



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000524/2023**

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**Held in Glasgow on 21 February 2024**

**Employment Judge P O'Donnell**

10 **Mrs Caroline Houston**

**Claimant  
In Person**

15 **The Board of Management of Glasgow Clyde College**

**Respondent  
Represented by:  
Mr R Ashmore -  
Solicitor**

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

The judgment of the Employment Tribunal is:

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1. The claimant is disabled as defined in s6 of the Equality Act 2010 in respect of the impairments described as “shingles” and “endocarditis”.
  2. The claimant’s application to amend her claim to add further specification of the claims under the Equality Act as set out in her case management agenda is granted.

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### **REASONS**

#### **Introduction**

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1. The claimant has brought a number of complaints against the respondent. One of the claims being pursued is a claim of disability discrimination under the Equality Act 2010. The claimant relies on a number of impairments, some of which the respondent concedes meet the test for disability under s6 of the 2010 Act.

2. However, in relation to impairments described as “shingles” and “endocarditis” the respondent does not concede these meet the test under s6 of the 2010 Act. The present hearing had been listed to determine whether those impairments meet the statutory test.

5 **Evidence**

3. The Tribunal heard evidence only from the claimant.
4. There was an agreed bundle of documents prepared by the parties. A reference to a page number below is a reference to a page in that bundle.
5. The Tribunal found the claimant to be a credible and reliable witness. She had some difficulty in recalling the precise details of events when she first became ill with the relevant conditions but the Tribunal accepts that this was due to the severe effects on her health at the time as described below. The Tribunal has no hesitation in accepting the claimant’s evidence as true and accurate.

15 **Findings in fact**

6. The Tribunal made the following relevant findings in fact.
7. The claimant had been employed by the respondent as a lecturer from 2006.
8. On or around 6 October 2022, the claimant started experiencing a pain on the left hand side of her head radiating down to her left eye. The claimant was teaching a class at the time and when she finished she attended the Accident & Emergency department at the Queen Elizabeth University Hospital (QEU) because the pain had become severe. The medical advisers at QEU could not identify a cause of the claimant’s pain and suggested that the claimant attend the Royal Alexandra Hospital (RAH) in Paisley because it had better equipment to test her eye.
9. The claimant attended the RAH on the next day and the medical advisers at that hospital suggested that the claimant had shingles in her left eye. The claimant cannot recall what, if any, treatment was suggested.

10. The claimant, again, attended QEU on the day after because the pain was worse. She could not recall precisely what had been said in terms of the cause and treatment of the pain she was experiencing. She had been given medication, acyclober, for her shingles but this had made her violently ill. She was not eating or drinking as a result.
11. The claimant can recall phoning her manager on or around 8 October to explain the situation and inform the manager that she would not manage to teach the class she was due to teach the next day.
12. On the night of that same day, the claimant's daughter had to phone an ambulance to take the claimant to A&E at QEU. The claimant was in severe pain and had to be put on a drip at the hospital. The claimant was dehydrated due to being unable to drink as described above and needed nutrients because she was unable to eat.
13. A cannula was put into the claimant's arm to assist in applying the drip. The site of the cannula became infected and the bacteria entered the claimant's bloodstream. She contracted endocarditis, an infectious disease, which went round her body and entered her heart. This caused damage to the claimant's heart valves.
14. The claimant was extremely ill as a result. She described herself as being "at death's door" and did not come back to her full senses until two weeks later.
15. The claimant was given antibiotics to fight the endocarditis. Due to the need for hospital beds, the suggestion was made that the claimant would be discharged and would attend each day as an outpatient to be given the antibiotics via a drip. In the end, a particular medication was used which only required a weekly treatment. The claimant attended QEU for 5 weeks as an outpatient to receive this medication.
16. At this time, the claimant was put under the care of the OPAT team at QEU which specialises in treating infectious diseases. Whilst under the care of OPAT, a weakness in the claimant's heart was identified and she was referred

to a heart specialist, Dr Corcoran. He instructed various tests and scans of the claimant's heart which identified a leaky aortic valve in the claimant's heart caused by the endocarditis. This continues to be monitored and, at the date of the Tribunal, the claimant continues to attend Dr Corcoran's clinic. The damage to her heart will not heal on its own and the claimant has been advised that there will need to be some form of surgical intervention at some stage with the only question being when this will become nursery.

17. The diagnosis of shingles was confirmed by Dr Chakrabarti at QEU and the claimant continues to receive treatment for this. She takes eyedrops to fight a persistent infection in her left eye arising from the shingles which has not cleared up.

18. On 21 February 2023, the claimant indicated to the respondent that she felt fit to return to work. She alleges in her pleadings that from this date up to 6 August 2023 she was subject to disability discrimination. The conditions relied upon are those which she has described as "shingles" and "endocarditis".

19. The claimant continued to experience the effects of shingles at this time. Despite taking eye drops, she continued to have an infection caused by shingles. This continued to cause her pain and down the left side of her face and an itchiness in her left eye. She describes a feeling of nerves running up and down the left side of her face. The claimant finds her vision getting blurry at random especially when she has put any strain on her left eye. She can read with her right eye so long as she closes her left one.

20. All of this affects her mood making her angry and depressed. She finds she is bad-tempered and impatient with people when dealing with them.

21. She cannot take any exercise as a result of these symptoms. Any exertion puts pressure on her eye and it feels as if it is swelling up in the socket. She cannot lift and carry things. She has ceased pushing a shopping trolley when she goes shopping as this effort makes her eye feel as if it is swelling up.

22. The damage to the claimant's heart valve meant that from the time she had been hospitalised she gets short of breath and tired after very little exertion. She was previously a keen hill walker but after her hospitalisation found it difficult to walk up more than two flights of stairs. When visiting her daughter she struggled to walk up the 6 stairs in her daughter's house without using the banister. She could not carry heavy items and struggled to get up a ladder or chair to change a light bulb.
23. The Tribunal was taken to the claimant's medical records relating to her time in hospital and the subsequent treatment (pp125-169). These cover the period from 5 October 2022 to 20 September 2023. The Tribunal makes the following relevant findings of fact from these records:
- a. The records show the symptoms described by the claimant in her evidence as continuing over the period of the records.
  - b. There is nothing in the records that indicates the claimant's symptoms will improve at any time in the future.
  - c. The claimant's endocarditis is not the immediate cause of her shortness of breath and similar symptoms. These are caused by the damage to her heart.

### Relevant Law

24. Disability is one of the protected characteristics covered by the Equality Act 2010 and s6 of the Act defines disability as a physical or mental impairment which has long-term, substantial adverse effects on a person's day-to-day living activities.
25. Schedule 1 of the 2010 Act sets out further provisions in relation to the definition of "disability":

### ***Paragraph 2***

- (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.*

(3) *For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.*

(4) *Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.*

#### **Paragraph 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.*

(2) *'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.*

20 26. In *Goodwin v Patent Office 1999 ICR 302*, the Employment Appeal Tribunal gave guidance as to how the Tribunal should approach the issue of disability by addressing the following questions:

a. did the claimant have a mental and/or physical impairment? (the 'impairment condition')

25 b. did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition')

c. was the adverse condition substantial? (the ‘substantial condition’),  
and

d. was the adverse condition long term? (the ‘long-term condition’).

27. However, in *J v DLA Piper UK LLP* 2010 ICR 1052, it was said that the  
5 Tribunal did not have to rigidly adhere to answering these questions  
consecutively although it is good practice for the Tribunal to set out its findings  
on these issues separately. In particular, if the issue of impairment is in  
dispute then it may assist for the Tribunal to set out its findings on the long  
term, substantial and adverse effect conditions first then address the issue of  
10 impairment in light of its findings.

28. The term “impairment” is to be given its ordinary and natural meaning and has  
broad application (*McNicol v Balfour Beatty Rail Maintenance Ltd* 2002 ICR  
1498).

29. In considering whether there is an impairment, it is the effect and not the  
15 cause of any impairment which is of importance to the Tribunal’s  
determination of whether a claimant is disabled (*Walker v Sita Information  
Networking Computing Ltd* UKEAT/0097/12).

30. The Government Guidance on the definition of disability addresses the issue  
of what can be considered “normal, day-to-day” activities at D2-7.

20 31. Section 212(2) of the 2010 Act states that the word “substantial” means more  
than minor or trivial.

32. The Government Guidance on the definition of disability deals with the issue  
of disabilities with recurring effects at paragraph C9:

25 *“Likelihood of recurrence should be considered taking all the circumstances  
of the case into account. This should include what the person could  
reasonably be expected to do to prevent the recurrence. For example, the  
person might reasonably be expected to take action which prevents the  
impairment from having such effects (e.g. avoiding substances to which he or  
she is allergic). This may be unreasonably difficult with some substances.”*

33. The word “*likely*” appears in a number of contexts in the provisions relating to the definition of disability. The House of Lords in *SCA Packaging Ltd v Boyle* [2009] IRLR 746 held that this should be interpreted as meaning “could well happen”.
- 5 34. The Tribunal must assess the issues relevant to disability status (for example, whether there are substantial adverse effects, whether the effects are long-term, the likelihood of recurrence) as at the date of the alleged discrimination (*McDougall v Richmond Adult Community College* [2008] IRLR 227)

### Decision

- 10 35. The Tribunal will begin by making some comments about the submissions made on behalf of the respondent regarding the issue of disability status.
36. Much emphasis was placed on the fact that the claimant had been fit to return to work in February 2023, that she and her daughter had described her as “being on the mend” in correspondence and that she was not experiencing  
15 the extreme symptoms of her conditions that had hospitalised her.
37. However, none of these particularly assist the respondent’s case. The fact that someone is fit to carry out their job does not mean that they are not disabled for the purposes of the Equality Act. The law is very clear that the issue of disability status is about what the claimant cannot do rather than what  
20 they can. So long as there are day-to-day living activities which are adversely affected to a substantial and long-term degree then the fact that other activities are not so affected is neither here nor there.
38. Similarly, the fact that a claimant’s condition may have improved does not mean that the test for disability is not met unless that improvement is to such  
25 a degree that there is no longer a substantial adverse effect. The question for the Tribunal is whether the impairment, at the relevant time, had a long-term and substantial adverse effect.
39. There was also a reliance by the respondent on the label or name applied by the claimant to the impairments relied upon, particularly in relation to  
30 endocarditis. However, the Tribunal is concerned with the effects of an



impairment and not its cause or the name which might be applied to it (*Walker*, above). The fact that the claimant may mistakenly, but genuinely, apply the wrong name or label to the impairment does not mean that it cannot be a disability. If the impairment, however it is described, has a long-term and substantial adverse effect on the claimant then this is a disability regardless of what name is given to it.

40. With those comments in mind, the Tribunal turns to the issues to be determined.

41. The Tribunal agrees with the submission by Mr Ashmore that the relevant period for determining whether the claimant was disabled is 21 February 2023 to 6 August 2023 as this is the period over which the claimant alleges any disability discrimination had occurred.

42. Dealing first with the condition described as “shingles”, the Tribunal is satisfied that this had a substantial adverse effect on the claimant over the relevant period. Although she was not suffering the extreme headaches that had hospitalised her in October 2022, she had continuing pain, itchiness and nerves in her left eye and left side of her head over the relative period arising from an ongoing infection caused by shingles. The effects of this on her daily activities have to be more than minor or trivial and the Tribunal is satisfied that they are for the following reasons.

43. There was no question that the shingles had a substantial adverse effect on the claimant’s activities in October 2022; she described extreme pain that was so bad she was not eating and drinking. This led to her being hospitalised and needing to be put on a drip to provide rehydration.

44. However, although these effects diminished, the Tribunal considers that there were ongoing substantial effects.

45. The claimant described being unable to carry out certain physical activities such as exercise as well as lifting and carrying weights. The reason for this is that such physical exertion caused a feeling of swelling and pressure in her left eye. Although she initially described the weights as “heavy”, she went on

to give evidence that she could not push a shopping trolley because this caused the same feeling of swelling and pressure. The pushing of a shopping trolley is not a particularly strenuous exertion and so the Tribunal considers that it can reasonably infer that the claimant is unable to lift and carry everyday weights.

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46. The claimant described these effects in circumstances where she is taking medication in the form of eyedrops to help with the effects of the infection. The Tribunal has to assess any adverse effects in circumstances where such treatment is not being taken and it considers that it is, again, reasonable to infer that the effects would be worse if the claimant was not taking medication. The claimant's ability to lift and carry everyday objects or engage in the everyday activity of pushing a shopping trolley or light exercise is, therefore, adversely affected to a substantial degree.

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47. Further, the claimant described the nerves in her face, the itchiness in her eyes and any pain or discomfort as affecting her mood. She described feeling low or depressed as well as becoming angry and irritable. The Tribunal considers that such effects would undoubtedly impact on her interactions with others to a substantial degree. It is axiomatic that someone who finds themselves depressed or irritable would not be able to interact with friends, family or anyone else in the manner in which they ordinarily would.

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48. The evidence of the claimant and the relevant medical records show that the effects described above had started in and were continuing throughout the relevant period and there is nothing to suggest that these were likely to cease in the near future, particularly given the fact that the infection was not responding to treatment.

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49. The adverse effects of the claimant's shingles commenced in October 2022 and were continuing over the relevant period. By the end of the relevant period, adverse effects of one kind or another had existed for 10 months. Applying the test for the word "likely" in *Boyle* (above), the Tribunal considers that, when assessed at the relevant time, it could well be that any adverse effects would last for 12 months particularly given that there had been no

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improvement over the previous 10 months and no likely improvement was suggested in the medical records.

50. In these circumstances, the Tribunal is satisfied that the impairment described as “shingles” has had long-term and substantial adverse effects on the claimant’s day-to-day living activities. The claimant is, therefore, disabled as defined in s6 of the Equality Act in respect of this impairment.
51. Turning to the impairment described as endocarditis, the respondent’s main submission as to why this does not amount to a disability was that the letters from the claimant’s medical advisers do not say that endocarditis was the direct cause of any adverse effects.
52. It is correct that these letters state that the proximate cause of the adverse effects on the claimant is damage to her heart valves. However, none of those letters state what caused that damage and the Tribunal accepts the evidence of the claimant that she has been advised by those doctors that it was the endocarditis that caused the damage to her heart. In these circumstances, the Tribunal finds that the ultimate cause of the adverse effects on the claimant was endocarditis. The damage to the claimant’s heart valves is not some separate or intervening injury but something flowing directly from the endocarditis. It is wholly artificial to say that the ultimate effects on the claimant are not caused by the endocarditis in the circumstances of this case.
53. In any event, as noted above, the Tribunal is not concerned with the cause of an impairment but, rather, its effects. The Tribunal will address this in more detail below but there are clearly substantial adverse effects on the claimant’s daily activities flowing from the damage to her heart valves.
54. The name or label applied by the claimant (who is a party litigant and not medically qualified) to the impairment giving rise to these effects should not mean that she cannot rely on that impairment as a disability if it turns out that she has applied the wrong label. This would be contrary to the interests of justice. So long as the claimant can demonstrate that she has an impairment

which meets the statutory test then an error in the naming of that impairment does not mean that the test is not met.

55. The Tribunal is satisfied that the impairment described as endocarditis has had a substantial adverse effect on the claimant's living activities. Similar to the impairment of shingles when the claimant was hospitalised due to the infection then she was obviously unable to carry out any activities.

56. The claimant's condition has clearly improved from the life-threatening effects it originally had but there was then a substantial adverse effect on the claimant's mobility. The claimant describes having a shortness of breath which prevents her from climbing stairs, that it restricts her ability to walk a distance or carry things. The Tribunal is satisfied that this amounts to a substantial adverse effect on her daily activities.

57. These effects were described by the claimant as existing at the relevant time and this is supported by the medical evidence which records her describing her shortness of breath.

58. In terms of long-term effects, the effects existed from October 2022 until the end of the relevant period, a total of 10 months. The claimant's evidence was that these effects will persist permanently unless and until there is some form of surgical intervention. There is nothing to suggest that this was not the position during at the relevant time and so the Tribunal considers that, at the relevant time, it was likely that the substantial adverse effects would likely last longer than 12 months (again, applying the definition of "likely" in Boyle, above).

59. For these reasons, the Tribunal is satisfied that the impairment described by the claimant as endocarditis is a disability as defined in s6 of the Equality Act 2010.

### **Case management**

60. At the end of the hearing, the Tribunal sought to address certain issues of case management in order for the claim to now progress to a final hearing.

61. The respondent had previously sought further specification of the claims under the Equality Act and the claimant sought to amend her claim to add the specification set out in her case management agenda lodged in advance of the previous preliminary hearing.
- 5 62. The respondent had objected to that application but, at the present hearing, Mr Ashmore confirmed that those objects were now withdrawn.
63. There being no objections, the Tribunal granted the application to amend.
64. Mr Ashmore had helpfully produced a draft list of issues but there was insufficient time to fully discuss and finalise this list. The Tribunal made  
10 directions set out below for progress to be made in finalising the list of issues and the listing of the final hearing.
65. However, there were some comments regarding the list of issues which the Tribunal considers would assist the parties in finalising it:
- 15 a. It should only include issues which have to be determined (for example, the draft included an issue of time bar in respect of the unfair dismissal claim but no such defence has been pled or arises on the face of the pleadings).
- b. If any issue is agreed then the list of issues should record that.
- 20 c. In relation to the issue of time bar for the discrimination claims, this issue is best addressed once the Tribunal has determined what acts of discrimination, if any, have occurred. The issue of time bar will then crystallise in terms of whether the ET1 was presented within the relevant time limit, whether there needs to be any consideration of whether individual acts amount to conduct over a period and whether  
25 the Tribunal has to consider exercise its discretion to hear any claim of discrimination out of time. The Tribunal considers that it would make more sense for this issue to be moved towards the end of the list of issues.

d. The issue for unfair dismissal needs to be separated into discrete issues of whether there were a dismissal as defined in s95(1)(c) of the Employment Rights Act 1996 and whether any such dismissal was fair in terms of s98. In relation to the former issue, this should be broken down into the elements of the test for constructive dismissal (that is, whether there was a fundamental breach of contract by the respondent, whether the claimant resigned in response to that breach and whether she resigned as soon as reasonably practicable) and it would assist if the claimant clarifies what term of the contract was breached (for example, does she say that it was the term requiring the respondent to offer work, does she say that there was a breach of the duty of trust and confidence by the respondent or some combination of these).

e. In relation to the claim for deduction of wages, it was clear from what could be discussed at the hearing that this does not arise from a single set of facts. The claimant alleges that prior to her hospitalisation she was paid the wrong hourly rate whereas after she was fit to return she was not paid at all. The list of issues needs to reflect this.

66. The Tribunal directed that parties should, in the period of 28 days after the hearing, liaise in order to finalise the list of issues, agree the length of the final hearing and identify mutually suitable dates for the hearing. They should then make a joint application to the Tribunal for the final hearing to be listed on those dates and provide the agreed list of issues.

67. If parties cannot reach agreement on these points within that 28 day period then they must ask the Tribunal to list a case management hearing for directions to be made by the Tribunal to list the final hearing.

Employment Judge Peter O'Donnell  
**Employment Judge**

5/3/24  
**Date**

**Date sent to parties**

7/3/24