



EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 8000215/2023 Preliminary Hearing by Cloud Video Platform at
Edinburgh on 13 March 2024**

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Employment Judge: M A Macleod

Mr J Harkins

**Claimant
In Person**

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McQueen's Dairies Ltd

**Respondent
Represented by
Mr R Milvenan
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**The Judgment of the Employment Tribunal is that the claimant was not at the
material time a disabled person within the meaning of section 6 of the
Equality Act 2010.**

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REASONS

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1. The claimant presented a claim to the Employment Tribunal on 10 May 2023 in which he complained that he had been unfairly dismissed, discriminated against on the grounds of disability and unlawfully deprived of a redundancy payment, notice pay, holiday pay, arrears of pay and other payments. He also sought to bring a claim of wrongful dismissal and personal injury.

2. The respondent submitted an ET3 response in which they resisted all claims made by the claimant.
3. A Preliminary Hearing was listed to take place on 13 March 2024 in order to address two preliminary points:
 - 5 1. Whether the claimant is and was at the material time a disabled person in terms of section 6 of the Equality Act 2010; and
 2. Whether the claimant was seeking to amend his claim, and if so, whether the application to amend should be allowed.
4. The Hearing was listed to take place by CVP. The claimant appeared, but
10 was unable to communicate by means of video, and accordingly he attended by telephone only. He was willing to participate in this way, and the respondent's representative raised no objection.
5. The respondent was represented by Mr Milvenan, solicitor.
6. At the outset of the Hearing, Mr Milvenan confirmed that the respondent did
15 not have any particular objection to the application to amend, but wished to have some case management done in relation to that.
7. The claimant gave evidence on his own behalf, and a set of productions was presented to the Tribunal and referred to in the course of the Hearing.
8. Based on the evidence led and information provided, the Tribunal was able
20 to find the following facts admitted or proved.

Findings in Fact

9. The claimant, whose date of birth is 12 July 1987, commenced employment with the respondent on 11 April 2021, and his employment there ended on 17 February 2023.
- 25 10. In his agenda document prior to an earlier Preliminary Hearing, the claimant confirmed that he relied upon two conditions as disabilities within the

meaning of the 2010 Act, namely sinusitis and “mental health challenges, specifically depression and anxiety”.

5 11. The claimant said that he suffers from sinus problems, generally day to day, and when his sinuses are blocked, they cause him severe headaches. His last absence from the respondents’ workplace was caused by a chest infection.

10 12. However, before the Tribunal, the claimant maintained that the main factor in his disability was that of his mental health. He said that he had suffered issues in childhood which had caused him considerable mental health difficulties, to the extent that he could not remember his childhood before the age of 10 or 11.

15 13. The claimant advised that he often stresses about problems, turning matters over in his head. Just before he commenced employment with the respondent he had suffered a period of depression, but at that point, he had ceased taking anti-depressant medication (he had been on sertraline for approximately 6 months).

14. Initially he was appointed as a standard milk delivery driver, with the same route each day. He was promoted in April 2022 to Team Leader. He had to supervise and cover 3 other drivers, who were on 6 significant routes.

20 15. In that new role, he said he felt additional pressure, particularly as setting a schedule for the week involved constant changes. His partner suffered a miscarriage, and his grandfather died. From approximately July 2022, his mental health deteriorated, though he wanted to get on with his job. He did, over time, have a number of issues with his attendance with Covid-19
25 related symptoms, and as a result had been taken to formal meetings about his absences.

16. His partner happily became pregnant again, but required to be in hospital on 3 occasions prior to the baby’s birth on 29 January 2023.

17. The claimant did not attend his GP during his employment with the respondent. He said he goes up and down, but felt that he could manage his illness. He intended to go and seek help at the point when he was then dismissed by the respondent.
- 5 18. The claimant's medical records show that on 24 March 2016, he was referred by a Dr Hall to a counsellor and to a psychologist for a "Beating the Blues" course (59). His medical records also show that Dr Hall noted, on 22 March 2016, (61) that the claimant had suffered from "*Low mood for at least 2 years, poor sleep, becomes angry easily, poor motivation [understood to mean 'motivation'], loss of appetite, gets anxious & panicky everything*"
- 10 *seems black, and thoughts suicide, own business but little work at moment.*"
19. On 2 August 2019, the claimant was prescribed fluoxetine, an anti-depressant.
20. On 6 September 2019, (57) the claimant was provided with a fit note for the
- 15 period between 28 August and 18 October 2019, giving anxiety with depression as the reason for absence.
21. On 4 November 2019 (61), a nurse telephone triage noted that the claimant, while not suicidal, would not leave the house, and sought a GP appointment to discuss his worsening mental health.
- 20 22. In April 2023, the claimant phoned the practice and spoke to a nurse practitioner who noted that his mental health was deteriorating, though again he had not thoughts of harm. He was unhappy as he had been trying to obtain an appointment for 4 months. The claimant reported that he had been feeling low for 4 months, and that he had a lot of stressors at that time.
- 25 On examination on 28 April 2023, (67) he was suffering from "*Anxiety ++, Sweating, shaking, head racing, on edge, churning in stomach. Feels angry about the situation with work. Subjectively he feels his mood is 'exhausted'. Objectively presents as low. Loss of interest in activities, no longer doing things that he would before. Poor motivation and lack of interest. Tearful on*"
- 30 *telephone.*" It was recommended that he would recommence on sertraline.

23. He was seen again at the practice on 16 May 2023, which was some 3 months after the end of his employment with the respondent. It was noted (67) that he was “disgruntled” about a number of factors relating to his work, and the GP surgery, and that he was feeling stressed about all of this. It was noted that “*John states that he is low in mood and he ‘cannot take anymore’. He is not actively suicidal, and there was evidence of forward planning. Objectively his mood appears to be euthymic, and he is tending to tasks that are needing done and to do with instructing this court case...Easily upset and feels angry with situation to do with work and his paternity being ‘ruined’. He describes feeling ‘empty’. John is under a lot of stress, he does not present as Clinically depressed and an increase in medications are unlikely to help this presentation as it is related to Social factors.*”

24. He was continued on sertraline 10mg at that time.

25. The claimant’s evidence was that he was not taking any medication while working for the respondent, as each medication had its own side effects. He found that sertraline caused him to be more anxious, and has now been prescribed venlafaxine.

26. The claimant’s medical records do not show any treatment being given in respect of sinusitis.

27. The claimant said that when he was at work his conditions did not affect his work performance, as he would seek to do his best there. He accepted that he was not clinically depressed in May 2023 but upset and angry about the way he had been treated at work. He said that being clinically depressed would have meant being in bed unable to do anything.

Submissions

28. For the respondent, Mr Milvenan submitted that the claimant had not met the criteria for disability in relation to either depression and anxiety or sinusitis. He set out the definition in section 6 of the 2010 Act, and noted

that the burden of proof is on the claimant, to prove that he is and was at the material time a disabled person on the balance of probabilities.

29. The respondent's submission is that the relevant period is 14 April 2021 until 17 February 2023.

5 30. He argued that, taking into consideration the terms of the claimant's medical records, the claimant has not shown that he was suffering from the impairment of depression at the relevant time. He was receiving no treatment nor was he attending medical appointments. Similarly he has not proved that he has been suffering from a disability in the form of sinusitis.

10 31. Mr Milvenan referred to the guidance and to section 212 of the 2010 Act.

32. The claimant maintained that depression had been a recurring issue for his entire life since 2011. He said that he did not see himself as disabled but does have a daily problem with his mental health. He has to deal with his condition daily, as it is "never not there". With maturity, he said, he has been
15 able to go without help for periods of time, but when his stress increases then he requires to seek help.

Discussion and Decision

33. The Tribunal must determine a number of matters, based on the evidence available, in considering whether or not the claimant was at the material
20 time a disabled person within the meaning of section 6 of the Equality Act 2010.

34. The definition of disability is set out as follows in section 6(1) of the 2010 Act:

"A person (P) has a disability if—

25 *(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."

35. The onus of proof rests on the claimant to prove on the balance of probabilities that she has a relevant impairment within the statutory definition (**McNicoll v Balfour Beatty Rail Maintenance Ltd 2002 ICR 1498, at paragraph 19**).

5 36. In this case, the claimant relies, it appears, upon two conditions as amounting to disabilities under the 2010 Act.

37. He indicated that the major condition under consideration is that of anxiety and depression, but that he also relies upon sinusitis.

10 38. Dealing with sinusitis first, it is my judgment that the claimant has not proved, on the balance of probabilities, that this condition amounts to a disability in terms of the Act. It is not clear that the claimant was, at the material time, suffering from this condition, which is a physical impairment, in such a way that it had a substantial adverse effect upon his ability to carry out normal day to day activities. He was able throughout his employment
15 with the respondent to attend work and carry out his duties. There was no significant evidence provided by the claimant that this condition had anything more than a minor impact upon him during the period of his employment.

20 39. However, the claimant did say that the primary condition upon which he relies is that of anxiety and depression.

25 40. During the course of his employment, the claimant did not require to be absent from work due to this condition. There is no doubt that the claimant has, over a period of years, suffered from anxiety and depression. He has in the past had periods of absence from work – for example, in August and September 2019 (57), and at the point of his employment ending he was signed off as not fit for work due to mental health issues on 17 February 2023 and thereafter – but during his employment he did not require to be absent from work due to anxiety and depression.

41. In addition, the claimant's medical records, together with his own evidence, confirmed that the claimant had not attended his doctor for any assistance or treatment in relation to his mental health during the course of his employment, except, it appears, on the final day of that employment. The claimant was not prescribed any anti-depressant medication during that employment.

42. The claimant did have a number of absences from work during his employment, though they related to Covid symptoms.

43. The claimant's own evidence was that he did not attend his doctor during his employment as he believed he could manage his own condition. He said that when he "gets near the edge, I go and seek help". From this it can be inferred that he was not "near the edge" – which I interpret as suffering from substantial adverse effects upon him – during the course of his employment with the respondent.

44. There is no doubt, in my judgment, that the claimant has suffered from depression in the past, and perhaps at the time of this Tribunal hearing. However, the claimant requires to prove on the balance of probabilities that his condition was such as to have a substantial, adverse, long-term effect on his ability to carry out normal day-to-day activities. In my judgment, the claimant has not proved that his condition, during his employment and therefore at the material time when the respondent's allegedly unlawful acts of discrimination took place, had a substantial adverse effect upon him. He was able to continue to work, and he has not demonstrated that he was unable to do anything of substance in his evidence or in the medical evidence provided. The condition may be a long-term, if fluctuating, one, but in my judgment the evidence does not justify a finding that the claimant suffered at the material time from a condition which had a substantial adverse long term effect upon his ability to carry out normal day to day activities.

45. Accordingly, it is my judgment that the claimant was not at the material time a disabled person within the meaning of section 6 of the Equality Act 2010.

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| Employment Judge: | M A Macleod |
| Date of Judgment: | 07 June 2024 |
| Entered in register: | 24 June 2024 |
| and copied to parties | 24/06/2024 |

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15 I confirm that this is my Judgment in the case of Harkins v McQueen's Dairies Ltd and that I have signed the Judgment.