



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4110765/2021 (V)**

**Held at Aberdeen on 29 November 2022**

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**Employment Judge N M Hosie**

**Mr J Sim**

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**Claimant  
Represented by  
Mr D Purdie,  
Solicitor**

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**Peterson (United Kingdom) Limited**

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**Respondent  
Represented by  
Mr P Chadwick,  
KLC Employment Law**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that:-

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1. the claimant was disabled in terms of s.6 of the Equality Act 2010; and
2. the Tribunal has jurisdiction to consider his claim.

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

## REASONS

1. This claim comprises complaints of disability discrimination. The claim is denied in its entirety by the respondent. Further, the respondent had not  
5 accepted that the claimant was disabled in terms of s.6 of the Equality Act 2010 (“the 2010 Act”).

2. Accordingly, the case called before me, by way of a preliminary hearing to consider and determine the issue of disability status. The hearing was  
10 conducted by video conference using the Cloud Video Platform (“CVP”). Helpfully, the respondent’s representative advised, with reference to the s.6 definition, that the specific issue was whether the claimant’s admitted long-term impairment had a substantial adverse effect on his ability to carry out  
“normal day-today activities”.

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### The evidence

3. I heard evidence from the claimant and on behalf of the respondent from Robert Smith, General Manager. Both presented as credible and reliable. A  
20 Joint Bundle of documentary productions was also submitted (“P”).

### The facts

4. Having heard the evidence and considered the documentary productions, I  
25 was able to make the following findings in fact, relative to the issue of disability status.

5. Mr Sim has been employed by the respondent as a Shipping Co-ordinator since 2016. He remains in the respondent’s employment. He works in an  
30 office.

6. He has had a lifelong history of a medical condition called “Pectus Excavatum”. This is a condition in which the person’s breastbone is sunken into the chest. As a consequence, the claimant can suffer from breathlessness. There was included in the Joint Bundle a medical report from his G.P. dated 22 February 2022 (P.44-45); and an Occupational Health Report dated 18 January 2021 (P.40-43). However, these reports had to be treated with a degree of caution as the claimant did not undergo a physical examination and the reports were based principally on the information which he provided.

7. In response to my directions (P.33), the claimant submitted an “Impact Statement” (P.37-39). I was satisfied that his description of how his medical condition impacted upon him was reasonably accurate. While mindful of my reservations, what he said in his Impact Statement was consistent with the medical reports. He said this:-

*“My date of birth is 7th January 1988. I am generally in good health although my condition pectus excavatum does restrict my day-to-day activities. I cannot walk for more than a mile or so without needing to rest. I cannot run for any significant period of time. I am no longer able to play sports or undertake any strenuous exercise at the gym or elsewhere. If I attempted to do that I would become severely breathless. In order to undertake the necessary levels of exercise I require to walk extensively to maintain a good level of physical fitness.*

*Following surgery in 2014, I suffered complications and this resulted in pain and difficulties with breathing. This followed surgery to correct my pectus excavatum. However the condition is lifelong and discussed this matter with my doctor in September/October 2021. A further operation had previously been scheduled but was cancelled. There is now a possibility that this operation won’t take place. I attach an electronic printout of my medical records from Garthdee Medical Practice. This confirms that I underwent surgery in 2014 and continue to see my doctor about Pectus Excavatum.”*

8. So far as the claimant’s work is concerned, he drives to work and then has to walk approximately half a kilometre from the car park to his office. He then has to climb some 18 steps and then a further 16 steps to his office on the first floor. He normally goes home for lunch which involves him retracing his steps back to his car and then back to his office again on his return. I

accepted his evidence that when he climbs these stairs he becomes breathless and has to stop before carrying on. However, I also accepted the evidence of the respondent's General Manager, Robert Smith, that in the 4½ years that he had worked for the respondent he had never seen him  
5 breathless In the last 6 months or so, he has worked in the same office sitting opposite him. Their desks are separated by a screen. Nor had the claimant ever complained to him about being breathless.

9. In August 2020, the claimant spent some time camping in the Cairngorms  
10 National Park, over 60 miles from his home. He did some walking at that time but maintained that this was all low level and not in the mountain range. With some hesitation, as there was no other evidence one way or the other, I accepted his evidence in this regard as he presented as credible and reliable.

#### 15 **Claimant's submissions**

10. The claimant's solicitor submitted that the issue was whether the claimant's  
admitted physical impairment had a substantial effect on his ability to carry out normal day-to-day activities. He submitted that the claimant's difficulty  
20 was "getting from A to B", that he became breathless if he walked more than a mile and had to pause when he was climbing stairs.

11. He also submitted that I should have regard to the claimant's relatively young  
age. He is unable to participate in sport and had to give up playing football  
25 due to his condition.

12. He submitted that "breathlessness is an inherently distressing cause for  
concern".

- 30 13. He also suggested that the evidence of the respondent's witness, Mr Smith, had been "compromised" due to the conflict which he had with the claimant with regard to him wearing a face covering due to Covid.

**Respondent's submissions**

14. The respondent's representative referred me to the Appendix to the "Guidance on the Definition of Disability (2011)" ("the Guidance") and the fact that the "Illustrative and non-exhaustive list of factors which, if they are experienced by a person, **it would not be reasonable** to regard as having a substantial adverse effect on normal day-to-day activities" included:-

“

- Experiencing some tiredness or minor discomfort as a result of walking unaided for a distance of about 1.5km or 1 mile.”

15. He reminded me that the medical reports had been prepared without the benefit of the claimant undergoing a physical examination and were based solely on his own evidence as was the "Impact Statement".

16. He reminded me of Mr Smith's evidence that he had never seen the claimant breathless or him ever saying that he was. He suggested that this was "somewhat surprising".

17. Further, the claimant had been out walking in the Cairngorms which, it was submitted, was "inconsistent with his position".

18. Finally, he submitted that the claimant had failed to discharge the burden of establishing that he was disabled, in terms of s.6 of the 2010 Act.

## Discussion and Conclusions

### Relevant law

19. The provisions of the 2010 Act apply only in relation to persons who have a  
5 disability. S.6 of the 2010 Act is in the following terms:-

#### **“6. Disability**

*(1) A person (P) has a disability if –*

- 10 *(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.”*

20. When considering the particular circumstances relating to Mr Sim, I had  
regard not only to the foregoing definition, but also the “Guidance on matters  
15 to be taken into account in determining questions relating to the definition of  
disability (2011)” and also the EHRC Code of Practice on Employment  
(2011).

21. The case of ***Goodwin v. Patent Office*** [1999] IRLR 4, remains good law.  
20 The different factors involved in the definition of “disability” need to be looked  
at separately.

### Physical or mental impairment

22. It was common ground between the parties that the claimant suffers from  
25 “Pectus Excavatum” and that this is a physical impairment.

#### **“Long-term”**

23. Under para. 2(1) of Schedule 1 to the 2010 Act, the effect of an impairment  
30 is long-term if it:

- Has lasted for 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.

24. As Mr Sim “has a lifelong history of Pectus Excavatum” (P.44), it was not  
5 disputed that his impairment was long-term.

### Normal day-to-day activities

25. The issue for me, therefore, was whether the effect of the claimant’s admitted  
10 impairment had an adverse effect on his ability to carry out normal day-to-day activities and if so whether the effect was substantial.

26. I am bound to say that I did not find this issue at all easy to determine. The  
15 issue was finally balanced and I was mindful that the onus was on the claimant to establish that he was disabled.

27. In the Appendix to the Guidance an example of an impairment which was  
20 would not be reasonable to regard as having such an effect is: “*experiencing some tiredness or minor discomfort as a result of walking unaided for a distance of about 1.5km or 1 mile.*” However, that example is illustrative only and not determinative. Disability status has to be considered on the basis of the adverse effect on each claimant in his or her particular circumstances,

28. Further, the EAT commented in **Goodwin** that it is important to remember  
25 that the focus is on what a claimant cannot do, or can only do with difficulty, rather than what a person can do. In the Appendix to the Guidance “List of factors which it would be reasonable to regard as having such an effect” there is the following: “*Difficulty in going up or down steps, stairs or gradient; for example because movements are painful, fatiguing or restricted in some way.*”  
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29. I accepted the claimant's evidence that he becomes breathless when climbing stairs. I accepted his evidence that if he walked for more than a mile he would become breathless and would have to stop.

5 30. The claimant is still a relatively young man. He had to give up playing football and other sports due to his condition.

31. There is the following guidance in the EHRC Code of Practice on Employment in Appendix 1:-

10 ***"What are 'normal day-to-day activities'?"***

15 ***14. They are activities which are carried out by most men or women on a fairly regular and frequent basis. The term is not intended to include activities which are normal for only a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is only affected in normal day-to-day activities would be covered by this part of the definition.***

20 ***15. Day-to-day activities thus include – but are not limited to – activities such as walking, driving, using public transport..... Normal day-to-day activities also encompass the activities which are relevant to working life."***

25 32. In ***Hutchison 3G UK Ltd v. Edwards*** UKEAT/0467/13 the EAT rejected the employers' argument that the claimant's inability to carry out a contact sport was not a finding in relation to a day-to-day activity. I am mindful that the focus needs to be on the claimant's ability to perform normal day-to-day activities, but that ability can be assessed by using the illustration of sporting  
30 activity.

33. When considering the issue of the adverse effect on the claimant's ability to carry out normal day-to-day activities I found the guidance of Langstaff J, the President of the EAT in ***Aderemi v. London & South Eastern Railway Ltd***  
35 [2013] ICR 591 to be of assistance. He laid down a three-stage process of assessment, as follows:-



5 “It is clear first from the definition in section 6(1)(b) of the Equality Act 2010,  
that what a Tribunal has to consider is an adverse effect, and that it is an  
adverse effect not upon his carrying out normal day-to-day activities but upon  
his ability to do so. Because the effect is adverse, the focus of a Tribunal  
must necessarily be upon that which a claimant maintains he cannot do as a  
result of his physical or mental impairment. Once he has established that  
there is an effect, that it is adverse, that it is an effect upon his ability, that is  
to carry out normal day-to-day activities, a Tribunal has then to assess  
whether that is or is not substantial. Here, however, it has to bear in mind the  
10 definition of substantial which is contained in section 212(1) of the Act. It  
means more than minor or trivial. In other words, the Act itself does not create  
a spectrum running smoothly from those matters which are clearly of  
substantial effect to those matters which are clearly trivial but provides for a  
bifurcation: unless a matter can be classified as within the heading ‘trivial’ or  
15 ‘in substantial’ it must be treated as substantial. There is therefore little room  
for any form of sliding scale between one and the other.”

20 34. Taking account of the s6. definition, the Guidance, the Code and the relevant  
case law, I was satisfied that the claimant’s impairment had an adverse effect  
on his ability to carry out “normal day-to-day activities. I was satisfied that he  
had discharged the onus on him of doing so.

#### Was the adverse effect substantial ?

25 35. I was satisfied on the evidence, and in particular that of the claimant himself,  
that the adverse effect of his impairment was more than ‘minor or trivial’  
(s.212(1) of the 2010 Act). It was substantial, therefore.

30 36. The question of whether a person is disabled is a matter of fact for the opinion  
of the Tribunal. I was satisfied that Mr Sim had established that he was  
disabled within the meaning of s.6 of the 2010 Act. I should add that while I  
have split the s.6 definition into its component parts, I also looked at the  
position as a whole, in accordance with the guidance in **Goodwin**, and I was  
35 still satisfied he was disabled.

37. Accordingly, the Tribunal has jurisdiction to consider his claim

**Employment Judge: N M Hosie**

**Date of Judgement: 5 December 2022**

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**Date sent to Parties: 5 December 2022**