



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100166/2024

Held in Glasgow on 13 June 2024

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Employment Judge D Hoey

Mr E Smith

**Claimant
In Person**

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Mitie Limited

**Respondent
Represented by:
Ms A Stobart -
Counsel
[Instructed by:
Messrs Dentons]**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the claimant was a disabled person for the purposes of the Equality Act 2010 at the material time for his claim in respect of the impairment of headaches.

REASONS

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1. The claimant raised a claim for disability discrimination and constructive unfair dismissal. The respondent disputed the claims and argued the claimant was not a disabled person. This Hearing was fixed to determine that issue.
2. The Hearing began by a reminder of the overriding objective and a discussion took place as to what the claimant was relying upon in relation to his disability status and what the law required to exist for that issue to be determined in his favour.

Issues to be determined

3. The issue was whether or not the claimant was a disabled person for the purposes of the Equality Act 2010 in respect of his claim at the material time.

Evidence

4. The parties had produced a joint bundle of 126 pages. Regrettably this was printed single sided.
5. The Tribunal heard from the claimant only who set out the position in relation to his impairments and answered questions from the Employment Judge and was cross examined and asked further relevant questions.

Facts

6. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are strictly necessary to determine the issue of disability.
7. The claimant suffered from headaches since around 2007. As a consequence of the headaches he suffered he also suffered panic attacks.
8. The consequence of either or both of the headaches and panic attacks was severe and debilitating for the claimant and on occasion he felt suicidal. The claimant suffered vertigo like symptoms as a consequence of either or both impairment. He could not drive properly. He struggled on motorways and dual carriageways and would often have to stop or keep to the left progressing layby by layby. Driving over bridges caused the claimant real concerns. His impairments individually or cumulatively significantly impacted upon his ability to socialise and enter large densely populated spaces such as supermarkets, pubs and football grounds (and as a result he would stay indoors and not mix with people). The effect the headaches (which included panic attacks) was to have a material and adverse effect upon the claimant's mental health.
9. From around 2017 he began to take medication. The impact of the medication was fast and the headaches reduced and the panic attacks significantly diminished to the extent that he was more able to drive and more able to attend places where others attended.

10. Stress can also exacerbate the claimant's impairments and on occasion the claimant can suffer panic attacks. He believes he has a phobia about being on a camera and this causes him stress which exacerbates the symptoms of the impairments.
- 5 11. From September to November 2023 the claimant had the benefit of medication which masked the effects of his impairments. During that time it was more likely than not that had the claimant not taken the medication the original effects of the impairment would have resumed.
- 10 12. The claimant had been advised by his Doctor to avoid the situations that had exacerbated his symptoms. Thus with the benefit of medication the claimant felt able to drive and as a precaution avoided motorways where possible.

Observations on the evidence

13. The claimant appeared to be entirely honest and candid in his evidence. While his impact statement had focused solely in relation to driving, that was because he had understood that was the issue in this case. There was no basis to dispute the impairments the claimant had set out he had encountered nor the effect of the impairments. The claimant's GP notes had also been produced and did not materially contradict what the claimant had said. This was a case that the issues to be determined could be assessed from the evidence the claimant gave in light of the issues arising.
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Law

14. Disability is one of the protected characteristics provided for by section 4 of the Equality Act 2010 ("the Act"). Section 6 of the Act defines disability as follows:
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- "(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.*
- (2) A reference to a disabled person is a reference to a person who has a disability."*

15. “Substantial” means more than minor or trivial under Section 212(1) of the Act.

16. Further provisions are set out at Schedule 1 of the Act, which includes that:

“2. *Long term effects (1) The effect of an impairment is long term if (a) It has lasted for at least 12 months.....*

Effect of medical treatment

(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..... “*

17. In **Goodwin v Patent Office** [1999] IRLR 4 the Employment Appeal Tribunal 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:

- a. Does the person have a physical or mental impairment?
- b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
- c. Is that effect substantial?
- d. Is that effect long-term?

18. The burden of proof is on a claimant to show that he satisfies the statutory definition of disability.

19. The term “impairment” is not defined in the Act. In **Rugamer v Sony Music Entertainment UK Ltd** 2002 [ICR] 381 the Employment Appeal Tribunal referred to “some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition.” In **McNicol v Balfour Beatty Rail Maintenance Ltd** [2002] ICR 1498 the Court of Appeal held that the term bears its ordinary and natural meaning and said: “It is left to the good sense of the tribunal to make a

decision in each case on whether the evidence available establishes that the [claimant] has a physical or mental impairment with the stated effects.”

20. Appendix 1 paragraph 6 to the EHRC Code states: ‘The term “mental impairment” is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities’.
21. Where there is no clear medical diagnosis it may be legitimate for a tribunal to first consider adverse effect and then to consider whether the existence of an impairment can reasonably be inferred from those adverse effects on a long term basis (**J v DLA Piper UK LLP** 2010 ICR 1052): “If, ..., a tribunal starts by considering the adverse effect issue and finds that the claimant’s ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering “clinical depression” rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived”.
22. The cause of the impairment does not require to be established (Guidance A3).
23. A distinction may be drawn between a mental impairment such as clinical depression and stress/ low mood (both of which may be a reaction to adverse life circumstances). In some cases tribunals may find that effects suffered by a claimant were sometimes attributable to a mental impairment and sometimes to stress/low mood which does not amount to a mental impairment (Piper).
24. As for what is relevant to the determination of this question, a broad view is to be taken of the symptoms and consequences of the disability as they appeared during the material period, **Cruickshank v VAW Motorcast Ltd** [2002] IRLR 24 which also held that the Tribunal must determine disability status as at the date of the act. As **Ahmed v DWP** 2024 EAT 84 shows, it is important to assess whether or not the claimant had the relevant impairment (and disability) at the relevant times relied upon for each complaint.

25. What are normal day to day activities has also been considered in authority. The Court of Appeal in **Chief Constable of Norfolk v Coffey** [2019] IRLR 805 approved the approach of the Employment Appeal Tribunal in that case, that “the phrase ‘normal day to day activities’ should be given an interpretation which encompasses the activities which are relevant to participation in professional life”. Underhill LJ preferred the term ‘working life’ rather than ‘professional life’. Two cases illustrate that approach.
26. The first is **Banaszczyk v Booker Ltd** [2016] IRLR 273. The employee had a back condition which was ‘long term’. He could lift and move items weighing up to 25kgs in the warehouse in which he worked; however, he could not meet the ‘pick rate’ of 210 cases per hour. The Employment Tribunal did not consider him to be ‘disabled’. The Employment Appeal Tribunal held that the day-to-day activity in question was lifting and moving objects up to 25 kgs and that the claimant suffered a substantial adverse effect because his back condition meant he was significantly slower than non-disabled comparators, such that he could not achieve the necessary “pick rate”. The employer’s submission that achieving the pick rate was not a ‘normal day to day activity’ was rejected as confusing the relevant activity with the speed at which it is required to carry it out. The claimant’s back condition in rendering his work rate slower hindered his full participation in his working life, and the Employment Appeal Tribunal substituted a finding that he was disabled.
27. The second is **Igweike v TSB Bank Plc** [2020] IRLR 267, where it was held that an effect on normal day-to-day activities may be established if there is a requisite effect on normal day-to-day or professional or work activities, even if there is none on activities outside work or the particular job. The Employment Appeal Tribunal commented that “in many, perhaps most successful cases, disabled status is established because the requisite effects are found on normal day to day activities outside work, or both outside and in work”.
28. In considering whether there is an impairment, it is the effect and not the 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).

29. In **Ahmed v Metroline Travel Ltd** UKEAT/0400/10 the Employment Appeal Tribunal cautioned against carrying out a balancing exercise between what a person can and cannot do. It quoted from **Leonard v Southern Derbyshire Chamber of Commerce** [2001] IRLR 19, in which the Employment Appeal Tribunal stated: “Whilst it is essential that a Tribunal considers matters in the round and makes an overall assessment of whether the adverse effect of an impairment on an activity or a capacity is substantial, it has to bear in mind that it must concentrate on what the Applicant cannot do or can only do with difficulty rather than on the things that they can do. This focus of the Act avoids the danger of a Tribunal concluding that as there are still many things that an applicant can do the adverse effect cannot be substantial.”
30. The assessment required is to determine what the person cannot do, or only do with difficulty, then assess that against the statutory test. That was also the finding of the Employment Appeal Tribunal in **Aderemi v London and South Eastern Railway Ltd** [2013] ICR 591, in which it stated the following as to the meaning of “substantial”: “It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading “trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.”
31. In **Rooney v Leicester City Council** EA-2021-00256 the claimant argued that she was a disabled person, and suffered from symptoms from the menopause. A list of symptoms was given that included losing personal possessions, forgetting to put the handbrake on, forgetting to lock her car, leaving the cooker or iron on, leaving the house without locking it, and spending prolonged periods in bed due to fatigue. The Employment Appeal Tribunal held that such a person might be a disabled person under the Act, that there had been an error of law by the Tribunal when determining that the

claimant was not a disabled person which it had done partly by considering what she could do, and remitted that issue to the Tribunal.

- 5 32. Schedule 1 paragraph (5) of the Equality Act provides that 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 measures are being taken to correct it and but for that, it would be likely to have that effect. The Tribunal should deduce the effect on activities if medication or treatment were to cease unless it has resulted in a permanent improvement.
- 10 33. The Guidance provides at para B7 “Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.
- 15 34. Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011) provides guidance on the matters which are to be taken into account (account of which may be taken under Schedule 1 to the Act, paragraph 12) and the Equality and Human Rights Commission Code of Practice: Employment which also has guidance on the question of disability status, at paragraphs 2.8 – 2.20 and Appendix 1. Account may be taken of it where it appears to be relevant under section 15(4) of the Equality Act 2006).
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Discussion and decision

Does the person have a physical or mental impairment?

35. The Tribunal assessed the evidence in light of the law and dealt with the issues in the order set out above.

36. The first issue was whether the claimant had a physical or mental impairment. There was no doubt the claimant suffered from headaches and panic attacks. From the evidence before the Tribunal the claimant had a physical impairment – his head was sore. The Tribunal was not satisfied that having a panic attack
5 by itself was an impairment as panic attacks, from the evidence, were a consequence of the headaches the claimant suffered rather than an independent impairment. The consequences that the claimant suffered, from his evidence, all stemmed from his headaches.

Impact of the impairment

10 37. The next issue was for the Tribunal to assess the impact of the impairment, the headaches, upon the claimant's ability to carry out day to day activities. It was not disputed that the claimant had been unable to drive properly or visit busy places as a consequence of his headaches which led to panic attacks.

15 38. At the relevant time covered by the claim, the claimant's evidence was that he had the benefit of medication which he believed had reduced the symptoms of his impairment. The consequence of having taken medication was that his headaches had diminished and there were fewer panic attacks.

20 39. While there was no medical evidence, the claimant's clear evidence (which was not disputed) was that once he had taken the relevant medication, the negative effects of his impairment substantially diminished. He was able to manage the consequences of his impairment, albeit there were still occasions where he suffered headaches and panic attacks.

25 40. The Tribunal is satisfied from the evidence that on the balance of probabilities, had the claimant not taken his medication the effects he encountered prior to taking the medication could return. It was more likely than not that the medication the claimant had been prescribed had achieved its purpose.

30 41. The Tribunal must assess the impact of the impairment had the claimant not had the benefit of the medication which had been prescribed. On the balance of probabilities, from the evidence, the Tribunal is satisfied the impairment would have had an adverse effect upon the claimant's ability to carry out day

to day activities. He would not be able to drive properly and would not be able to attend busy places. Even with the benefit of medication his driving was impaired (as a consequence of the impairment) and he finds it difficult to attend busy places but he is able to force himself to do these things (which he would otherwise find practically impossible).

42. The impact upon his ability to carry out day to day activities was patently more than minor or trivial. He was unable to drive on busy roads and attend places such as supermarkets and interact with people. These are day to day activities which the claimant struggled to carry out in a significant way.

43. The effects had been evidenced since 2017 and for longer than a year.

44. The above consequences were as a result of the impairment, the headaches, which had in turned caused the adverse effects the claimant suffered at the material time for the purposes of his claim.

Taking a step back

45. The Tribunal took a step back to assess the evidence that was led and the submissions. One of the respondent's issues was that the claimant had produced no medical evidence to substantiate what he was saying. The Tribunal took that into account together with the evidence of the claimant. The claimant was clear in his position in that the effects of his headaches and panic attacks were severe in relation to his life. That was not disputed by the respondent.

46. The claimant's evidence was that his headaches led to his having panic attacks. He had formed that view from the experience he had in his life. There was no reason to dispute the claimant's assertion that it was his headaches which had led to his panic attacks. There was no evidence that anything else had led to his panic attacks (and both had diminished as a result of the medication he had been given). The claimant had given his evidence in a clear, fair and cogent way and the Tribunal accepted his evidence.

47. The claimant had the benefit of medication after which the effects of his medication appeared, to the claimant, to have a material effect and

substantially reduce the impact of the impairments. Again that was not challenged by the respondent given it was the claimant's experience and there was no basis to challenge what he had encountered.

5 48. The onus is on the claimant to establish the requisite elements found in section 6 of the Equality Act 2010. That is often best done with the assistance of medical evidence given the issues arising but that need not always be so. On occasion it is possible for the claimant's evidence to satisfy the Tribunal of the requisite elements. This is one of those cases.

10 49. While there was no medical evidence, the claimant in his evidence was able to explain to the Tribunal how his impairment had affected him and what the consequences had been before he took medication and the effects shortly after he took his medication. While the claimant could have brought medical evidence, it was equally open to the respondent to have brought medical evidence to challenge what the claimant had said. The claimant's GP notes were provided and were considered but ultimately the evidence of the claimant was clear and sufficient in relation to the material points in this case. The Tribunal makes its decision from the evidence before it and in this case the Tribunal was satisfied the claimant's oral evidence was sufficient.

15 50. The issue the respondent had was that there was no medical evidence to support the claimant's belief that the medication had been the reason for the impact upon of his impairments. It was suggested, for example, the impairments could have disappeared (and any panic attacks or other issues caused by other sources given the time period).

20 51. The Tribunal considered that and the evidence. The Tribunal found the claimant to be honest and genuine. The purpose of him seeking medication was to manage the symptoms of his impairment. The effect of the medication was to achieve precisely that. There was no reason for the claimant to seek further medical intervention given the medication which he had been prescribed (and which he continued to take at the material time) had the effect he had sought. The Tribunal found no evidence (medical or otherwise) to

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challenge or dispute what the claimant had said in evidence which the Tribunal accepted.

52. Accordingly the Tribunal was satisfied from the evidence before it that it was more likely than not that the claimant's belief was accurate and his headaches had led to his panic attacks and that that had the claimant not had the benefit of medication, the impairment the claimant had would have resulted in the claimant's inability to carry out day to day activities (such as driving and interacting with people) which was more than minor or trivial and which had lasted for over a year (and which had applied at the material times).
53. The claimant was accordingly a disabled person in terms of section 6 of the Equality Act 2010 in respect of the headaches he suffered.
54. A separate case management note is issued to progress this case to a final hearing.

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Employment Judge: D Hoey
Date of Judgment: 14 June 2024
Entered in register: 17 June 2024
and copied to parties

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