



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000188/2022**

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**Preliminary hearing  
Held in Edinburgh on 23 October 2023**

**Employment Judge A Jones**

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**Mr G Gordon**

**Claimant  
In person**

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**G Grigg and Sons Ltd**

**Respondent  
Represented by:  
Mr M O'Carroll  
advocate  
instructed by rradar**

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

1. The claimant had the protected characteristic of disability by reason of the following conditions at the material time (being between 1 July 2020 and 16 November 2022), within the terms of section 6 Equality Act 2010:
  - i. Anxiety and depression, and
  - ii. Emphysema and silicosis.
2. The urological condition suffered by the claimant did not amount to a disability for the purposes of section 6 Equality Act 2010 during the material time.

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### **REASONS**

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#### **Introduction**

1. The claimant presented claims of disability discrimination and unfair dismissal. The respondent does not accept that the claimant was a disabled person during the material period. It was agreed that the material period was 1 July 2020 to 16 November 2022. A preliminary hearing was listed to

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determine whether the claimant was a disabled person during that period in terms of section 6 Equality Act 2010 ('EA'). The claimant gave evidence on his account and was cross examined by the respondent. A joint bundle of documents was produced.

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2. The claimant relied upon three separate conditions as amounting to a disability which were:

- a. Anxiety and depression
- b. Silicosis and emphysema, and
- c. Persistent urinary tract infections.

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3. Having listened to the evidence, and submissions made by both parties and having considered the documentation to which reference was made, the Tribunal made the following findings in fact.

15 **Findings in fact**

4. The claimant is a 53-year-old man. He worked as a Stonemason for the respondent for around 13 years.

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5. The claimant was diagnosed with silicosis and emphysema around 2008. He has continued to suffer from these conditions since. He has been prescribed two inhalers since 2010, one which he uses daily and the other as required.

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6. He attends the Department of Respiratory Physiology at the Western Hospital annually for tests in relation to these conditions. His condition remains stable as was reported at 9 September 2022. These are progressive lifelong conditions which are likely to deteriorate over time and which impact his respiratory system.

7. The claimant spent a period of five days in hospital around March 2018 as a consequence of pneumonia and was off work for two and a half months.

8. These conditions cause the claimant to be tired during the day and affect his breathing. He struggles for breath if he exerts himself physically. He does no physical exercise. He can walk no more than 200 yards on a flat surface without stopping and a shorter distance if there is any incline. He struggles to walk upstairs or lift anything significant. He struggles to carry shopping upstairs. His sister generally does his shopping for him.
9. The claimant could carry out his work duties carving stone but found it difficult to work off site. His workplace was a 10-15 minute walk from his house. He found climbing ladders very difficult which caused him to get out of breath.
10. The claimant started having difficulties passing urine in 2018. He was prescribed medication for this but in July 2020 the difficulties worsened and the claimant was admitted to hospital where he was catharised. When he was released from hospital he had to wear a catheter for around 8 months. During this period he suffered from a series of urinary tract infections. He continues to suffer from these infections and is on long term antibiotics.
11. The claimant was added to a waiting list for a procedure to address his difficulties called a TURP which was carried out in October 2022. Until then the claimant had to self-catheritise around five times a day to release urine. While the claimant stopped self catheritising for a period, he subsequently had to recommence and continues to have to self-catheritise twice a day and continues to develop UTIs.
12. The claimant's urological condition caused him anxiety, particular in relation to the ability access to clean toilet facilities at work.
13. The claimant was required to shield during the beginnings of the COVID pandemic from 27 March until 1 August 2020. During that period the claimant's sister did his shopping for him and he did not leave the house. He had no contact with anyone other than his sister during that period. The claimant had previously had issues with his mental health in 2010. The isolation during this period had a detrimental effect on the claimant's mental health.

14. The claimant attended his GP on 27 July 2020 complaining of depressed mood and difficulties sleeping. He was prescribed mirtazapine to 'reduce anxiety/improve sleep pattern'.
15. The claimant attends his GP regularly regarding his various conditions. He attended again on 19 October 2020 where he informed the GP that the mirtazapine was not assisting him. The notes also narrate 'not enjoying much, struggling to sleep, really down, not got a great appetite, no energy, mind racing, 'on the edge' which reflected how the claimant was coping at that time. The claimant was prescribed citalopram.
16. The claimant had a further consultation with his GP on 17 December 2020 where he reported no change in his mental health. The note records 'ongoing difficulty sleeping – racing thoughts and wakes frequently through the night – this seems to be due to urinary frequency, eating – mostly ready meals, lack of social contact – was shielding for a long time. Prev saw sister at weekends but now she just drops of shopping for him. Not working due to current mood. No thoughts of suicidality or self-harm, no alcohol.' The GP increased the claimant's dose of citalopram to 30 mg.
17. The claimant's dose of citalopram was subsequently increased to 40 mg and he continued on that dose until summer of 2023 when his was prescribed a different medication.
18. The claimant was informed on 12 October 2023 that he was now entitled to adult disability payment. This award was a standard rate Daily Living component and the claimant was not entitled to a mobility component.
19. The claimant's sick notes during the material period referred to low mood, and anxiety and depression.
20. The claimant provided a disability impact statement to the Tribunal and the respondent on 18 May 2023.
21. During the material period, the claimant suffered from anxiety and depression which impacted upon his ability to socialise; to prepare food for himself (he mainly ate ready meals provided by his sister); his ability to function during

the day (he often spent the day with the television on or tried to sleep) and he found it difficult to concentrate. He relied on his sister to assist with his shopping and household tasks.

### Relevant law

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22. Section 6 EA provides that a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day to day activities. Schedule 1 of the EA sets out further detail of the basis on which the issue of disability should be determined. Guidance on matters to be taken into account in determining questions relating to the definition of disability was also provided in 2011.

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23. The Tribunal was referred by Counsel to **Goodwin v Patent Office 1999 ICR 302**, **Morgan Stanley International v Posavec UKEAT/209/13/BA** and **Primaz v Carl Room Restaurants and others EAT/137/20/JOJ** all of which were considered by the Tribunal in making its determination.

### Issues to determine

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24. Following the approach in **Goodwin**, the Tribunal is required to consider in relation to each of the conditions put forward by the claimant whether:

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- a. They amounted to a physical or mental impairment;
  - b. Any impairment affected the claimant's ability to carry out normal day to day activities;
  - c. Whether any adverse condition was substantial, and
  - d. whether any adverse condition was long-term.
25. The respondent's position appeared to be that they accepted that the claimant suffered from the respiratory and urinary tract infections conditions. They did not accept that the claimant suffered from anxiety and depression and

appeared to suggest that as these conditions were self-reported, there was insufficient evidence to determine that the claimant did in fact suffer from these conditions. In any event it was said that any conditions or impairments the claimant did have did not have a substantial long-term adverse impact on his ability to perform normal day to day activities. The respondent's position is that even if the claimant was a disabled person at the material time, it did not and could not reasonably have known that he was disabled.

### Discussion and decision

#### Anxiety and depression

26. The Tribunal accepted the claimant's evidence that he suffered from anxiety and depression from around July 2020 and continues to suffer from this condition. The Tribunal was also conscious that he had been prescribed medication in relation to these conditions since that time. While it was noted that his fit notes sometimes referred to 'low mood' and sometimes 'depression', the Tribunal did not consider this to contradict the claimant's evidence. The Tribunal also noted that the claimant's medication was increased over a period to what was said to be the maximum dose. The anxiety and depression from which the claimant suffers is an impairment and has had a long-term impact on the claimant given that he continues to have this condition three years later. The Tribunal was also satisfied that the condition had a substantial impact on the claimant's ability to perform normal day to day activities.

27. In particular, the Tribunal accepted the claimant's evidence that over this period he did not socialise with anyone other than his sister and indeed that he only saw her irregularly. He did not go out other than for a short walk. He only ate ready meals in the microwave which had been provided by his sister. His sister did his washing for him. He had difficulty sleeping. He felt worthless. While he had the television on most days when he was at home, the Tribunal accepted his evidence that this was different from actually watching it which he did not always do. He stayed in bed a lot of the time either trying to recover from a sleepless night or because he did not want to get up. As was recorded

in his GP notes, he had no energy, his mind was racing and he felt 'on the edge'. He had difficulty concentrating.

28. The Tribunal should also take into account how the claimant might have been without medication. In the event, that was unnecessary, as the Tribunal was satisfied that even with medication, the condition of the claimant had a substantial adverse impact on the claimant's ability to perform normal day to day activities. In those circumstances, the Tribunal finds that the claimant is a disabled person as result of the impairment of anxiety and depression amounted for the purposes of section 6 EA.

10 Respiratory conditions

29. Turning to the respiratory conditions suffered by the claimant, the respondent appeared to suggest that as there was a report in 2009 which stated that the condition was mild and reports in 2022 that the condition was stable, there had been no change in the condition between those years. That did not accord with the claimant's evidence, accepted by the Tribunal, which was that his condition had become worse over the years. The report in 2009 made no reference to the claimant having been prescribed inhalers which it is reasonable to presume were subsequently provided because the claimant was struggling to cope without them. The Tribunal accepted the claimant's evidence that his conditions caused him fatigue, and that he could only walk a short distance on the flat and less on an incline. He struggles to walk upstairs and has difficulty carrying shopping or any weight bearing activities. He did not do any physical exercise. The Tribunal noted that the claimant walked around a mile to work and that he used an inhaler once a day and then another when necessary. He was required to shield during COVID because of the risk to his health should he be infected with this.

30. Taking all these factors into account the Tribunal was satisfied that the emphysema and silicosis from which the claimant suffers is an impairment, that it is long term and that it had a substantial adverse effect on the claimant's ability to perform normal day to day activities during the material period. As such it also amounts to a disability for the purposes of section 6 EA.

## Urological condition

31. The Tribunal then turned to consideration of the claimant's condition in relation to urinary tract infections. The Tribunal accepted, and it was not in dispute, that the claimant suffered from difficulties which resulted in a requirement for cathertisation. There was also no dispute that the claimant regularly suffered from urinary tract infections. These infections have continued to recur over a number of years, despite intervention in terms of a medical procedure and the claimant being prescribed long term antibiotics.
32. However, there was little evidence from the claimant as to how this condition impacted him on a daily basis. The Tribunal had no doubt that the condition must be uncomfortable and inconvenient and accepted that it caused him anxiety. However, it was not clear on what basis it affected his ability to perform normal day to day activities. The Tribunal accepted that the condition would have reasonably caused him anxiety about the ability to use toilet facilities which were hygienic and that no doubt the condition caused him pain.
33. Notwithstanding this, the Tribunal was not satisfied that the condition had an adverse impact on his ability to perform normal day to day activities. While it may have contributed to the anxiety and depression from which he suffered it did not appear to the Tribunal that of itself it was an impairment which amounted to a disability for the purposes of section 6. Therefore, the Tribunal finds that this condition did not amount to a disability.
34. In all these circumstances, the Tribunal was satisfied that the claimant was a disabled person by virtue of the impairments of anxiety and depression and the respiratory conditions from which he suffers.
35. The case is listed for a final hearing and parties indicated that preparations were in the final stages for that hearing. Therefore, no further orders were required. It should be noted that the respondent indicated that it will continue to maintain that it did not have the requisite knowledge of the claimant's



disability status during the material period.

<b>Employment Judge:</b>	<b>A Jones</b>
<b>Date of Judgment:</b>	<b>25 October 2023</b>
<b>Entered in register:</b>	<b>26 October 2023</b>
<b>and copied to parties</b>	