must take it into account where relevant (Schedule one, Part two, paragraph 12 EqA).

20        30. The Guidance at paragraph A8 states '*It is not necessary to consider how an impairment is caused... What is important to consider is the effect of an impairment, not its cause.'*

31. The Guidance at paragraph B1 deals with the meaning of '*substantial adverse effect*' and provides:

25        '*The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.'*

30        32. The Guidance at paragraph B15 refers to Schedule 1, paragraph 5(3) of the EqA and states '*in other words, the only effects on the ability to carry out normal day-to-day activities which are to be considered are those which remain when spectacles or contact lenses are used (or would remain if they were used).'*

33. Paragraph B1 should be read in conjunction with Section D of the Guidance 15, which considers what is meant by '*normal day-to-day activities*'.



34. In ***Goodwin v Patent Office*** [1999] IRLR 4, the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are:
- a. Does the person have a physical or mental impairment?
  - 5 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?
- 10 35. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability.

#### *Qualifications Bodies*

36. Section 53 EqA prohibits discrimination, victimisation and harassment by qualifications bodies. S54(2) states that a qualifications body is an authority or  
15 body which can confer a relevant qualification. A 'relevant qualification' is defined, in s54(2) as *'an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession'*

### **Discussion & Decision**

#### 20 *Disability Status*

37. The Tribunal firstly considered whether the claimant had demonstrated a physical or mental impairment. The Tribunal concluded that the claimant had demonstrated that he had near exphoria at the relevant time, and this amounted to a physical impairment. The Tribunal did not accept that any further  
25 impairment was established by the claimant, particularly the impairment relied upon of dyslexia.

38. In relation to dyslexia, no evidence was produced which substantiated the claimant's assertion that he had dyslexia, or any impairment of that nature. The  
30 claimant accepted that he had never been formally diagnosed as having

dyslexia, or assessed by an psychologist to ascertain whether he had the condition. Whilst there were spelling and grammatical errors in the email of 13 November 2021, a conclusion that the claimant has dyslexia cannot be drawn from that, particularly given that there was no evidence of any such spelling and grammatical errors in any other emails which the Tribunal were referred to. No further facts were established from the evidence to support the claimant's assertion that he has dyslexia or an impairment of that nature.

39. The claimant relied upon an academic article, published in 2021, entitled 'The relation between the severity of reading disorder and visual functions among children with dyslexia. Tiawan J Ophthalmol 2022; 12:178-183' (the **Article**) to demonstrate that he had dyslexia. He relied upon this in two respects:

a) In the introduction, it is stated '*in common theory, phonological deficits constitute the main cause of dyslexia. However, further studies have revealed that sensory and visual perceptual dysfunctions might play a role*'; and

b) The conclusion of the report, which was that '*we found that higher exophoria at near has a significant correlation with the severity of dyslexia. A complete and detailed eye examination of patients with dyslexia and correcting their visual impairments might be helpful.*'

40. The claimant relied on the Article to assert, in his correspondence with the respondent on 2 December 2021 and in his evidence to the Tribunal, that this demonstrated a link between near exophoria and dyslexia and therefore his diagnosis of near exophoria should also lead to the conclusion that he also has dyslexia. The study was however of 32 primary school aged children who had mild, moderate and severe dyslexia. They were picked for the study because they had dyslexia, to investigate the relation between the severity of reading disorder and visual functions amongst children with dyslexia. The study concluded that the children with severe dyslexia were more likely to have near exophoria than those with mild or moderate dyslexia. It was not a study of individuals who had been diagnosed with near exophoria to establish whether

they were statistically more likely to also have dyslexia. There is accordingly no basis for the claimant's assertion that the Article demonstrates that his diagnosis of near exophoria should also lead to the conclusion that he also has dyslexia.

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41. While it was not necessary to do so, given the finding that the claimant did not have the impairment relied upon, given that the claimant asserted that his symptoms (and thus the effects of the impairments asserted) were similar for dyslexia and near exophoria, the Tribunal considered whether the impairment established had an adverse effect on the claimant's ability to carry out normal day-to-day activities and, if so, whether that adverse effect was substantial. The Tribunal was mindful that, in considering that question, taking into account schedule 1, paragraph 5 EqA and paragraph B15 of the Guidance, this required to be assessed when the claimant was wearing his middle distance glasses, not without them. The claimant's evidence was that the wearing of middle distance glasses resolved the adverse impact on his ability to carry out day to day activities. He relied on his ability to use a computer as a day to day activity and confirmed that, with his glasses, he was able to do so. No further adverse effect on the claimant's ability to carry out normal day-to-day activities was relied upon or established.

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42. Given the above findings, the Tribunal concluded that the claimant has not demonstrated that he was a disabled person, for the purposes of s6(1) EqA, at the relevant time. It was accordingly not necessary to determine the issue of the respondent's knowledge of disability.

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43. Whilst there was no requirement to do so, given the finding that the claimant was not disabled at the relevant time, the Tribunal also considered the remaining preliminary issues asserted and sets out its response to each below.

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*Whether the claim ought to have been rejected under rule 12 of the Rules of Procedure*

5 44. The respondent asserted that the Tribunal had no jurisdiction to consider the claim. Their position was that it ought to have been rejected under rule 12(1)(b) of the Rules of Procedure, as it was in a form which could not be sensibly responded to, in the absence of the 'attached document' referred to in section 8.2 of the ET1 Form. The claim should be dismissed as a result.

10 45. The Tribunal determined that it was not able to consider this application. The decision to accept the claim was made on 6 April 2022. That decision was a judgment, as defined in rule 1(3)(b) of the Rules of Procedure: A decision as to whether a claim ought to be accepted or rejected is an *'issue which is capable of finally disposing of any claim...even if it does not do so'*. The  
15 procedure for challenging judgments is to apply for reconsideration or to appeal. No application for reconsideration was made in accordance with rule 70 of the Rules of Procedure. No appeal was submitted. There is therefore no basis upon which the Tribunal can properly consider an application to dismiss the claim on this basis, at this stage.

20 *Is the respondent a 'qualifications body' as defined in s54 EqA?*

46. The Tribunal considered whether the respondent is a 'qualifications body' as defined in s54 EqA. The Tribunal noted that being on the Register merely facilitated the ability of an individual on the Register to undertake medicals to  
25 assess an individual's suitability for offshore work for certain organisations. Not all organisations however use doctors from the Register. The Tribunal concluded that being on the Register was akin to being appointed to a panel of approved suppliers. Being on the Register does not however confer on a doctor  
30 *'authorisation, qualification, recognition, registration, enrolment, approval or certification'* needed to practice their profession. Doctors not on the Register can carry out all aspects of their profession. Nor does being on the Register confer on a doctor *'authorisation, qualification, recognition, registration, enrolment, approval or certification'* needed to facilitate their engagement in

their profession. Doctors not on the Register can carry out all aspects of their profession, including conducting medicals to assess an individual's suitability for employment offshore. Indeed, the Guidance states that *'operators may choose to use alternative methods of assessment for their own installations'* and makes it clear that the key requirement for unrestricted work in the North Sea is that the medical assessment meets the requirements of the Guidance, not that it is conducted by a doctor on the Register. Being on the register accordingly does not *'facilitate engagement in a particular trade or profession'*, it simply facilitates commercial arrangements between those on the Register and the organisations who chose to rely on the respondent's recommendation.

47. Given these findings, the Tribunal concluded that the respondent is not a qualifications body, as defined in s54 EqA.

48. In light of the conclusions that the claimant was not a disabled person for the purposes of s6 EqA and that the respondent is not a qualifications body, as defined in s54 EqA, the Tribunal conclude that it has no jurisdiction to consider the claim. The claim is accordingly dismissed.

Employment Judge: Mel Sangster  
Date of Judgment: 11 October 2022  
Entered in register: 12 October 2022  
and copied to parties

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