



EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 8000180/2022 Preliminary Hearing (Hybrid) at Glasgow on 26
September 2023**

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Employment Judge: M A Macleod

Alessia Potalivo

**Claimant
Not Present and
Not Represented**

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Clements Europe Limited

**Respondent
Represented by
Mr K Aggrey-Orleans
Barrister**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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**The Judgment of the Employment Tribunal is that the claimant has not
proved that she is, or was at the material time, a disabled person within the
meaning of section 6 of the Equality Act 2010, and accordingly her claim of
discrimination on the grounds of disability is dismissed.**

REASONS

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1. In this case, a Preliminary Hearing was listed to take place on 26
September 2023 by hybrid means, at the Glasgow Tribunals Centre, for the
purpose of determining whether the claimant was a disabled person for
statutory purposes, and the respondent's outstanding application for
expenses.

2. The Notice of Hearing listing this Hearing was issued to the parties by letter dated 16 August 2023.
3. Prior to the Hearing taking place, the claimant engaged in correspondence with the Tribunal in which she raised a number of issues, including seeking the identity of the Employment Judge allocated to this Hearing. By letter
5 dated 21 September 2023, the Tribunal advised that the Vice-President of Employment Tribunals (Scotland), Employment Judge Eccles, had asked that parties be informed that the Judge who would be conducting the Preliminary Hearing on 26 September would decide whether the application
10 for expenses was more appropriately determined by Judge Whitcombe, who was currently absent from the office.
4. It was clear, then, from that letter that Employment Judge Whitcombe would not hear the Preliminary Hearing on 26 September 2023.
5. This did not prevent the claimant from writing again, on 24 September 2023,
15 again seeking clarification that Employment Judge Whitcombe would not be hearing the Preliminary Hearing, and suggesting that she may not attend the Hearing if he were allocated to it.
6. She also submitted that her letter of 17 September should be allocated
20 priority above the Preliminary Hearing, which she described as having profound implications for the fairness of the Hearing. Further she complained that allowing the respondent to contest her assertion that she was a disabled person in the face of the substantial evidence she had provided constituted an injustice to her, and undermined the principles of fairness and equality in the broader context.
7. On 25 September 2023, the claimant wrote again at 4.30pm, insisting that
25 she be given formal confirmation that the Employment Judge who would be hearing the Preliminary Hearing was not Employment Judge Whitcombe.
8. The claimant's correspondence was interpreted by the Tribunal as an
30 application for postponement of this Hearing, which was then opposed in the strongest terms by the respondent.

9. At 9.41am on 26 September 2023, the claimant emailed the Tribunal again, making reference to the objection taken by the respondent to her application under Rule 30A(2) of the Employment Tribunals Rules of Procedure 2013. She stated that she had never said that she did not want to discuss her disability with the Tribunal, but took issue with the unfairness of debating it with the respondent.

10. She went on to say that *“It is not true that I am simply trying to avoid the PH. I have been seeking attention from the ET up until yesterday, and now another working day has been wasted due to the mishandling of this case. The truth is that I do not believe it would be fair to force me to attend a PH that would not be conducted impartially.”*

11. The Preliminary Hearing was due to commence at 12 noon on 26 September 2023, but in the interests of clarity, I directed that a response be sent to the claimant.

12. In the course of that response, it was stated:

“It is not clear that the claimant is making an application to postpone this afternoon’s Hearing. The claimant has raised an objection to Employment Judge Whitcombe hearing this case, but that is irrelevant as he is not allocated to this Hearing. She has also suggested that her application of 17 September 2023 should be given priority over the issue of disability status and dealt with at this Hearing. For two reasons, this is rejected: firstly, her application of 17 September seeks a review, and variation or revocation, of earlier case management decisions by Employment Judge Whitcombe, and such an application must be dealt with by the Judge who took those decisions; and secondly, this Hearing has been listed for some time for the specific purpose of addressing the issue of whether the claimant meets the test for disability in section 6 of the Equality Act 2010, and it would be contrary to the overriding objective to alter the basis of the Hearing at such short notice.”

13. The Tribunal went on to explain that the respondent was entitled to attend the Preliminary Hearing and make representations on the evidence led from

the claimant in relation to disability status. The Tribunal letter confirmed that this was a standard process in such cases.

14. The letter concluded by making clear that if the claimant were making an application for postponement, that was refused.

5 15. That letter was sent to the parties at 11.29am by email.

16. At 11.53am, the claimant responded. She expressed her dismay that, had this response reached her by yesterday, she would now be ready to take part in the Preliminary Hearing.

17. She went on:

10 *"I want also to stress that allowing the respondents to take actively part in this PH and to object my disability status, contrary to the evidence I have provided, if it's truly in line with standard procedures, only proves that employment proceedings are tailored for represented parties, thus not predisposed to fair treatment and my mistrust is fully logical and*
15 *reasonable...*

Due to the late response from the ET, my participation to the PH is therefore forced to be limited to written evidence submitted so far, including the 3 pages submitted 2 weeks ago and up until the witness statements sent at 3.56 this night."

20 **The Hearing**

18. Against that background, I noted that the claimant had not attended at 12 noon, and asked the clerk to contact her by telephone. The clerk did so, but reported that there was no reply, and the phone was ringing out. Counsel for the respondent, Mr Aggrey-Orleans, had attended by Cloud Video
25 Platform, and accordingly at approximately 12.15pm I commenced the Hearing in the claimant's absence. I took into account the terms of her correspondence, the fact that she was due to attend in person at the Hearing, that her address is in Largs, some distance from Glasgow and the fact that the respondent was represented and ready to proceed.

19. I also noted that there was a considerable history to this matter, and that the Preliminary Hearing to determine disability status had been postponed on 6 April 2023, and a further 2 Hearings had had to be rearranged since then.

5 20. As a result, Mr Aggrey-Orleans submitted that the Hearing should proceed in the claimant's absence, partly due to the lengthy history of attempts to having this matter addressed by the Tribunal, and partly given the terms of the claimant's email of 11.53am, in which she indicated that her participation was forced to be limited to the documents and statement contained within the bundle of documents. He submitted that the claimant
10 did not intend to attend the Hearing, and indeed that it was clear that she never intended to do so.

21. I asked Mr Aggrey-Orleans to confirm that he was prepared to proceed on consideration of the papers only, in light of the fact that the claimant's absence meant he would be unable to challenge that evidence in cross-
15 examination. He asked for a short adjournment to seek instructions on this matter, which was granted to him. On resumption of the Hearing, he confirmed that he had been unable to speak to his instructing solicitor, but wished to proceed on the basis that he believed that those would be his instructions. He also made the point that without the claimant to speak to
20 the statement and records, the weight to be attached to that written evidence must be regarded as limited.

22. Having considered these points, and reviewed the file and correspondence as set out above, I concluded that it was in the interests of justice, and consistent with the overriding objective, to proceed with the Hearing. The
25 claimant chose not to attend this Hearing, for the reasons she set out in her correspondence. It was open to her to attend the Hearing (which was never postponed and therefore scheduled to commence at 12 noon on 26 September) and to make any arguments or objections as she wished at that stage. The Hearing was prepared – both parties had contributed to the
30 production of a Joint Bundle of Documents which was made available to me, and the respondent and Employment Judge were ready and able to proceed at the scheduled start time – and since the claimant chose not to

attend, and given the lengthy history behind this matter, it was my view that the Hearing should proceed and a decision could be taken, so as to make progress with these proceedings.

5 23. It should be noted that no application was made by the respondent to seek dismissal of the claimant's claim under Rule 47, in circumstances where she did not appear nor was represented at the Hearing. However, taking into account the terms of Rule 47, which I raised at the outset, I noted that it is open to the Tribunal to proceed in the party's absence, taking into account all information available to it.

10 24. Accordingly, having reference to the Joint Bundle of Productions, I asked Mr Aggrey-Orleans to present his submissions.

15 25. Counsel referred to the Order issued by Employment Judge Whitcombe dated 9 February 2023 and issued to parties on 13 February 2023 (57ff), in which the claimant was given very clear guidance as to the information she had to provide in relation to disability status (59). In particular, he pointed out that the Order advised the claimant that she required to present medical records and a concise disability impact statement.

26. The claimant did provide a disability impact statement (96ff) and copies of medical records (99ff).

20 27. Mr Aggrey-Orleans then referred to the definition contained in section 6 of the Equality Act 2010, and identified what the claimant said are the issues in this case, namely that she suffered at the material time from "visual impairment" (15), and that the respondent had knowledge that she suffered from a disability in the form of visual impairment (18).

25 28. He made reference to the terms of the disability impact statement, in which the claimant confirmed that she relied upon strong myopia combined with divergent muscle and detached vitreous gel, namely a large Weiss Ring floater in her right, dominant, eye, and insomnia caused by anxiety and depression as a consequence. He maintained that the strong myopia was

the part of this statement which related to the particulars of claim, as insomnia and depression or anxiety were not mentioned in her claim.

29. Mr Aggrey-Orleans then observed that the medical records produced largely relate to appointments with an optometrist or optician, rather than a clinical ophthalmologist, and argued that this is not the basis upon which to establish a disability within the meaning of the Act.

30. He made reference to the Statutory Code of Practice for Employment at paragraph 17 (128), in which the wearing of spectacles was not included within the rule about ignoring the effects of treatment, and that in this case, the effect while the person is wearing spectacles or contact lenses should be considered.

31. Going to the medical records, counsel referred to the entries on pages 100 to 111, and noted that they were not significant enough to justify a finding of disability. It should also be noted that there are entries which relate to the period following the end of her employment with the respondent.

32. He concluded his submission on disability by inviting the Tribunal to find that there is no evidence that the claimant suffers, or suffered at the material time, from a visual impairment amounting to a disability within the meaning of the Act, and to find, therefore, that the claimant is not a disabled person within the statutory definition.

33. Mr Aggrey-Orleans also made a short submission on the application for expenses submitted by the respondent on 18 May 2023. Essentially, he set out the position in that application and argued that the claimant had acted unreasonably in the process which led to the postponement of the Hearing on 6 April 2023.

34. Finally, he proposed that if the Tribunal were to find that the claimant is not a disabled person, that would leave only an unlawful deductions from wages claim, encompassing holiday, notice and other payments; and that it would be helpful if the Tribunal were to direct the claimant to set out the amounts sought and the basis upon which she seeks those amounts.

The Claimant's Position

35. In this case, the claimant did not attend the Hearing, and therefore was not available to give evidence under oath or affirmation, nor to be cross-examined. While counsel for the respondent observed that this would affect the weight to be attached to the evidence presented by the claimant in written form, he very fairly made a written submission taking into account that evidence to the extent that he was able to.

36. I consider that it is appropriate and in the interests of justice to take into account the written evidence presented by the claimant in determining this issue, notwithstanding that the claimant did not attend the Hearing.

37. I make no finding, incidentally, as to whether or not the claimant ever intended to attend this Hearing, simply because I have no evidence upon which to base such a finding. The respondent clearly suspects that the claimant did not intend to attend, but there is no factual basis upon which a finding can be made.

38. Before analysing the evidence, it is critical, as Mr Aggrey-Orleans pointed out, to establish what condition or conditions the claimant seeks to rely upon in her claim to the Tribunal.

39. In the paper apart to her ET1, the claimant stated (15):

20 *"They [her former employer] had also been made aware that I suffer from visual impairment and that I would find it difficult to follow the training via Teams by reading someone else's screen with normal settings."*

40. She went on to complain (16) that the way in which she had been treated by her line manager had made her feel *"really uncomfortable and anxious from the very beginning, and that I suffered mental stress as a result."* She also indicated that she *"suffered another breakdown"* at a later stage.

41. I accept the respondent's submission that her claim relies upon visual impairment as a disability, and that the references to mental stress are

related to the effects upon her of the allegedly unlawful treatment to which she alleges she was subjected.

42. Following an Order issued by the Tribunal, the claimant submitted further and better particulars of her claim (77ff). She did not depart from her
5 assertion that her disability related to her visual impairment. She did set out greater details of her impairment and its effect upon her ability to carry out normal day-to-day activities, as follows:

"I take much longer to read, so

I take longer to understand and

10 *I get easily tired from reading*

Furthermore the strong annoyance caused by the white veil in the centre of my visual field is truly mentally distractive. It takes much mental energy away from me

I develop very frequent headaches, so

15 *With or without headaches*

The effort I must make to see leads me to develop mental tiredness which means diminished lucidity and

Increased mental confusion which prevent me from easily fixing and retaining what I have learned, and

20 *I also take longer to memorise (any concept of my daily life, also those which are not work related).*

Therefore, I also make mistakes of any kind. They could be linked to conceptual learning or practical.

As a further result:

25 *I develop anxiety and depression. These issues were already present in my life at intermittent phases because of my visual problems.*

This means that being through this impairment, especially when not understood or accepted, being faced with human selfishness and shallow attitude to my problems, can cause strong anxiety or depression which in turn prevent me from sleeping.

5 *Insomnia, as a further result of all the above, further worsens my vision in the morning and makes me even more mentally tired and confused.*

As a consequence, mistakes (theoretical and practical) are more frequent.

I also find it difficult to control my feelings.

10 *The impact on my mental wellbeing is not trivial as well as this reflects not only on my more frequent mistakes but also in the reduced quality of human relationships...”*

43. Again, the further and better particulars focused upon the visual impairment from which the claimant suffers, and the consequences which arose from that impairment.

15 44. Accordingly, the claimant offered to prove that she suffers, and suffered at the material time, from a visual impairment amounting to a disability under section 6(1) of the 2010 Act.

45. Next, the Tribunal requires to consider the evidence which she presented, in written form, in support of her pleadings.

20 46. The claimant submitted a disability impact statement (96ff) dated 9 March 2023.

47. She stated therein:

25 *“The disabilities I rely upon for the purposes of my claim are Strong Myopia combined with divergent muscle and detached vitreous gel, namely a large Weiss Ring Floater in my right (and dominant eye), and insomnia caused by Anxiety/Depression as a consequence.*

Strong myopia started more than 10 years ago. The detached vitreous gel occurred in November 2019 and was diagnosed in December 2019. Anxiety and depression are effects of the great difficulties posed in my daily life by my visual impairment and the shallow and selfish attitude I had to withstand from other people, especially at work...

The immediate impact of my strong myopia has always been my difficulty in reading text on the paper as it was always too small for me.

This has not always been fixed by glasses as I need three different set of lenses based on my needs and the prescription for these change very frequently, so very frequently I end up with visual issues even whilst wearing glasses.

Working with electronic devices, and therefore with Visual Display Units is the activity which takes, without any exaggeration, a minimum of 80% of my daily life, when not more...

Now, since November 2019, when I am in front of a source of light or light emitting device like a PC display, the visual field of the right eye is dramatically affected. I have a constant and wide white strip (it seems like made of a thick white veil) in the very centre of the visual field. This prevents me from correctly seeing what is in front of me on the display and cannot be corrected by glasses."

48. The claimant went on to explain that it takes her much longer to read, longer to understand and she gets easily tired from reading. (She does not make a comparison between herself and another person when she says it takes much longer; that is, she does not say much longer than whom it takes her to read).

49. She complained that she is mentally distracted by the white veil in the centre of her visual field; that she develops frequent headaches and mental tiredness, with diminished lucidity and increased mental confusion. As a result, she says, she makes mistakes of any kind.

50. She then asserted that the difficulties she suffers with her visual field cause her to suffer from anxiety and depression, and that she finds it difficult to control her feelings.

5 51. In addition to the disability impact statement, the claimant submitted records relating to the treatment of her eye conditions.

52. She produced a letter from her GP, Dr Telfer, of the Gilmore Medical Practice, dated 19 June 2014 (100), which stated:

10 *"I can confirm that Alessia Potalivo of [address] has been having problems with her eyes which she has been attending our surgery for. It may be of benefit to Alessia if she did not spend as much time in front of a computer as this exacerbates her symptoms."*

53. Subsequently, Dr Gordon Scott of the same practice wrote a letter to whom it may concern dated 7 October 2014 (101), in which he said:

15 *"I am writing in support of my above patient. She has an ongoing visual problem which makes it difficult to see small computer screens and there are problems having her lenses corrected appropriately to prevent this issue. Her symptoms would be helped by a larger or special screen to help her in the workplace."*

20 54. Dr Scott wrote to Sykes Global Services Ltd in relation to the claimant on 3 March 2015 (102), setting out a longer and more detailed medical report.

55. Within that report, he made the following observations:

- 25 • *"Ms Potalivo has Type 2 Diabetes and uses Metformin for this. This is mainly in the form of insulin resistance and can cause weakness in the mornings and make her mentally sluggish. It can also cause insomnia at night. She also suffers from allergic rhinitis and allergic blepharitis, which will cause eye and nose problems, and this is currently being assessed and investigated. This may cause itchy irritated eyes and nose. She has also recently been found to be slightly anaemic and we are treating this. She has long-term*

problems with insomnia which may well cause fatigue early in the day in particular...

- *She also has some problems with her vision, which she sees opticians about, and they are unable to really correct this fully...*
- 5 • *She has no mental impairment. She has low back pain and irritated eyes and nose, Type II diabetes and insomnia...*
- *She does describe intermittently irritated eyes and nose which is a relatively minor problem...*
- *I do not think that the adverse effects are all substantial. Insomnia is*
10 *substantial. Other problems are minor...*
- *Her current health problems are long term, they may be indefinite.*
- *Ms Potalivo is currently receiving anti-allergy eye drops..."*

56. On 7 January 2021, Elaine Thomson, an optometrist with Vision Express, Frederick Street, Edinburgh, wrote a short letter to whom it may concern
15 (105):

"Miss Potalivo has attended our practice on two occasions over the past month with new onset floaters. These affect her right eye and are quite central in position. She is finding these floaters are affecting her ability to read her computer screen and means that her work is taking her longer to
20 *complete."*

57. On the same date, Ms Thomson carried out an eye examination, and reported that her next examination was advised in 1 year, that she was not referred and that she required a new prescription (106).

58. On 9 June 2022, the claimant was seen by an optician, Hannah Pugh, in Largs. A new prescription was reported to have been issued to her. The
25 comments section of the report by Ms Pugh confirmed that her next appointment would be 9 June 2023, and "eyes healthy" (107)

59. Similarly, the claimant was examined by an optician, Lynn Maclaren, in Largs on 9 September 2022. The report (108) said that the next examination would be on 9 September 2023. It confirmed that “Reassured healthy. NO DR. Discussed options re RE floater.”

5 60. A further report produced on examination by an optician in the same practice, Gillian McDonald, on 2 March 2023, simply commented that her next examination would be on 9 September 2024. (109)

61. Ms McDonald provided a letter dated 6 March 2023 based on that examination (110).

10 Discussion and Decision

1. Was the claimant, at the material time, a person disabled within the meaning of the Equality Act 2010?

62. The definition of disability is set out as follows in section 6(1) of the 2010 Act:

15 *“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.”

63. It is necessary, in determining whether or not the claimant meets, or met,
20 this definition, to consider the available evidence before the Tribunal.

64. The disability which the claimant seeks to rely upon is that of “visual impairment”.

65. There is no doubt that the claimant has difficulties with her eyesight. She has produced evidence demonstrating that she has attended at her optician or ophthalmologist on a number of occasions from 2014. She has also
25 completed a disability impact statement in which she stresses the difficulties which she suffers with her eyesight and the impact upon her day to day activities which that impairment has.

66. As Mr Aggrey-Orleans pointed out, the Statutory Code of Practice for Employment must be considered in terms of paragraph 17 (128), in which the wearing of spectacles was not included within the rule about ignoring the effects of treatment, and that in this case, the effect while the person is wearing spectacles or contact lenses should be considered.

67. Taking the definition of disability in section 6, it is necessary to consider the different aspects of that definition in order to understand whether or not the claimant's condition is such as to satisfy it.

68. The claimant's condition is a physical impairment. It is clear from the documentation that she relies upon her visual impairment as a disability, and that while there may have been consequences for her mental health in relation to these matters, it is the physical impairment which requires to be considered.

69. Does the impairment have a substantial adverse impact upon the claimant's ability to carry out normal day to day activities? Substantial must be taken to mean more than trivial. The reports from the claimant's GP are, perhaps understandably, slightly vague as to the particular problem or problem from which the claimant's suffered in 2014, describing her as having an "ongoing visual problem which makes it difficult for her to see small computer screens" (101), or "problems with her eyes" (100). The most detailed report, dated 3 March 2015, confirmed that she "has some problems with her vision, which she sees opticians about, and they are unable to really correct this fully" (102); and that she was currently receiving anti-allergy eye drops" (103). However, against that, Dr Scott states that "I do not think that the adverse effects are all substantial. Insomnia is substantial. Other problems are minor." I take that statement to include visual problems among those defined as minor.

70. Thereafter, her interactions were all with opticians. The only issue arising from those records relates to "floaters", which are understood to refer to a large white strip in front of the vision of her right eye (according to the claimant -110), which was adding to her eyestrain symptoms. In 2022 and

2023 it appears that the claimant was advised about the risks of potential surgery to correct this problem, but there is no evidence that she was referred to a specialist ophthalmic surgeon to act upon the possibility of surgery. In the claimant's absence, there is no basis, therefore, upon which I can conclude that the problem was sufficiently significant to require surgery to be, at least, considered.

71. Some general literature was presented to the Tribunal about floaters in the eye but there was nothing specific to the claimant other than what was contained in the opticians' correspondence.

72. In my judgment, the claimant has failed to prove that her visual impairment is substantial. It is clear that she suffers from some difficulties in seeing print on a small screen, and that opticians have found it difficult to identify corrective lenses with much effect. However, the claimant's own statement does not suggest that this has a substantial effect upon her ability to carry out normal day to day activities. There is no doubt that it has some effect, but given that she has spectacles (a corrective device which cannot be taken into account), the extent to which it affects her is limited and not, in my judgment, substantial. While the effect is adverse, and clearly long-term, it does not amount to a disability within the meaning of the 2010 Act.

73. The other conditions to which the claimant refers are not relied upon as disabilities.

74. It is therefore my conclusion that the claimant does not meet the definition of disability within section 6 of the 2010 Act, and accordingly her claim for disability discrimination must be dismissed.

2. Should the Tribunal deal with the respondent's application for expenses at this Hearing?

75. Having reflected on this matter, it appears to me that there is a risk that if I were to intervene in the application for expenses, which relates to the postponement of a previous Hearing before another Employment Judge, I may take into account factors which are not relevant, or may omit to

consider factors which are relevant. I am not aware of the full background of the postponement of that Hearing, not having taken the decision nor been the Employment Judge responsible for it.

5 76. Accordingly, I would refer that matter back to the case-managing Employment Judge for his decision, appreciating that he was not the Employment Judge for that Hearing either. He is, however, in the appropriate position to review the matter from the perspective of having managed the case throughout.

3. Should further case management orders be issued?

10 77. Given that only payments claims remain, and that the respondent considers those claims to lack specification, again it seems to me appropriate that I refer this matter back to the case management Employment Judge for him to take forward.

78. No Orders are therefore issued at this stage.

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Employment Judge: M A Macleod
Date of Judgment: 16 October 2023
Entered in register: 17 October 2023
and copied to parties

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25 I confirm that this is my Judgment and Orders in the case of Potalivo v Clements Europe Limited, and that I have signed the Judgment and Orders by electronic signature above.