



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000228/2023

Held in Edinburgh on 6 & 7 December 2023

Employment Judge Sangster

Miss J Rennie

**Claimant
In Person**

Emtelle UK Limited

**Respondent
Represented by
Mr K Duffy
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant was a disabled person, at the material times, for the purposes of section 6(1) of the Equality Act 2010.

REASONS

Introduction

1. The case was listed for an open preliminary hearing to determine disability status.
2. A joint bundle of documents was lodged prior to the preliminary hearing, extending to 189 pages.

E.T. Z4 (WR)

3. The claimant gave evidence on her own behalf at the preliminary hearing and called three witnesses: a former colleague of the claimant, Connor Kyle and two friends - Gareth Thompson and John Johnson.
4. The respondent called two witness: Dr Christopher Pugh, consultant in Occupational Medicine and Kevin Pringle, Plant Leader for the respondent.

Findings in fact

5. The Tribunal found the following facts, relevant issues to be determined, to be admitted or proven.

6. The claimant experiences the following difficulties, which are exacerbated if she is feeling anxious. She takes anxiety medication as a result, which generally assists the claimant to manage the challenges she faces on a day to day basis.

6.1. Verbal Communication: Conversational cues often confuse her. She experiences difficulties making eye contact, discerning tone of voice and understanding sarcasm and humour.

6.2. Non-Verbal Communication: Interpreting body language, facial expressions and gestures is challenging for the claimant. Recognising and respecting personal space boundaries can also be problematic.

6.3. Social Relationships: Establishing and maintaining relationships is a significant challenge for the claimant and a source of anxiety. She struggles with understanding social norms, sharing interests and responding appropriately to social cues. Additionally, she finds it difficult to perceive when individuals may have negative feelings or animosity towards her. She finds it difficult to fit in with peers and social groups.

6.4. Routines: The claimant requires consistent environments and established routines. Any deviation or unexpected change in those generally leads to heightened and significant distress and anxiety. At its worst, deviation from consistent environments and established routines leads to the claimant becoming entirely overwhelmed and not undertaking, or at very

least neglecting, basic functions such as eating, drinking, sleeping, or personal hygiene, and she will entirely withdraw from others.

5 6.5. Sensory Sensitivities. The claimant has hypersensitivity to various sensory stimuli, including lights, sounds, textures, tastes, and smells and can become overwhelmed by these.

6.6. Cognitive Processing. The claimant processes things literally, making it challenging for her to grasp implied meanings.

7. The claimant has experienced these difficulties throughout her life, but only began to attribute them to autism from around the time of her discussions with Autism Initiatives Scotland, in May 2022.

8. The claimant met with Autism Initiatives Scotland on 19 May 2022. They stated that they believed it was very likely that the claimant was autistic. They encouraged her to seek a formal diagnosis. The mental health team in her local authority have however closed their waiting list, meaning that the claimant cannot secure a formal diagnosis, unless she does so privately.

9. The claimant worked with the respondent from 18 July 2022, initially via an agency and then, from 21 January 2023, as an employee. Her employment with the respondent terminated on 19 April 2023.

Submissions

20 *Respondent's submission*

10. The respondent produced a written skeleton argument and a summary of relevant authorities, which Mr Duffy spoke to. In summary the respondent submitted that:

25 10.1. It is accepted that the claimant had a mental impairment, namely autism, at the relevant time, albeit not formally diagnosed;

10.2. It is not however accepted that the mental impairment had an adverse effect on the claimant's ability to carry out day to day activities at the

relevant time, or, if there was any adverse effect, that it was substantial or long-term. Any adverse effect is as a result of other, separate, mental impairments, namely anxiety and depression, rather than autism.

Claimant's submission

- 5 11. The claimant, in summary, submitted that She has autism. She has had this since she was born and the effects are lifelong. She has been treated as having this for several years, albeit that she has been unable to secure a formal diagnosis. The medication she takes controls her anxiety and thus the symptoms of autism, which are otherwise exacerbated by anxiety. If she did
10 not take that medication, she would not be able to function.

Relevant law

12. Section 6(1) EqA provides:

'A person (P) has a disability if —

P has a physical or mental impairment, and

- 15 *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'*

13. Schedule 1 EqA contains supplementary provisions in relation to the determination of disability. Paragraph 5 states:

- 20 *'5(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...

- 25 14. The 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (the **Guidance**) does not itself impose legal obligations, but the Tribunal must take it into account where relevant (Schedule one, Part two, paragraph 12 EqA).

15. The Guidance at paragraph B1 deals with the meaning of ‘*substantial adverse effect*’ and states ‘*The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.*’
16. Paragraphs B4 and B5 state that:
- ‘*An impairment might not have a substantial adverse effect on a person’s ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effect on more than one activity, when taken together, could result in an overall substantial adverse effect.*
- ‘*For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of day-to-day activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.*’
17. Paragraph B1 should be read in conjunction with Section D of the Guidance, which considers what is meant by ‘*normal day-to-day activities*’.
18. Paragraph D2 states that it is not possible to provide an exhaustive list of day-to-day activities.
19. Paragraph D3 Provides that:
- ‘*In general, day-to-day activities are things that 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 household tasks, walking and travelling by various forms of transport, and taking part in social activities.*’

20. D16 provides that normal day-to-day activities include activities that are required to maintain personal well-being. It provides that account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, or personal hygiene.
21. The Equality and Human Rights Commission: Code of Practice on Employment (2011), at Appendix 1, sets out further guidance on the meaning of disability. It states at paragraph 7 that *'There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause.'*
22. At paragraph 16 it states *'Someone with impairment may be receiving medical or other treatment which alleviates or removes the effects (although not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if the substantial adverse effects are not likely to occur even if the treatment stops (that is, the impairment has been cured).'*
23. In **Goodwin v Patent Office** [1999] IRLR 4, the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are:
- 23.1. Does the person have a physical or mental impairment?
- 23.2. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
- 23.3. Is that effect substantial?
- 23.4. Is that effect long-term?
24. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability.

Discussion & Decision

25. The Tribunal noted the respondent's concession in submissions that they accepted that the claimant had a mental impairment, namely autism. The Tribunal accordingly restricted itself to considering the remaining questions posed in ***Goodwin v Patent Office***. The Tribunal's conclusions in relation to those questions are as follows:

25.1. **Was there an adverse effect on the claimant's ability to carry out day**

to day activities as a result of the mental impairment? The Tribunal was mindful that, in considering that question, any medical or other treatment should be discounted, and the impairment should be taken to have the effect it would have had without such treatment. The Tribunal's findings in relation to challenges the claimant faces on a day to day basis are set out at paragraph 6 above. The Tribunal noted that anxiety exacerbated the adverse effects, but determined that it did not cause them. The adverse effects were caused by autism. The Tribunal concluded that these findings demonstrated that there was an adverse effect on the claimant's ability to carry out day to day activities as a result of the mental impairment.

25.2. **Was that effect substantial?** The Tribunal was satisfied that the adverse effects on the claimant's ability to carry out day to day activities in that period, particularly when considering what the position would be without medication, were substantial i.e. they were more than minor or trivial.

25.3. **Was that effect long-term?** The Tribunal accepted the claimant's evidence that she has always experienced the adverse effects identified on her ability to undertake day to day activities, albeit that she only began to attribute them to autism in 2022. The substantial adverse effects on the claimant's ability to undertake day to day activities were accordingly, throughout the relevant period, long-term.

26. For these reasons the Tribunal concluded that the claimant was a disabled person as a result of a mental impairment, namely autism spectrum condition, in the period from 18 July 2022 to 19 April 2023.

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Employment Judge:
Date of Judgment:
Entered in register:
and copied to parties

Sangster
11 December 2023
14 December 2023

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