



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

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**Judgment of the Employment Tribunal in Case No: 8000461/2023 Issued
Following Preliminary Hearing Held at Edinburgh, on the Cloud Based Video
Platform, on 28th of February 2024, with Deliberation on 1st April 2024**

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Employment Judge J G d'Inverno

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Mr S Anderson

**Claimant
In Person**

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**P.J. Carey (Contractors) Limited
Careys Plc**

**Respondent
Represented by:
Ms A Dannreuther of
Counsel
instructed by Mr Oliver
Stacey, Trainee
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:-

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(First) That the claimant lacks Title to Present and the Tribunal Jurisdiction
to Consider his complaints of Discrimination.

(Second) That the claimant's complaints of Discrimination are dismissed for
want of Jurisdiction.

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ETZ4(WR)

(Third) Let it be assumed that the Tribunal had not so dismissed the claims, that the respondent be granted Leave to Amend in terms of its Tendered Proposed Amendment dated 21st December 2023.

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Employment Judge: J d'Inverno
Date of Judgment: 16 May 2024
Entered in register: 16 May 2024
and copied to parties

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I confirm that this is my Judgment in the case of Anderson v P.J. Carey (Contractors) Limited and that I have signed the Judgment by electronic signature.

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REASONS

1. This case called for Open Preliminary Hearing on the Cloud Based Video Platform at Edinburgh.
2. The claimant appeared in person, the respondent was represented Ms Dannreuther, of Counsel, instructed by Mr Stacey, Trainee Solicitor.
3. The issues for Determination before the Tribunal at the Hearing were two;

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(First) Was the claimant, at the material time for the purposes of his complaints that being 18th of August 2023, a person possessing the protected characteristic of Disability, by reason of Attention Deficit Hyperactivity Disorder ("ADHD"), in terms of section 6 of the Equality Act 2010 ("EqA"); and, let it be assumed that the claimant did so possess the protected characteristic on 18th August 2023,

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(Second) Whether the respondent should be granted Leave to Amend in terms of the opposed Application and Tendered Proposed Amendment of 21st December 2023.

- 5 4. The claimant gave evidence on affirmation and answered questions in cross
examination and questions put by the Tribunal. Each party then addressed
the Tribunal in submission; firstly, in relation to the issue of Disability Status in
respect of which the claimant addressed the Tribunal first, followed by the
respondent's representative with the claimant afforded the right of limited
10 response; and, secondly, in respect of the opposed Application for Leave to
Amend, with the respondent's representative addressing the Tribunal first
followed by the claimant and the respondent's representative afforded a
limited, but in the event unexercised, right of reply.

15 **Submissions in relation to Disability Status**
Summary of Submissions for the Claimant

5. In the course of his submissions the claimant made four main points:-
- 20 (a) That everything in his medical records was fact and that he
relied upon his medical records for the purposes of establishing
both his ADHD and his possession of the protected
characteristic as at the 18th of August 2023
- 25 (b) That ADHD was a lifelong condition
- (c) That Cannabis Flower which he has taken on a prescribed basis
since in or about July/August 2022 and that his doing so allows
him to work
- 30 (d) That he was in receipt of a Disability Living Allowance from
"Disability Scotland"

Summary of Submissions for the Respondent

5 6. The respondent's representative submitted that in approaching the Determination of the principal issue, the Tribunal required to consider and determine:-

10 (a) As at the material time, namely on the 18th of August 2023, did the claimant have the mental impairment of ADHD upon which he founds as giving rise to his possession of the protected characteristic

15 (b) If so, as at the material time, did the impairment have a substantial and long term adverse effect on his ability to carry out day to day activities, that is to say

(i) had it lasted or was it likely to last for at least 12 months or for the rest of the claimant's life

20 (ii) substantial meant not trivial

7. The respondent's representative further submitted that relevant to the consideration and determination of the questions were the terms of;

25 (a) Regulation 3 of the Equality Act 2010 Disability Regulations 2010 which provided that addiction is not to be treated as an impairment for the purposes of section 6, and she invited the Tribunal to hold on the evidence before it that the claimant was addicted to cannabis and that his symptoms, such as they were described in evidence, fell to be attributed to that.

30 (b) Paragraph 5.1 of Schedule 1 to the 2010 Act, which provides that measures taken to treat or correct an impairment are to be discounted when assessing whether the impairment has a substantial adverse effect,

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(c) Paragraph 5(2) of Schedule 1 which defines “measures” as including, in particular, medical treatment and the use of a prosthesis or other aid

5 (d) IDS Volume 5 Chapter 6 paragraph 6.14 which states that self intervention, non psychiatrist counselling or non prescribed cognitive therapy does not fall within the definition of “measures” for the purposes of paragraph 5(2) of Schedule 1 to the 2010 Act

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8. Turning to the first question, did the claimant have ADHD on the 18th of August 2023? On that date, submitted the respondent’s representative, the claimant was 28 years of age and had been using cannabis for an admitted period of at least 9 years from 2019 in order to treat the symptoms of his conditions, and she submitted and invited the Tribunal to hold on his own evidence, for a total period of 12 years from age 16. That was the information that is recorded by the Sapphire Clinic as given by the claimant to them on the 22nd of July 2022, in their document which is produced and relied upon by the claimant at page 93 and 94 of the Hearing Bundle. In that document the claimant described himself as a daily user of cannabis which he first used at 16 years of age using less than 1 gram per day during the working week and 1 gram per day (in his oral evidence more than 1 gram per day) on days off. That that was likely to be an accurate statement made by him in July of 2022 was supported by the fact that in his evidence he had confirmed that he had for several years prior to that time stopped, taking the drug Concerta which had been medically prescribed to treat his symptoms. She invited the Tribunal to hold that he had been a habitual user of cannabis from the age of 16 in 2010 which failing certainly from the age of 19 in 2013, on his oral evidence using cannabis daily and weekly, but fluctuating its use when working for fear of drug testing.

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9. The letter from Dr Esparon of Consultant Child and Adolescent Mental Health Service (“CAMS”) dated the 1st of April 2011 confirmed the claimant was

discharged from CAMS on that day and that he was no longer on medication of any sort.

- 5 10. That since being medically prescribed Cannabis Heart in 2022 he was in the habit of taking the prescribed cannabis at night but prior to being in receipt of prescribed cannabis he was taking non medical cannabis certainly since 2019 consciously to treat his condition.
- 10 11. Regarding addiction there was no definition of addiction for the purposes of Regulation 3 of the Equality Act Regulations 2010. The Cambridge Dictionary defined addiction as an “inability to stop” and that a second Dictionary defined addiction as “compulsorily committed to a habit or practice”.
- 15 12. That while the claimant stated that he was not addicted, he gave as the only justification for that statement the fact that for a brief period from November 2023 until the start of 2024, not more than a period of a few weeks during which he had been prescribed Mirtazapine, he had stopped taking the cannabis. On the one hand, therefore, there was evidence, including the
20 claimant’s own evidence, that he had been a regular user of cannabis from at least the age of 19, whereas, on the other hand, the only evidence before the Tribunal of his ability to stop taking cannabis was that of a short period aged 28/29, some 9 years later at the end of which he had again resumed regular cannabis use. She invited the Tribunal to find, on the balance of probabilities
25 that the claimant had a cannabis addiction and had had that addiction at the material time. Under reference to pages 132 and 133 of the Bundle (“NHS Information on Cannabis”) the respondent’s representative submitted that a number of the symptoms (effects) upon which the claimant founded in his Disability Impact Statement at pages 80 to 83, were also to be found in the
30 NHS document at page 132, as identified symptoms associated with long term use of cannabis including in particular those of difficulty sleeping, low mood, difficulty concentrating and irritability.

13. The respondent's representative submitted that the claimant bore the burden of proof in this matter and he had placed no evidence before the Tribunal upon which common symptoms could be causally differentiated as between the use of cannabis and the impairment of ADHD. In these circumstances the Tribunal had no sound evidential basis for finding in fact that the symptoms, which the claimant described as experiencing, were symptoms which showed on the balance of probabilities that he was suffering from ADHD at the material time as opposed to from the effects of long term use of cannabis. The evidence of a medical expert would be required to make that differentiation. It was not a matter that the Tribunal could determine without such input in the absence of relevant medical evidence.
14. The respondent's representative separately submitted that there was in fact before the Tribunal no medical evidence expressly vouching a diagnosis of ADHD and no recent direct medical evidence of a continuing diagnosis. In this regard she rejected the claimant's contention that once diagnosed with ADHD it follows automatically that a person will continue to have the impairment for the rest of their life. She submitted that no medical evidence substantiating that proposition had been placed before the Tribunal.
15. The respondent's representative accepted that from the correspondence produced at pages 87 to 92 of the Bundle being correspondence from Dr Jan Esperon of CAMS to Dr A Pride, the claimant's General Practitioner between June 2008 and March 2011 there is reference to the claimant being prescribed the drug "Concerta" which she accepted was a drug used to treat ADHD. There is also reference in the letter of 7th March 2011 (page 95) to the claimant being, "*particularly angry that he was refused possible entry to the army due to his diagnosis of ADHD and his medication.*" The only document, however, which contains an express reference to diagnosis is that produced at page 95. While that document is undated it contains, in a past medical history, an entry dated 31st of the 10th 2023 a date after the material time, and could not therefore have been created earlier than that date. The document bears to be an extracted section of a larger document and while the author or source of the document is not disclosed on the face of the page

that the claimant has produced, the section in question is headed up “Clinical Information” and under the heading “Comment” the statement “*Dear Doctor many thanks for seeing Steven and offering your expert input. Steven has requested referral to the CMHT. He was previously under the care of CAMHS and was diagnosed with ADHD in 2007*”. In 2007 the claimant was 12/13 years of age. Although reference to ADHD appeared in two other documents produced by the claimant it was clear that they were included there as part of a narrative provided solely by the claimant and were not themselves confirmation of any diagnosis.

Causation

16. In relation to the issue of whether some or all of the impact given notice of by the claimant in his Impact Statement could be held to be caused by the medical condition upon which he relied, the respondent’s representative made reference to the claimant’s evidence in which he stated that he had been severely assaulted in young adulthood after which he had not wanted to leave the house and that had been and continued to be a long lasting effect upon him. She made reference to his use of the phrase they made “*footprints on my face*”. In her submission the impact referred to at paragraph 8 of the Impact Statement was equally referable to that assault and should be regarded as such by the Tribunal.

17. In relation to whether, let it be assumed that the Tribunal was to find that the claimant did, at the material time, suffer from ADHD, in the respondent’s representative’s submission any adverse impact arising from that condition on the claimant’s ability to carry out normal day to day activities should not be regarded as substantial; This because in evidence the claimant had emphasised that he had worked throughout 2021 and 2022 working 12 hour shifts, 7 days a week, in a responsible role relating to critical health and safety and was clearly capable of having done so. It was hardly surprising that after such an intense and sustained period of working without any breaks he would ultimately need a break. In the respondent’s representative’s submission anyone would and the fact that he did, in those circumstances,

could not, on the evidence presented and on the balance of probabilities be attributed to the condition of ADHD as opposed to the fact that he had been sustaining a punishing work schedule for such a prolonged period. That that was the case was consistent with the position set out at page 135 of the Bundle being the claimant's registration form submitted to the respondent in which he answered each of the following questions with a "No"; "*Do you suffer from any medical illness or disabilities which we need to be aware of*" – "No"; "*Are you currently attending a hospital/GP for treatment or currently taking any medication*". Answer "No", which responses the claimant had certified as being correct as at the 23rd of January 2021.

18. Referred the Tribunal to two case authorities and relied upon the opinion of the Inner House of the Court of Session in the Appeal by **JC v Gordonstoun Schools Limited** [2016] CSIH 32.XA25/15, in which the Court upheld the decision of the Tribunal at first instance. They were not satisfied that the claimant was, at the material time, disabled for the purposes of section 6 on the evidence presented.

19. While the guidance in **Goodwin** commended a focus on what a claimant could not do as opposed to what they could do, the evidence before the Tribunal in the instant case, being substantially the claimant's own evidence, that he was able to work not only normally but sustaining a very onerous level of continuous working, in 2021 and 2022 was relevant, in the absence of medical evidence that would go to demonstrate the ameliorating effect of the medically prescribed cannabis upon his asserted condition such as to show that any adverse impact experienced by the claimant was caused by the asserted condition of ADHD rather than by his habitual use of cannabis.

By way of limited response

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20. In response the claimant asserted that he was not an addict because he had been able to stop for a few weeks. He also submitted that there were times when he did not take cannabis for fear of it being detected in a random compulsory drug test at work. While he accepted that on those occasions he

was nevertheless able to carry out his duties he said that was because of his ability to discuss matters with a friend in the work place, if needed, who was supportive and understanding of his situation which provided him with a therapeutic benefit.

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Contingent Submissions on Amendment

21. Under reference to the *Selkent* principles the respondent's representative submitted that the terms of the Proposed Amendment were such that the balance of injustice and hardship lay in favour of it being granted and Leave to Amend being allowed. The Amendment did no more than factually answer the disclosure which had been made by the claimant in the course of the litigation that he was, at the time of being employed and at the material time, a habitual user of cannabis notwithstanding the declarations that he had made to the contrary when registering with the respondent; and which he had never departed from during his employment, and that the Amendment went relevantly to the issue of Remedy. The claimant had made his disclosure of daily cannabis usage on the 27th of November and the Application for Leave to Amend had been brought forward timeously on the 21st of December 2023, the claim was at a relatively early procedural stage, no Final Hearing having yet been listed, and thus, there was no prejudice to the claimant nor would the introduction of the Amendment result in any delay.

22. In opposition to the Application for Leave to Amend the claimant submitted that as the Proposed Amendment included an averment that he was addicted to cannabis, it was scandalous and should not be allowed that being something which he denied.

Findings in Fact

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23. On the documentary and oral evidence presented, the Tribunal made the following essential Findings in Fact restricted to those relevant and necessary to the determination of the Preliminary Issue of Disability Status.

24. Attention Deficit Hyperactivity Disorder is frequently diagnosed in childhood and, in some instances, can be a lifelong condition.
- 5 25. There was no medical evidence before the Tribunal expressly vouching a diagnosis of ADHD in respect of the claimant.
26. There was no recent direct medical evidence before the Tribunal of a continuing diagnosis.
- 10 27. There was no medical evidence before the Tribunal substantiating the proposition that once diagnosed in childhood ADHD will continue to be a condition suffered by all individuals in which it has been diagnosed throughout their life.
- 15 28. At Pages 87 to 92 of the Bundle correspondence from Dr Jan Esperon of the Child and Adolescent Mental Health Service ("CAMS") to the claimant's GP, Dr A Pride, in the period 2008 to 2011, contains reference to the claimant having been prescribed the drug "Concerta".
- 20 29. Concerta is a drug commonly used to treat ADHD.
30. In a letter dated 7th March 2011, from Dr Pride to Dr Esperon (page 95 of the Bundle), Dr Pride refers to the claimant being "*particularly angry that he was refused possible entry to the army due to his diagnosis of ADHD and his medication*".
- 25 31. At page 95 of the Bundle, there is produced by the claimant an extract from a larger document, which is undated and the provenance and authorship of which is not stated or otherwise discernible on its face, in which under the heading "History of Presenting Complaint" and "Past Medical History" Attention Deficit Disorder is shown as recorded on the 31st of the 10th 2023, a date occurring 2-3 months after the material time.
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32. The document at page 95 could not have been created earlier than 31st October 2023, that being a date 2½ months after the material time for the purposes of the claimant's complaints (18th August 2023).

5 **The Body of the Comment**

33. The document at 95 of the Bundle, contains the statement by the unidentified author in relation to the claimant "*He was previously under the care of CAMHS and was diagnosed with ADHD in 2007*".

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34. In 2007 the claimant was 12/13 years of age.

35. At pages 93 and 94 of the Bundle, the claimant produces a letter from "Sapphire Medical" in which it is clear on its face that the claimant is the sole source of the information narrated in it including references to ADHD and the fact that he had been a daily user of cannabis since age 16.

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36. On the balance of probabilities the claimant was diagnosed as suffering from ADHD in or around 2007, when he was a child aged 11/12.

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37. That material time for the purposes of the claimant's complaints is 18th of August 2023.

38. On 18th August 2023 the claimant was 28 years of age.

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39. At the material time (18th August 2023) the claimant had been a daily user of cannabis for a period of 12 years from age 16, a position confirmed by him to the Sapphire Clinic in July of 2022.

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40. During that period the claimant used cannabis at a dose of 1 gram per day during the working week and more than 1 gram per day on days off and weekends.

41. At page 92 of the Bundle Dr Esperon of CAMHS confirms in a letter dated 1st of April 2011, that he had discharged the claimant from the Child and Adolescent Mental Health Service as at that date and, that as at that date the claimant was not receiving any prescribed medication. As at that date he was 16 years of age.
42. In the course of cross examination the claimant stated that he was not taking cannabis to treat his medical condition.
43. The claimant, on his own evidence and initiative had stopped taking the previously prescribed drug Concerta some months/years prior to his discharge from CAMHS in April 2011.
44. From on or about April 2011 the claimant self medicated by the daily use of non medically prescribed cannabis. Such non prescribed self intervention and treatment does not fall within the definition of “measures” for the purposes of paragraph 5(2) of Schedule 1 to the 2010 Act and thus does not fall to be discounted in terms of paragraph 5.1 when assessing whether the claimant’s impairment of ADHD has a substantial adverse effect upon him.
45. The medical reports intimated and lodged by the claimant on 27th 11th 2023, and which are founded upon him and produced at pages 84 to 95 of the Bundle inclusive contained no reports, records of documentation for the 11 year period following his discharge from CAMHS in April 2011 and his first consultation with “Sapphire Medical”, a private prescriber of cannabis cake on 29th July 2022 which period covers the claimant from age 16 to 27.
46. During that period the claimant, from time to time, had help coping with such symptoms as he expired from a “good friend”. Such non prescribed cognitive therapy does not fall within the definition of measures included in paragraph 5.2 of Schedule 1 to the 2010 Act and does not fall to be discounted when assessing whether the claimant’s impairment had a substantial adverse effect.

47. For an 8 week period, between November 2023 and January 2024, that is a period commencing some 2½ months after the material time, the claimant stopped taking cannabis while being prescribed the drug Mirtazapine.
- 5 48. The claimant stopped Mirtazapine in January of 2024 and taking daily cannabis again at that time with which he continues as at the date of Hearing. Since January of 2023 the claimant has been continuing to take daily cannabis as prescribed at page 94 of the Bundle.
- 10 49. The claimant was severely assaulted when aged 17. The assault was a traumatic event which continues to affect him to the present day resulting in him not wanting to leave the house on occasions.
- 15 50. In 2018 the claimant signed up with Apex Resources Limited, which supplies construction workers to the industry, and worked with them for a period of time in St Andrews and Fife.
- 20 51. In January 2021 the claimant re-registered with Apex Resources Limited (as a ground worker) (page 135 of the Bundle). On both those occasions under the heading "Medical and Background History" the claimant answered the questions "*Do you suffer from any medical illness or disabilities which we need to be aware of?*" with the answer "**No**" and the question "*Are you currently attending a hospital/GP for treatment or currently taking any medication*" with the answer "**No**".
- 25 52. The work undertaken by the claimant was arduous and responsible involving installation of drainage, foundations, road formation, plant operations including certified operation of dumper trucks, rollers and excavators. It was work in which safety awareness was important and in which the claimant was responsible for the safety of other fellow workers.
- 30 53. In 2021 and 2022 the claimant worked for most weeks in the year including a period of 7 weeks of 12 hours shifts 7 days per week.

54. From October 21 to February 2022, the claimant was sub contracted for 5/6 months with Balfour Beatty again working 12 hour shifts 7 days a week up to the end of October 2022.
- 5 55. In November 2022, the claimant took a break as he had become tired from months of continuous working without taking days off.
56. The claimant returned to working in or about November 2022, working through until August of 23 at which point he took another break as he felt
10 burned out.
57. When asked in cross examination why in completing the registration form at page 135 of the Bundle in January 2021 the claimant had said that he was not suffering from any medical illness or disability he indicated that he did so
15 because he was not suffering a great deal at that time and was able to work and to function while working without being impaired and that he had a friend who helped him manage any symptoms.
58. The NHS Information Sheet, dated 22nd of the 2nd 2024, produced at pages
20 132 and 133 of the Bundle and relating to cannabis, contains the following factual information, the accuracy of which was not in dispute between the parties under the heading "Risk Factors".

- 25 “(a) Cannabis can make some existing mental health symptoms worse and has been linked with the possible development of mental health issues. The risk factors include ... heavy cannabis use from a young age over a long period of time

Long Term Use and Dependency

- 30 (b) People using cannabis every day over a prolonged period may develop a tolerance of the effects. They may need more to get the desired effects or may experience dependency.
Withdrawal effects can be reported when people become dependent.

The most commonly reported symptoms are:

- Difficulty sleeping
- Vivid dreams or nightmares
- Low mood
- Difficulty concentrating
- Irritability
- Craving”

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59. In his Impact Statement produced at pages 80 to 83 the impact which the claimant attributes to his ADHD include:-

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- an inability to cope well in busy places
- low mood swings
- difficulty in focusing and or concentrating
- irregular sleeping patterns; and
- states that his ADHD has associations with Anxiety Disorder and Depression, and, that he can struggle to go out of the house even to supermarkets due to social anxieties

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60. In the course of his oral evidence, the claimant stated that the severe assault which he had been subjected to when aged 17 had resulted in his being reluctant and on occasions unable to go out of the house even to the supermarket and that that was something which had continued to and continued to affect him as at the date of the Hearing.

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61. The undated and unattributed extract from a document which is produced by the claimant at page 95 and relied upon him (but which could not have been created prior to the 31st of the 10th 2023) contains amongst others the following statements in relation to the claimant:-

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- “He had had no recent consultations in primary care re ADHD”
- “He attended myself at the end of October” [sic 2023]
- “He is in the process of legal action against the employer, this is causing considerable anxiety related symptoms and stress”

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- “He also described self funding this action at the Tribunal and this is also causing further stress”
 - “I have had a brief note from Sapphire Clinic and have prescribed some Mirtazapine”
 - 5 • “Steven was subjected to historical abuse when in residential care in 1997, this came to light about 5 or 6 years ago and there seems to be very little in his medical notes.”
 - “He is currently involved in a ‘redress application’, he informs me that it was physical abuse ...”
 - 10 • “I think he is struggling with very significant anxiety and stress, but I also think there is significant issues re previous trauma”
62. As at the material time, 18th August 2023, there was no medical evidence of any recent consultation within the NHS in relation to ADHD. There was no recent medical diagnosis of ADHD.
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63. In the Health and Safety Project Starter and Induction Questionnaire completed by the claimant for the respondent and produced at pages 96 and 97 of the Bundle signed by the claimant and countersigned by the respondent’s inductor, both on 20th January 2021, there is no written evidence of the claimant disclosing any disability or medical condition suffered by him at the material time.
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64. For several years the claimant’s normal day to day activities included substantially and at periods entirely performing onerous work duties in successive 12 hour shifts 7 days a week.
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65. The claimant confirmed both in examination in chief and in cross examination he was able to carry out those duties without prescribed medication of any sort prior to July of 2022 and thereafter while daily using prescribed cannabis.
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66. The claimant stated in cross examination that at the material time he carried out his work duties successfully and without difficulty while not taking prescribed cannabis when he considered that there might be a risk of a

compulsory drug test which may detect his use of cannabis, in circumstances when he had not disclosed either his medical condition or his use of prescribed cannabis.

5 67. A number of the adverse impacts identified, in his Impact Statement, and relied upon by the claimant as attributable to his ADHD, are also identified as commonly encountered symptoms of habitual cannabis usage.

10 68. There was no medical evidence placed before the Tribunal which went to establish the effects, at the material time, of the medically prescribed cannabis which the claimant was taking in relation to the aspects and adverse impact of ADHD upon which he founded.

15 69. There was no clear medical evidence before the Tribunal that went to show what the “deduced” effects of the impairment of ADHD relied upon by the claimant would be if at the material time he had not been receiving and taking prescribed medical cannabis.

20 70. The claimant’s oral evidence was to the effect that, at and around the material time, his practice was to not take the medically prescribed cannabis when he considered that there was risk of drug testing and or detection and that on those occasions he was able to function in the same way with non prescribed assistance (cognitive therapy) provided by a friend.

25 **Applicable Law**

30 71. Discrimination occurs where, because of a protected characteristic, one person treats another less favourably than he treats or would treat others (the Equality Act 2010 (“EqA”) section 13). Disability is a protected characteristic (section 4) and, in so far as relevant, is defined in section 6 at Schedule 1 of the 2010 Act as follows:

“6. 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.

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.....

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of sub section (1).”

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.....

SCHEDULE 1
 DISABILITY: SUPPLEMENTARY PROVISION
 PART 1
 DETERMINATION OF DISABILITY

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.....

Effect of Medical Treatment

5(1) An impairment is to be treated as having a substantial adverse effect on the ability of a person concerned to carry out normal day-to-day activities if-

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- (a) measures are being taken to treat or correct it, and
- (b) but for that, it would be likely to have that effect.

25 (2) “Measures” includes, in particular, medical treatment and the use of prosthesis or other aid”

72. HM Government’s Office for Disability Issues issued guidance under section 6(5) in May 2011. It is not an authoritative statement of the law and does not purport to be. The passage at section B1 is relevant to the issue to be determined in the present case and is in the following terms:

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“B1 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

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differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect”.

5 73. That statutory guidance reflects what is contained in the authorities. It is well established that the implication of “substantial” in section 6(1)(b) is that the effect requires to be of some substance; something significant and non trivial: *Goodwin v Patent Office* [1999] ICR 302; [1999] IRLR 4. [WHEN REVISING INSERT A REFERENCE TO GOODWIN IN THE RESPONDENT’S REPRESENTATIVE’S SUMMARY OF SUBMISSIONS ABOVE]. Whether or not the effect of an impairment is substantial in that sense is a question of fact for the Tribunal. As for what amounts to day to day activity, it too is a question of fact for the Tribunal to determine, using its basic common sense: *Vicary v British Telecommunications Plc* [IRLR 680]. Thus, the person allegedly discriminated against will usually give evidence before the relevant Tribunal about the impairment and its effects on them at the relevant time, that being, essentially the best evidence.

20 74. In *Goodwin v Patent Office*, an Employment Tribunal was criticised for having unduly focused on what the claimant could do whereas they ought to have looked at what he either could not do at all or only do with difficulty; that being so, they had failed to assess the effect that his mental impairment had on his abilities. *Goodwin* was a decision of the then President of the Employment Tribunal Morrison J, and has often been referred to for guidance as to the proper approach when determining whether or not a person is disabled within the meaning of disability discrimination legislation: see page 308. That guidance is essentially that the fact finding Tribunal needs to ask whether, at 25 the material time, the person has a physical or mental impairment, whether it affects their ability to carry out normal day to day activities, as the Tribunal finds on the evidence these to be, whether any adverse effect is substantial and whether it is long term? That is a non controversial analysis as it 30 effectively works its way through the statutory provisions in sequence.

75. *Goodwin* did criticise the practice of focusing on what a claimant could do. That, however, does not render irrelevant any evidence about what a

claimant can do. It serves as a reminder that in order to properly assess effect the Tribunal should take account of all of the evidence about what, in the course of normal day to day activities the claimant can and cannot do or can only do with difficulty. Read in that way the guidance reflects the application of the balance of probabilities test and standard of proof, to make Findings in Fact, which is an exercise that should be carried out on the preponderance of the evidence.

76. Regulation 3 of the Equality Act 2010 Disability Regulations 2010 provide that addiction is not to be treated as an impairment for the purposes of section 6.

77. Paragraph 5.1 of Schedule 1 to the 2010 Act provides that measures taken to treat or correct impairment are to be discounted when assessing whether the impairment has a substantial adverse effect.

78. Paragraph 5(2) of Schedule 1 defines “measures” as including, in particular, medical treatment and the use of a prosthesis or other aid.

79. Self intervention, non psychiatric counselling, or non prescribed cognitive therapy (self treatment/self medication with non prescribed drugs) do not fall within the definition of “measures” for the purposes of paragraph 5(2) of Schedule 1 to the 2010 Act and thus, do not fall to be discounted, in terms of paragraph 5.1 of Schedule 1 when assessing whether an impairment has a substantial adverse impact (IDS Volume 5, Chapter 6, paragraph 6.14).

80. Regarding what is sometimes referred to as a “deduced discrimination” claim, namely where paragraph 5 of Schedule 1 is relied on, it will normally be essential to lead clear medical evidence to show what the “deduced” effects of the impairment would be if the person did not have the treatment in question.

“13 ... in any deduced effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this particularly benign doctrine ... should not

readily expect to be indulged by the Tribunal of fact. Ordinarily one would expect clear medical evidence. “Woodrup v London Borough of Southwark [2002] EWCA Civ 1716; [2003] IRLR 111, Simon Brown LJ at para 13.

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Discussion and Decision

81. The evidence before the Tribunal at Hearing consisted of the oral evidence of the claimant, given both in chief and in cross examination, and the documents in the Joint Hearing Bundle including such medical reports that the claimant had chosen to produce and upon which he relied. The medical documentation presented contained no express diagnosis of the condition of ADHD. Notwithstanding, as the Tribunal has found in fact, it was satisfied on the balance of probabilities by reference to treatment prescribed for the claimant in historic medical correspondence which was produced, that the claimant had been diagnosed as suffering from ADHD as a child in or about 2007. The medical evidence presented contained no recent direct medical evidence of a continuing diagnosis. Such direct medical evidence as was before the Tribunal confirmed that, as at April 2011, the claimant had ceased taking and had ceased to be prescribed “Concerta”, the medication previously prescribed to treat ADHD, and, that in the intervening 11 years between that date and the material time, 18th August 2023, the claimant had received no NHS prescribed medication nor had he consulted the NHS in relation to ADHD. Although at pages 92 and 93 of the Bundle copy correspondence from Sapphire Medical, a private medical prescriber of cannabis contained reference to the claimant having been diagnosed with ADHD at aged 14 it is apparent on the face of those documents that no official documentary medical history was available to Sapphire Medical and that the claimant himself was the narrative source of all of the information appearing on the document, and upon which from a date some time after 29th July 2022 the claimant took cannabis cake privately prescribed by Sapphire Clinic. In his oral evidence the claimant confirmed that he had ceased taking all prescribed medication for ADHD in 2011 and accepted that between that date and his making contact with Sapphire Clinics at the end of July 2022 he had made no

NHS contact in relation to ADHD nor received any prescribed medication in respect of it nor had there been any direct medical continuing diagnosis of the condition. He accepted in cross examination that the information which appeared on the face of the documents at pages 92 to 94 and upon which
5 the private prescription of cannabis proceeded in 2022, was all information provided by him to Sapphire Clinics.

82. The undated and unsigned extract document at page 95, being a document which could not have been created earlier than 31st of October 2023, that is
10 some 2½ months after the material time confirms, let it be assumed that it is an extract from an NHS document, that the claimant made contact with the NHS on that date in relation to ADHD it also confirms retrospectively that there had been no contact by the claimant with the NHS relating to ADHD in the intervening 11/12 year period and that as at 31st October 23 there were
15 three other likely causes for some or all of the symptoms with which the claimant was presenting at that time.

83. While it is the case some of those who are diagnosed with ADHD in childhood will continue to suffer from the condition in adulthood and
20 potentially throughout the remainder of their lives, it is not established fact that that will always be the case. There was no medical evidence before the Tribunal that went to support the proposition advanced by the claimant that he having been diagnosed with ADHD in 2007 when a child, it followed automatically that he was suffering from that condition at the material time,
25 18th August 2023. The onus of establishing, on the balance of probabilities, that an individual (the claimant) suffered from the particular impairment relied upon at the material time sits with the claimant. In circumstances where there is no direct medical evidence of the same on the date of the alleged act of discrimination (the material time), a Tribunal is entitled to consider all
30 evidence available from around this date and infer that a disability was present at the relevant time. Having so considered the evidence the Tribunal considered it to be insufficient, in the circumstances, to allow it to draw such an inference and holds that the claimant has failed to discharge the burden of

proof and has not established that he suffered from the impairment of ADHD at the material time, 18th August 2023.

5 84. Let it be assumed that the Tribunal had been satisfied that the claimant suffered from the impairment at the material time, having considered all of the evidence it would not have been satisfied that the claimant could be said to have had, at the material time, an impairment which substantially and adversely affected his ability to carry out normal day to day activities. Applying the guidance in *Goodwin* to the evidence available, the Tribunal
10 would have been unable to hold, on the preponderance of the evidence, and on the balance of probabilities, that the claimant had discharged his onus of proof in that regard.

15 85. There is no rule of law that every person with a mental impairment, let it be assumed that the Tribunal had been satisfied that the claimant had the impairment as at the material time, is disabled for the purposes of the 2010 Act. That will only be the case if it is established that, at the material time, the impairment in question is at a level which amounts to a substantial and long term adverse effect on normal day to day activities. The onus of doing so lies
20 firmly on the person seeking to advance a claim that there has been a contravention of a part of the act the function of the Tribunal is to hear the case that parties choose to put before it, making Findings in Fact and to decide the case in accordance with the relevant law – *JC v Gordounstoun Schools Limited*.

25 86. The Disability Impact Statement, prepared by the claimant on the 27th of November 2023, three and ½ months after the material time is in three parts; paragraphs 3 to 6 inclusive relate entirely to the claimant's historic childhood diagnosis of treatment for ADHD in the period 2007 to 2011, paragraph 7
30 contains a statement that while the privately prescribed cannabis obtained via the Sapphire Clinic from in our about end July 2022 helps the claimant, there are circumstances when he does not take that "medication". The balance of paragraph 7 is couched in the present tense, that is to say as at the date of creation of the Impact Statement (3.5 months after the material time) and

identifies an impact on his going shopping or to supermarkets. In his oral evidence the claimant also attributed that same impact, as a continuing impact, to the traumatic assault which he suffered when aged 17, and the presence of anxiety and low mood swings and difficulty sleeping. Those impacts also figure amongst the commonly encountered symptoms of prolonged continuous cannabis usage. Paragraph 8 of the statement contains a general description of the condition of ADHD identifying some of the condition's general characteristics including association with anxiety disorders, depression, impulsiveness, difficulty focusing and completing tasks, irregular sleeping patterns and social interaction problems, several of which also figure amongst the commonly encountered symptoms of habitual cannabis usage (pages 132 to 133). At paragraph 8 the claimant expressly attributes his struggling to go out to supermarkets to social anxieties. Paragraph 9 comprises a statement the claimant feels that he works harder and longer hours than colleagues who don't suffer from ADHD and that on average he works 12 hour shifts 7 days a week whenever possible (that being his choice entirely) but the effect of his doing so is to "burn me out after a number of months". Paragraph 10 identifies positive matters which the claimant attributes to his having ADHD. The claimant's oral evidence neither departed from nor significantly expanded upon the content of the Disability Impact Statement.

87. The Tribunal has found in fact that the claimant had been a habitual and daily user of cannabis in the 11/12 year period from age 16 in 2011 up to and including the material time, 18th August 2023, and beyond up to the date of the Hearing. It did not consider that that evidence, of itself, was sufficient to support a Finding in Fact that the claimant was an addict.

88. In the period from April 2011 up to and including in or about July 2022 the claimant's use of non prescribed cannabis (self medication) and non prescribed cognitive therapy (help from a friend) were matters not falling within the definition of "measures" for the purposes of section 5.2 of Schedule 1 to the 2010 Act and thus, were matters which do not fall to be discounted when assessing whether the impairment, let it be assumed that

the Tribunal had found that the claimant was suffering from ADHD, had a substantial adverse effect on him in that period.

- 5 89. The albeit privately, but nevertheless medically, prescribed cannabis taken by the claimant in the period from in or about end of July 2022 up to and including the material time, 18th August 23, does fall within the definition of paragraph 5.2 of Schedule 1 and thus would fall to be discounted when assessing whether the impairment had a substantial adverse effect on the claimant's ability to carry out day to day activities in that period.
- 10 90. As the Tribunal has found in fact, at the material time the claimant had been, for a period of 11 years a continuously habitual user of cannabis. There was, however, no evidence before the Tribunal as to the likely effect on the claimant of the particular medically prescribed forms of cannabis in the particular dose prescribed for him by Sapphire Clinic at the material time.
- 15 Additionally, as the Tribunal has found in fact, several of the impairments described by the claimant in the latter part of his Impact Statement, let it be assumed that notwithstanding the use of the present tense by him, he intended them to refer to the material time, also appear amongst those described on the NHS Information Sheet (pages 132-133) as numbering among the commonly encountered symptoms/risks caused by habitual cannabis use. There was no evidence before the Tribunal upon which the common symptoms associated with habitual and long term cannabis use on the one hand could be causally differentiated from the described impairments said to have been caused by ADHD. The evidence before the Tribunal
- 20 provided no sound basis for finding in fact that the symptoms which the claimant described himself as experiencing were symptoms which, on the balance of probabilities, went to show that at the material time he was suffering from ADHD and separately, let it be assumed that he was suffering from ADHD, that the symptoms (impacts) were attributable to that impairment rather than to his long term habitual use of cannabis. Expert medical evidence would be required to make that differentiation. The Tribunal considered that it is not a matter that it could determine without such input and in the absence of relevant medical evidence.
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- 5 91. It was separately the claimant's evidence that in the period following his commencement of privately medically prescribed cannabis usage up to and including the material time, he not infrequently did not take the medically prescribed cannabis, e.g. "*before driving or in my opinion at work due to working and being in a safety critical position operating plant or working in close proximity*", at paragraph 7 of the Impact Statement, and confirmed by the claimant in his oral evidence; and further, in his oral evidence, when he considered there was some risk of random compulsory drug testing which would reveal his use of cannabis, in circumstances where he had not disclosed that to the respondents. There was no evidence before the Tribunal as to the extent to which on those occasions the non taking of the medically prescribed cannabis made a difference to any impact suffered by the claimant and attributed by him to ADHD. Such evidence as was available from the claimant was to the effect that on these occasions he continued to function in the normal way attributing his ability to do so to the assistance of a good friend (non prescribed cognitive therapy) the effect of which would not fall to be discounted in terms of paragraph 5.1 of Schedule 1 to the 2010 Act. There was no evidence before the Tribunal as to the effect or particular effect on the claimant of that assistance (therapy) or of its absence.
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- 25 92. The claimant's unchallenged assertion that he was in receipt of Disability Living Allowance under what is a different statutory regime does not result, of itself, in his meeting the requirements of section 6 of the EqA.
- 30 93. In all these matters, the onus of proof sits squarely with the claimant and, even had the Tribunal considered that the evidence before it was sufficient to support a Finding in Fact that, as at the material time, the claimant was suffering from the impairment relied upon, which it did not, it would have separately found that the claimant had failed to discharge his onus of proof in establishing that at the material time the impairment of ADHD founded upon substantially and adversely affected his ability to carry out normal day to day activities including establishing, on the balance of probabilities, a causal link between the condition and several of the impairments founded upon sufficient

to differentiate them from symptoms commonly associated with continuous long term use of cannabis. For the above reasons the Tribunal holds that the claimant has failed to establish, on the balance of probabilities, that at the material time, namely on 18th August 2023 he suffered from the mental impairment founded upon (ADHD), which had a substantial long term adverse effect on his ability to carry out normal day to day activities and thus giving rise to his possession, at the material time, of the protected characteristic of disability. The claimant's complaints of discrimination are accordingly dismissed for want of Jurisdiction.

94. Had the claimant established his Title to Present and thus the Tribunal's Jurisdiction to Consider his complaints of Disability Discrimination the Tribunal, upon an application of the *Selkent* principles, would have held that the balance of injustice and hardship lay in favour of allowing the respondent Leave to Amend in terms of the Proposed Amendment brought forward, the Tribunal being satisfied on the one hand that the same comprised a factual response to the lately added claimant's averments and disclosure, relating to his cannabis usage, and which was relevant to the issue of Remedy, let it be assumed the claimant's complaints were to succeed, and, on the other hand, its allowance would not result in prejudice to the claimant.

Employment Judge:	J d'Inverno
Date of Judgment:	16 May 2024
Entered in register:	16 May 2024
and copied to parties	

I confirm that this is my Judgment in the case of Anderson v P.J. Carey (Contractors) Limited and that I have signed the Judgment by electronic signature.