



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000292/2023

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Held via Cloud Video Platform (CVP) in Glasgow on 13 October 2023

Employment Judge: R McPherson

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Mr Nicci Drysdale

**Claimant
In Person**

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Ascensos Ltd

**Respondent
Represented by:
Mr M Briggs -
Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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1. The Judgment of the Tribunal is that the claimant is a disabled person in terms of section 6 of the Equality Act 2010 and was so at the relevant time, being from on or around **27 September 2021** to **21 June 2023**.
2. The claim is continued to the existing Final Hearing appointed for **27 to 29 November 2023**.

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REASONS

Preliminary matters

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1. The claimant presented his claim to the Employment Tribunal on **21 June 2023** which followed upon ACAS conciliation which commenced **11 May 2023** and in respect of which ACAS certificate was issued **20 June 2023**.
2. The respondent entered its response ET3 on the respondent set out that it resists the claim, arguing that the claimant had not sufficiently particularised his claim.

3. At the **case management Preliminary Hearing** on 21 August 2023, it was noted that the claimant asserted that he was at the relevant times a disabled person in terms of s6 EA 2010 as a result of ADHD, anxiety and depression and was directed to send to the respondent:
 - 5 a. copies of medical notes, occupational health assessments and other evidence the claimant intended to rely upon to establish he intends to rely on to establish that at the relevant times, he was disabled for the purposes of s 6 of the Equality Act 2010 (EA 2010); and
 - 10 b. a statement confirming the dates on which it is alleged the claimant was a disabled person, in relation to each condition relied upon, and addressing by specific reference to Schedule 1 of the EA 210... what the effect of the alleged disability was on his ability to carry out normal day to day activities at the time of alleged discriminatory treatment.
 - 15 c. A statement confirming the basis upon which the claimant asserts that the respondent knew, or ought to have known, that the claimant was a disabled person in respect of the impairments relied upon, at the material times.
4. The above preliminary matters are, so far as material to the present issue also Findings of Fact, although not repeated below for the sake of brevity.
- 20 5. The following evidential findings of facts are found to be relevant to the question directed by the **August 2023 PH** for this Tribunal to consider as set out in the Tribunal's letter of 23 August 2023 being the determination (only) of the preliminary issue of Disability Status.
- 25 6. While Tribunal made arrangements for the claimant to attend by CVP, on request, this does not determine that the claimant had at the relevant time a qualifying disability [**Herry v Dudley MBC** [2017] ICR 610 (**Herry**)].
7. At the outset of this Hearing the respondent provided a Bundle of Documents, and reference is made to documentation provided in same.

Evidential Hearing Findings of Facts

8. The claimant commenced employment on **27 September 2021** as a Customer Service Agent with the respondent, which employment continued beyond the presentation of the ET1 on **21 June 2023**.
- 5 9. For the claimant letter was issued on **22 August 2023** by Dr Paul Sheard Locum Consultant Psychiatrist (**22 August 2023 Medical report**), which confirmed that the claimant was a patient under the Dr Sheard's *"continuing care suffering from ADHD and major depression of moderate severity. Both these conditions have been present for a number of years although I only first*
10 *met with him on 15 December 2022. Since that visit it has taken some medication alternation and adjustment to achieve a dose and type of ADHD that suits Mr Drysdale. This at the moment is Concerta 2 x 54 mg tablets daily taken together with Sertraline 50 mg once daily. The principal way ADHD in particular impacts his work is the requirement to take intermittent regrouping and refocusing breaks in order to attend more efficiently and be more*
15 *organised. This can be at times a short break each hour for say 5 minutes or so.... In terms of life outside work, the main issue with ADHD is that when the medication wears off in the later part of the day an individual can become less attentive, less organised and less focused. Obviously with the past*
20 *history of depressive symptoms unexpected life events can impair an individual's ability to function on an optimal basis. I do consider Dr Drysdale to have a disability as described as under the Equality Act 2010, namely ADHD in particular.*
- 25 10. Further for the claimant, a *to whom it may concern* letter dated **4 October 2023** (the **4 October 2023 Medical letter**) was issued by Eileen Davidson, the claimant's Community Mental Health Nurse, which described that she had worked with the claimant since January 2023 in her role as a Community Psychiatric Nurse and described a process of monitoring and reviewing the effects of ADHD medication change. It further described that the claimant was
30 diagnosed with ADHD as a child and had been open to Mental Health Services prior to being reviewed by Dr Sheard, noting the claimant's ADHD was picked up as a child because he was found to be depressed and stressed

and had difficulty in keeping up with work as was restless in class and had difficulty concentrating. It described that the claimant would become easily frustrated and he had been tried on several ADHD medications over the years to try to reduce his symptoms. and described that the claimant still feels that he is a worrier in adulthood and over-thinks situations.

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11. The claimant described that he was diagnosed with ADHD describing broadly a history as set out in the **4 October 2023 Medical letter**.

12. The claimant described that ADHD medications (confirmed in the medical **22 August 2023 Medical report**), which he had been prescribed for years operated on a slow-release mechanism and its effects would wear off in the early evening.

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13. In particular, while the claimant described that on occasion, he forgot to take the prescribed medication when he took the medication, this would be by an initial tablet around 6:30 am in the morning, with a second tablet later. The medication would have ceased to have a material impact in the early evening from around 6:30 pm to 7:00 p.m.

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14. The claimant confirmed that absent the medication he would lose concentration and offered examples such as shopping when he would go to buy a single item and come back with 5 items. He would be generally forgetful; his speech would be impacted as he would sometimes mumble and would take twice as long to wipe clean windowsills because he is easily distracted all in consequence of his ADHD condition. He further described that he would lose concentration when crossing roads including a few incidents where he was required to step away from a car again in consequence of his ADHD.

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15. The claimant described a recent example of the type of conversation he would have with his partner (in the evening when the ADHD medication had worn off) who described to him that he had 4 different topics within a single conversation, which had started about his daughter being unwell.

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Submissions

16. The respondent provided brief oral submissions, the respondent did not dispute the diagnosis set out in the **22 August 2023 Medical report**, nor that the diagnosis had been made several years ago; they however argued that the claimant had not established a substantial adverse impact on his day-to-day activities.
17. The claimant also provided brief oral submissions, in summary, the claimant argued that from the information he had provided he did not understand why there was a challenge to the question of his disability status.

10 **Relevant Law**

18. S6 of the Equality Act provides:

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.*
- (2) *A reference to a disabled person is a reference to a person who has a disability.*
- (3) *In relation to the protected characteristic of disability—*
- (a) *a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*
 - (b) *a reference to persons who share a protected characteristic is a reference to persons who have the same disability.*
- (4) *This Act ... applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly—*

- (a) *a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*
- (b) *a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*

19. In terms of s212 EA 2010 [General interpretation] “*substantial*” means more than minor or trivial.

20. Further Schedule 1 to the EA 2010 provides, at 2 that:

- (1) *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.*
- (2) *If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.”*

21. And at 5 set out;

- “(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.*
- (2) *“Measures” include, in particular, medical treatment.*

22. The Tribunal is required, in terms of Sch 1, Part 1, para 12 to take into account the Guidance on the Definition of Disability while starting with the statutory language, considering the guidance and decide, having looked at both, what

the statute means, concentrating primarily on the language of the statutory provision itself [**Taylor v Ladbrokes Betting and Gaming** [2017] IRLR 312 [**Taylor**].

23. The Guidance addresses “normal day-to-day activities” in section D, General
5 Guidance is given at Para D3 “*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 and taking part in social activities. Normal day-to-day activities can include work-*
10 *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.*”
24. The question of whether a person meets the definition of disability is a matter
15 for the Tribunal rather than medical experts [**Paterson v The Commissioner of Police of the Metropolis** [2007] ICR 1522 [**Paterson**]], while the view of doctors on the nature and extent of claimed disability is relevant, the issue is one for the Tribunal itself to decide on all the evidence. The Tribunal should follow the approach set out in **Goodwin v Patent Office** [1999] IRLR 4
20 [**Goodwin**] including expressly referencing the Guidance, Tribunals should assess the evidence by reference to the different conditions of impairment, adverse effect, substantiality, and long-term effect. Mental impairment included impairment caused by or constituting a well-recognised mental illness. The adverse effect condition would be fulfilled if the Tribunal was
25 satisfied that one of the capacities in the Act had been affected, and the fact that a person could carry out activities did not mean that his ability to carry them out had not been impaired. Whether an adverse effect was substantial had to be assessed by considering whether the effect of the impairment on a person's ability to carry out normal day-to-day activities was more than minor
30 or trivial.

25. The EAT In **Morgan v Staffordshire University** [2002] 190 [**Morgan**] set out that occasional use of the term stress or anxiety, even by GPs will not amount to proof of mental impairment.
26. The EAT in **Leonard v South Derbyshire Chamber of Commerce** [2001] IRLR 19 (**Leonard**), emphasised that when considering an impairment had a substantial adverse effect on the ability to carry out normal day-to-day activities, the Tribunal must concentrate on what the claimant cannot do or can only do with difficulty.
27. Unless a matter can be classified as falling within the heading of trivial or insubstantial it should be treated as substantial **Aderemi v London and South Eastern Railway Ltd** [2013] ICR 591 [**Aderemi**].

Discussion and Decision

Qualifying impairments

28. The term ADHD, as set out in the Equal Treatment Benchbook, is an acronym for Attention Deficit Hyperactivity Disorder. The Equal Treatment Benchbook definition sets out that it should not be relied on as medical analysis and describes it as being based on three main behaviours which are typically present from before the age of seven years, may continue into adulthood and which include inattentiveness.
29. While the claimant had not provided his own written statement for this Tribunal, I accept the claimant's evidence that he had, in effect, forgotten or overlooked, direction b) that he should provide a Statement; however, he provided a statement in the form of the **4 October 2023 Medical letter**, and had otherwise complied with the direction a) by the provision of both that medical letter and the **22 August 2023 Medical report**. The diagnosis by the treating Locum Consultant Psychiatrist Dr Paul Sheard is not disputed.
30. The issue before the Tribunal is whether the claimant had the asserted qualifying disability of ADHD at the relevant time. While the claimant continues to be employed, for the current purpose I have focused on the relevant period

being from **27 September 2021** to the date of presentation of the ET1 being **21 June 2023**.

31. I am not required to conclude whether the respondent had knowledge. That is a separate question not directed for this hearing.

5 32. While the 4 October 2023 medical letter described certain matters before the relevant period, I am satisfied it was consistent with the evidence of the claimant who was honest and straightforward in his evidence. In particular, the claimant accurately described the impact of the ADHD condition absent the medication, including when he forgot to take medication and or commonly
10 when the slow-release mechanism had worn off and accurately described the impact on his day-to-day activities in the relevant period including from **27 September 2021 to 21 June 2023**.

33. The claimant's evidence was, in addition, consistent with the **22 August 2023 Medical Report**. It is noted that the report was created in August 2023 and
15 was prepared by the consultant psychiatrist, Dr Sheard, who first met the claimant on 15 December 2022 in excess of a year after the start of the relevant period this was within the currently assessed relevant period. The **22 August 2023 Medical Report** described a history of *continuing care suffering from ADHD and major depression of moderate severity. Both these conditions have been present for a number of years*"
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34. The claimant described that the ADHD condition had certain positive elements referencing identifying activities for his daughter. Further, the claimant fairly accepted that he had not in fact suffered any injury, in the context of his evidence of loss of concentration when crossing a road.

25 35. I have had regard to the terms of s 6 of the EA 2010, which provides that a person has a disability or if s/he has a physical or mental impairment which has a substantial and long-term adverse effect on her/his ability to carry out normal day-to-day activities. I have had regard to the relevant period itself and have also, so far as may be relevant to Schedule 1 above, had regard to the
30 claimant's history preceding the relevant period.

36. I am satisfied that when taken together with the loss of concentration impacting the activity of shopping (buying a product other than that intended), and the loss of concentration when looking to cross a road, albeit there had been no injury, these were normal day-to-day activities which the claimant can only do with difficulty (Leonard). Further, this is supported by the **22 August 2023 Medical report** which describes a process of short regrouping and refocusing breaks on an hourly basis.

Mental impairment

37. The claimant has an impairment; he has ADHD. I was entirely satisfied that this was a case in which the claimant suffered from ADHD. This is a mental impairment from which the claimant had suffered throughout the relevant period but for the use of medication.

Were the substantial effects long-term?

38. While not disputed, I considered whether the substantial effects were long-term. The claimant has had ADHD since childhood to the relevant period. The effect of an impairment is long-term if it has lasted for at least 12 months, is likely to last at least 12 months, or is likely to last long for the rest of the life of the person affected.

39. In coming to this decision, I have not had regard to events after the relevant period.

40. In conclusion, I was satisfied that the substantial adverse effects of the ADHD impairment were long-term because they had lasted and were likely to last at least 12 months and did so through the relevant period.

Did the impairment have a substantial effect?

41. In relation to the impairments, I am required to determine whether the claimant's impairment has or indeed had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. The term "*substantial*" is defined as "*more than minor or trivial.*"

42. The claimant's ADHD has manifested at times through loss of concentration, and I am satisfied that, taking the evidence as a whole, including the 22 August 2023 Medical Report, the 4 October 2023 Medical letter and the claimant's evidence the claimant's impairment of ADHD has or indeed had a
5 substantial and long-term adverse effect on his ability to carry out normal day to day activities. Loss of concentration while crossing a road is a substantial effect of ADHD. Shopping is a normal day-to-day activity. ADHD-related loss of concentration resulting in buying items other than the intended item is not a minor or trivial effect. Being caused to mumble when speaking is, in
10 consequence of ADHD, is not a trivial or minor matter. Taking twice as long to carry out household cleaning tasks such as window cleaning is not a trivial or minor matter.

Decision

43. The claimant is a disabled person in terms of s 6 of the Equality Act 2010. He
15 has a mental impairment (ADHD), which has a substantial long-term adverse effect on his ability to carry out normal day-to-day activities. Those activities, absent medication are substantially (that is to not a minor or trivial extent) impacted by the ability to concentrate and loss of attentiveness.

44. The claimant was a disabled person by reason of his diagnosed ADHD
20 condition.

Employment Judge: R McPherson
Date of Judgment: 16 October 2023
Entered in register: 17 October 2023
25 **and copied to parties**