



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105353/2020 and 4102876/2022

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Held in Glasgow on 8 and 9 November 2022

Employment Judge S MacLean

10 **Mrs Audrey Doyle**

**Claimant
In Person**

15 **North Lanarkshire Council**

**Respondent
Represented by:
Mr G Mitchell -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was a disabled person between May 2019 and October 2022 in terms of section 6 of the Equality Act 2010. The claimant met the criteria and had a disability (mental impairment) during the relevant time and a disability (physical impairment) from December 2020.

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REASONS

Introduction

1. These are claims of disability discrimination. The order dated 15 September 2022, set out that there was a preliminary issue: whether the claimant was disabled within the definition of section 6 of the Equality Act 2010 (the EqA). This was to be determined as a preliminary issue at this hearing.
2. The claimant relies on three medical conditions in support of her position that she was disabled in terms of the EqA: Asperger's syndrome, depression and anxiety and abdominal pain.

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3. In preparation for this hearing, the claimant produced medical records and other documentation in support of her position. Having had an opportunity to review the documentation, the respondent confirmed in an email sent on 3 November 2022 that the following concessions were made:
- 5 a. Asperger's syndrome. It was conceded that the claimant was disabled in terms of the EqA from February 2019 onwards in this respect.
- b. Anxiety and depression. It was conceded that the claimant was disabled in terms of the EqA from June 2017 onwards in this respect.
- c. Abdominal pain. It remained in dispute that this was a standalone
10 disability.
4. Notwithstanding the respondent's concession, the claimant's position was that her disability (Asperger's syndrome) was a lifelong condition which had a substantial long term adverse effect on her day to day life since early
15 childhood. Further, she had been struggling with anxiety since returning from maternity leave in June 2017. She also maintained that the physical condition (abdominal pain) was a standalone disability.
5. While it was initially intended that the preliminary hearing would take place in person, Mr Mitchell, the respondent's representative advised that he had tested positive for COVID-19. In these circumstances, it was agreed that he
20 would participate remotely by Cloud Video Platform. The Employment Judge and the claimant were present in the hearing room. The claimant was supported throughout by her husband.
6. The Employment Judge explained that the time at which she had to assess disability (i.e. whether there is an impairment which has a substantial adverse
25 effect on day to day activities) is the date of the alleged discrimination. The Employment Judge had endeavoured to clarify the key ingredients of the claims at a preliminary hearing for case management on 1 November 2021. In the note of that preliminary hearing, the allegations of discrimination commenced when the claimant was required to undertake a phased return to
30 work on May 2019 rather than attend a high school where she anticipated

undertaking a permanent appointment. The allegations of discrimination continued until October 2022 when a further claim was presented. The relevant time is therefore May 2019 to October 2022.

- 5 7. Mr Mitchell explained that the respondent accepted that as a result of the claimant's mental impairment, it was conceded that she had difficulties communicating with others, issues with noise (Asperger's syndrome), low mood and fatigue, panic attacks and insomnia (anxiety and depression). There was no concession made in relation to the ability to cope with change.
- 10 8. In relation to abdominal pain, Mr Mitchell confirmed that there was no doubt the claimant had abdominal pain but there was an issue as to whether or not it fell within the definition in section 6 of the EqA in that it was unclear what the condition was, it appeared to be intermittent and it was only relatively recently that the effects of the pain had increased. The respondent did not know if there was a substantial effect. The two elements seemed to affect her: movement and toileting. There was some issue as to whether or not there was any medical diagnosis and to what extent it has lasted or is capable of lasting more than twelve months.
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Relevant law

9. Section 6 of the Equality Act provides a definition of disability as follows:
- 20 “(1) A person (P) has a disability if:
- a. P has a physical or mental impairment; and
 - b. The impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.”
10. Section 212(1) of the EqA provides that “substantial” means more than minor or trivial.
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11. Schedule 1 of the EqA gives further details on the determination of disability. For example, schedule 1, paragraph 2(1) provides that the effect of an impairment is long-term if it has lasted at least 12 months, is likely to last for

at least 12 months or is likely to last for the rest of the life of the person affected.

12. Paragraph 5 provides that 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 measures are taken to correct it and but for that, it would likely to have that effect. Measures includes medical treatment.
13. The Tribunal must take account of statutory guidance on the definition of disability (2011) which stresses that it is important to consider the things that a person cannot do or can only do with difficulty. This is not offset by things that the person can do. Day to day activities are things people do on a regular basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking travelling and social activities. This includes work related activities such as interacting with colleagues, using a computer, driving, keeping to a timetable etc.
14. The Tribunal must consider the status of the claimant at the date of the discriminatory acts (*Cruickshank v VAW Motorcast* [2002] IRLR 24).

Issues

15. The Tribunal had to determine the following issues:
- a. Did the claimant have a mental or physical impairment? The claimant asserts that she had mental impairments: Asperger's syndrome and anxiety and depression. She also asserts that she had a physical impairment of abdominal pain.
 - b. Did the impairments cause a substantial adverse effect on the claimant's ability to carry out normal day to day activities?
 - c. Is the effect long term in that it has lasted 12 months; is likely to last 12 months; it is likely to last for at least 12 months; or is likely to last the rest of the life of the person affected?

Findings in fact

16. The claimant was born in April 1974.
17. Around 1996, she became aware of abdominal pain which would flare up on a monthly basis causing severe constipation and bleeding. During these monthly flare ups she would often be bedridden for a few days and not leave the house.
18. The claimant started teaching in West Lothian Council between 2001 and 2004.
19. In 2004, the respondent employed the claimant as a teacher. While the claimant's place of work was closer to home she still required to drive to work. The monthly flare up of her abdominal pain intensified. She had to attend accident and emergency from time to time due to the pain. The claimant was frequently late for work.
20. In 2006, the claimant underwent surgery where part of her bowel was removed and resected. One of her ovaries were removed. She was diagnosed with endometriosis and fibroid tissue which was surrounding her internal organs. As a result of this surgery, the claimant had a narrowing of her bowel and continued to be in regular pain and had constipation. The claimant had an MRSA infection to the abdominal scar which prolonged her recovery and resulted in build-up of scar tissue and an incision hernia.
21. In 2007, the claimant underwent a further operation to repair some of the abdominal scar tissue and to insert mesh to repair the incision hernia. The claimant continued to have sporadic pain which would cause abdominal swelling and would have difficulty bending. She found that physical activities such as going for walks would cause increased pain and she avoided this as much as possible.
22. In 2008/9, the claimant underwent fertility treatment and became pregnant. During the pregnancy, the claimant was in chronic pain because of the limited space in her abdomen and the pressure on the scar tissue.

23. The claimant had trouble with household tasks which were primarily undertaken by her husband. Her daughter was born in 2010. Her husband also took her daughter to nursery and collected her.
24. The claimant returned to work but was struggling with driving. The claimant was on medication which consisted of pain relief (paracetamol, co-codamol and hormone therapy). Initially, she endeavoured to manage the pain by limiting physical activity which would reduce the swelling. The claimant used most of her energy making it through the day at work. Housework was not being done. The claimant's husband would do most of the driving and pick up her daughter from school. He would undertake the shopping and most of the household chores that the claimant was unable to do.
25. In 2016 the claimant was pregnant with her second child. She struggled with lifting textbooks and had increasing abdominal pain. She required to take maternity leave early.
26. From June 2016, the claimant was a disabled person in that she had a mental impairment which had a substantial and long-term adverse effect on her ability to carry out normal day to day activities.
27. The claimant's son was born in September 2016. The claimant took extended maternity leave. While on maternity leave, she rarely left the house. She was unable to lift items and had no social life. Her stepfather would visit and help look after her son. The claimant's husband continued to deal with their daughter.
28. The claimant tried to get back on her feet but was finding it increasingly difficult to stand for any lengthy of period. She required to go to the toilet often. Her abdomen would often be sore and swollen and she would need to go to bed.
29. The claimant returned from maternity leave around June 2017. She reduced her working week to three days. She struggled in the house looking after her son for two days a week. She was physically limited in what she could do. Her husband would prepare her meals and bottles for their son. The claimant would wait for her husband to return.

30. During the summer of 2017, the claimant's husband took three weeks' annual leave to help look after the children. For the four weeks remaining weeks of the school holidays, the claimant was unable to cook and her husband would batch cook and would make sure that the house was clean and tidy. The claimant was not able to do housework. Her husband would pick out her clothes and the children would only leave the house if other family members came to take them out.
31. From August 2017 until June 2019, the claimant was referred to psychiatric services. The claimant was allocated a community psychiatric nurse (CPN). She was not eating or drinking properly. She had no energy. She was unable to leave the house. A childminder was employed to look after their daughter after school. The claimant endeavoured to keep the children washed and cleaned but was unable to carry out simple tasks. The claimant felt that it was easier if she stayed in the house and some days would not get out of bed. The claimant felt petrified to leave the house because of the pain. She was encouraged to join groups and engage in activities but she was in too much pain to do so. The claimant tried to push through but was unable to do so.
32. The claimant was diagnosed with Asperger syndrome in February 2019. As a result unexpected or sudden changes to her environment, routine, work demands can be extremely stressful. Social interaction with other adults can be stressful.
33. The claimant went on long-term absence from August 2018 until May 2019. She was struggling to leave her house. She developed insomnia. Even the smallest of tasks around the home were insurmountable. She was not able to drive.
34. In May 2019, the claimant found that taking liquids was resulting in incontinence. She needed to use incontinence pads. She consulted her general practitioner.
35. From June 2019, the claimant struggled to drive to work because of the abdominal pain. She had been tasked with covering classes and found it to be difficult to walk from classroom to classroom. She would go home

exhausted. She felt that she was not able to undertake physical work because of the pain. She could not walk any distance. Any exertion led to increased pain.

36. The claimant return to teaching in August 2019. She was able to walk to work as the school was in close proximity to her home. There was a toilet close by the classroom and she used a wheel cabin bag to transport her materials.
37. In April 2020, the claimant attended an incontinence clinic and was given a treatment plan.
38. In July 2020, the claimant contacted her general practitioner because she was in so much abdominal pain, suffering urinary incontinence and painful bowel movements. The pain was such that she was contemplating further surgery despite being “petrified” of this. She had difficulty have sexual intercourse.
39. The claimant met a friend, who she knew from hill walking, for support on a monthly basis. The claimant was unable to participate in any of the physical activities. The claimant’s husband also took the children to most of their activities.
40. By September 2020, the claimant continued to have stabbing pains. She was not washing, dressing, eating properly and was rarely leaving her bedroom. The claimant underwent tests in October 2020 for the abdominal pain.
41. The claimant continued to report to her general practitioner in December 2020 that she was suffering severe pain in the pelvic area near the hernia mesh and incontinence. She had difficulty having sexual intercourse.
42. By February 2021, the claimant said that the painful when she was trying to walk around. She needed to increase her pain relief.
43. In March 2021, she said that the pain continued to become significantly worse. She was in great discomfort when the clothes touched the location of the hernia mesh or brushed against anything in the swollen area. It was very difficult for her to bend down or to move around much without intense pain

and her mobility was becoming severely limited and even walking and basic tasks were becoming more challenging.

44. The claimant returned to work in May 2021 on a phased basis. Throughout June 2021, the claimant required to have her medication increased including her new medication (duloxetine) which helped with both pain and anxiety symptoms. Driving after a few minutes was becoming increasingly difficult for the claimant. She had been tasked with covering classes and found it to be very difficult to walk from classroom to classroom. She would go home and be sick. She felt that she was not able to undertake physical activities.
45. The claimant stopped looking after herself. She could not walk any distance and was in pain even when she reduced her physical activity. Any exertion led to increased pain. She was unable to look after the children.
46. By October 2021, the abdominal pain had significantly increased and the pain was of electric shocks, shooting pain in her groin and hip area and she was in too much constant pain to do any activities. It was very difficult to bend down. Her mobility was severely limited. She struggled to climb stairs and walk very far. She could not tackle basic household tasks. The claimant's medication was increased.
47. The claimant was signed off from work. She could not cope with pain when using stairs at work as the lift was not working.
48. In February 2022 the claimant abdominal pain and bloating worsened following a scan. She was bedridden and recovering from COVID-19.
49. The abdominal pain was linked to walking, lifting objects and climbing stairs. She was unable to have sexual intercourse. The pain was more severe if she had a full bladder. This affected the amount she would eat and drink because of the discomfort and pain.
50. By June 2022, the claimant continued to have chronic abdominal pain. She had severe pain if her bladder was full or pressing against the mesh, she had to go the toilet more frequently. She reported that the swelling was making very fatigued especially when trying to attempt any form of activity and

struggled to walk, lift or climb stairs or have sexual intercourse. The claimant was struggling to eat anything more than one meal because of the discomfort and pain she was in.

51. The abdominal pain has been under control for many years but in the last
5 twelve to eighteen months reared its head. There are ongoing investigations with general surgeons and gynaecologists. The claimant requires regular toilet breaks and she has difficulty with any physical exertion.

Observations on the evidence

52. The claimant's evidence was based on her recollection of events (which at
10 times was confused) with reference to supporting documentation. Given the respondent's concessions her focus was understandably on the impact her physical condition on her day to day activities. The claimant tended to focus on her work related activities. She endeavoured to answer questions in cross-examination to the best of her abilities.

- 15 53. The evidence supports that the claimant had previously managed to work full time as a teacher. Following abdominal surgery in 2006/2007 the claimant had abdominal pain which was cyclical/intermittent. She participated in hillwalking/rambling group. However, in recent years, she had only been able to meet with the group about once a month at the meeting place for moral
20 support and did not get involved in the walking activities. Her abilities to function at home and at work have been slipping away from her. The claimant's dedication to her job and her attempts to cover up increasing difficulties may have led to an underreporting of her condition during the relevant period.

- 25 54. While the oral evidence focussed on the claimant's physical condition there was substantial medical evidence about the claimant's mental impairment. Most of the psychiatric reports concentrated of the claimant's infrequent leaving the house being due to her anxiety. There is little reference to the claimant being unable to leave the house because of the physical pain. There
30 was however reference in a medical report from the Chronic Pain Service in August 2021 to the reason for the claimant infrequently leaving the house

being mainly due to her anxiety rather than the pain. That said the claimant explained that her anxiety was due to concern about the increasing abdominal pain on physical exertion and the need to be close to a toilet to ensure that she did not have a full bladder. A report dated 30 June 2022 from the claimant's consultant psychiatrist refers to the claimant's ongoing physical health issues related to chronic pain secondary to hernia repair and the impact of the uncertainty of the cause of the pain combined with the disturbances of sleep and mobility creating further perpetuating factor for her symptoms of depression and anxiety.

55. The Tribunal did not accept the respondent's submission that the claimant's anxiety resulted in negative thought processing about her physical pain. The claimant was consulting her general practitioner and specialist consultants about managing the pain, her account of her symptoms and its effect on her day to day activities and they were corroborative of this.

15 **Deliberations**

56. The test is functional and not a medical test directed to what a claimant cannot or can no longer do at a practical level.
57. Impairment bears its ordinary and natural meaning and may result from an illness or consist of an illness. Disability may include someone who is not in fact disabled if, without medical treatment, they are in fact receiving and they would suffer that disability.
58. The burden of proving disability lies with the claimant. The Tribunal's assessment of her situation must be taken at the time she says the claims arose.

25 *Did the claimant have an impairment?*

59. Dealing first with the issue of impairment, it was undisputed that the claimant had a mental impairment at the relevant time. She had been diagnosed with Asperger's syndrome in February 2019 and has anxiety and depression since June 2017.

60. In relation to physical impairment, the Tribunal was satisfied that the claimant had something physically wrong with her abdomen since 2006. The claimant had an illness (endometriosis) requiring surgical intervention. Following an operation that removed part of her bowel and an ovary, the claimant had a hernia which resulted in an operation to insert a mesh. The claimant continued to have problems in the abdominal area which resulted in cyclical pain requiring medication. The physical impairment did not have a mental cause.
61. As regards the physical impairment, there was no doubt that the claimant was in pain. She candidly accepted that for some time that pain was cyclical. The claimant managed the pain by reducing physical activity and self-medicating.
62. Mr Mitchell accepted that the claimant was on medication for anxiety and depression. He suggested that this may affect the claimant's thought processing about her physical condition and what she can and can not do.
63. While the claimant took medication for pain relief from time to time, her medical records note that from June 2019 she was being prescribed a variety of medication for pain relief/inflammation which increased and most significantly from February 2021. The Tribunal felt that it seemed more plausible that the increasing physical symptoms exacerbated the claimant's anxiety rather than her anxiety triggering the pain.

Did the impairments have an adverse effect on her ability to carry out normal day to day activities?

64. It was undisputed that the claimant's mental impairment had an adverse effect on her ability to carry out day to day activities. The claimant could not leave her house. At its worse the claimant did not leave her bedroom. She struggled with household chores and day to day living.
65. In relation to the Asperger's syndrome, Mr Mitchell said that there was there is no reference in the GP notes about any difficulties in relation to change but the focus is on the noise and ability to concentrate. The Tribunal considered that this was addressed in the report by AHP Health and Work report dated

20 July 2021 and by the consultant psychiatrist in his report dated June 2022 when he explained that the difficulties created by the claimant's autism were widespread. "Her behaviours are highly routinised and she actively resist change. Any change that is sudden, unplanned or to which she has not been made aware can result in significant stress".

5 66. As regards the physical impairment from July 2020, the abdominal pain became constant rather than cyclical. The level of the pain was such that she sought medical advice claimant. She could no longer alleviate the pain by reducing physical activity.

10 67. The complication is that there is an interrelationship with the claimant's medical conditions. There are occasions when she was experiencing all the symptoms at the same time. While the claimant was diagnosed with Asperger's syndrome in 2019, the claimant has had issues with her mental health for most of her life. Her anxiety at its height causes disabling panics attacks and she cannot leave the house. She is predisposed to depression which leads to disturbed sleep, lack of motivation and loss of enjoyment in life. The claimant has also a physical impairment which despite surgical intervention she has been managing for over a decade but this physical impairment did not significantly interfere with her life until around December 20 2020 when it began to alter her lifestyle. By then, she required was reporting severe pelvic pain, nerve pain, incontinence and sexual pain. She was unable to undertake household tasks which involved heavy lifting or physical activity. She could only drive and walk short distances.

25 68. In terms of the statutory guidance, the focus is not on what the claimant could do but what she could not do or could only do with difficulty.

30 69. The claimant was able to attend work, undertake work tasks and travel to her work. It is not definitive in the Tribunal's assessment. She had difficulty in climbing stairs, walking long distances, lifting items and carrying out household chores. These are normal day to day activities and are ones which must be considered in deciding that they show disability. The claimant was able to do these things to some extent, but only with difficulty and in

determination to be at work and on some days she required assistance from others. The Tribunal considered that there was an adverse effect on her ability to do these activities.

Was the effect substantial?

5 70. Mr Mitchell said that there was no doubt that the claimant had been in pain. He said that it was not as severe as it was being suggested. It may be a symptom of the anxiety/depression. There was an uptick in symptoms from October 2021 which seemed to coincide with a move to a new school and cannot be unbound from the other issues that were ongoing at the time.

10 71. In the Tribunal's view the seriousness of the effects varied over the relevant period but became worse as time passed. Although the symptoms were not so substantial that the claimant was off work throughout the period, even with medication they had a significant effect on her ability to carry out domestic tasks, drive for any significant length of time, walk and climb stairs. On the
15 basis of the claimant's evidence and the medical records, the Tribunal considered that throughout the period December 2020 to October 2022 her physical impairment had an effect on her day to day activities as described above that was more than minor or trivial.

Was the substantial adverse effect long-term?

20 72. The Tribunal must also consider whether the substantial adverse effect was long-term. As noted above, the Tribunal considered that the substantial adverse effect of the physical impairment started around December 2020. As the Tribunal is considering specifically the period from May 2019 to October 2022 this is more than twelve months and meets the statutory criteria for being
25 considered as long term.

73. Based on the evidence that has been provided, the claimant has suffered increasing symptoms and has been prescribed medication. At this stage there is no evidence to support any finding that that the symptoms will be alleviated or that that the claimant will make a significant

74. The Tribunal concluded that the claimant had met the criteria and had a disability (mental impairment) during the relevant time and a disability (physical impairment) from December 2020.

75. In conclusion, the claimant has a disability and the claim can proceed.

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Employment Judge: S MacLean
Date of Judgment: 28 November 2022
Entered in register: 29 November 2022
and copied to parties