



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100187/2024**

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**Held in Glasgow on 22 July 2024**

**Employment Judge McCluskey**

**Mr Antonio Onofrio**

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**Claimant  
Represented by:  
Mr B McKinlay -  
Solicitor**

**Irvine Healthcare Ltd**

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**Respondent  
Represented by:  
Mr J Bryce  
Advocate**

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

20 The judgment of the Tribunal is that:

1. the claimant was a disabled person in terms of section 6 Equality Act 2010 during the relevant period because of irritable bowel syndrome; and
2. the claimant was not a disabled person in terms of section 6 Equality Act 2010 during the relevant period because of back issues.

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### **REASONS**

#### **Introduction**

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1. This was a public preliminary hearing to determine whether the claimant is disabled as defined in section 6 Equality Act 2010 (EqA). The claimant relies on two impairments as disabilities namely irritable bowel syndrome (IBS) and back issues.
2. The claim was raised against Irvine Healthcare Limited. The respondent clarified that in accordance with the ET3, the correct legal entity is Irvine Healthcare Ltd. The correct spelling is Ltd not Limited. Ltd is the spelling of

the name at Companies House. The claimant agreed that the claim is against Irvine Healthcare Ltd. The postal address of the respondent on the ET3 was not correct and Mr Bryce provided up to date details.

3. The claimant gave evidence on his own behalf. Ms Jordan Ryan, Area  
5 Manager gave evidence on behalf of the respondent.
4. There was a joint file of productions extending to 149 pages. Representatives  
took witnesses to various pages in the joint file during parties' evidence. I  
reminded parties that if they wished me to consider the contents of any  
documents in the file, they required to take me to the relevant parts of the  
10 document.
5. It was agreed that the relevant period for the purposes of reaching a  
conclusion about the claimant's disability status is from the claimant's first  
absence on 17 April 2023 until 8 August 2023.

### Issues

- 15 6. Did the claimant have a disability as defined in section 6 of the Equality Act  
2010 at the time of the events the claim is about? The Tribunal will decide:
  - a. Did the claimant have a physical or mental impairment: the claimant  
relies on two disabilities:
    - 20 i. irritable bowel syndrome (IBS); and
    - ii. back issues
  - b. Did the impairment have a substantial adverse effect on his ability to  
carry out day-to-day activities?
  - c. If not, did the claimant have medical treatment, including medication,  
or take other measures to treat or correct the impairment?
  - 25 d. Would the impairment have had a substantial adverse effect on his  
ability to carry out day-to-day activities without the treatment or other  
measures?

- e. Were the effects of the impairment long-term? The Tribunal will decide:
- i. did the impairment last at least 12 months, or was it likely to last at least 12 months?
  - ii. if not, was the impairment likely to recur?

5 **Findings in fact**

7. I have made the following relevant findings of fact. Where facts were disputed, I have made my findings on a balance of probabilities. If it appeared to me that a fact was more likely to be true than untrue then for the purposes of this judgment it was deemed to be true. If a fact appeared more likely to be untrue than true, then for the purposes of this judgment it was deemed to be untrue.
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8. The claimant was employed by the respondent from 9 January 2023 – 8 August 2023 as a dental receptionist. The respondent operates six dental practices in the west of Scotland.
9. The claimant suffers from irritable bowel syndrome (IBS). He was diagnosed with IBS approximately ten years ago.
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10. The claimant's disability impact statement (page 135 –138) includes the following about his IBS: "My IBS causes me to experience sudden needs to use the bathroom and stomach pain and cramping. It also causes acid reflux and nausea..... My IBS also has a significant impact on me and my daily life. I need to be careful to manage my stress levels as stress can exacerbate my IBS. Other external factors, such as medication, can also exacerbate my IBS so I need to be cautious to avoid or limit them when possible....."My IBS can at times result in me pretty much constantly going back and forth from the bathroom. This really limits my ability to be productive in other aspects of my life, and also makes socialising with friends and family very difficult. I am anxious about not making it to the bathroom in time if I need to go due to my IBS, which means I feel uncomfortable going out a lot of the time. My IBS means I need to shower often because of how much I need to use the bathroom; sometimes I shower as many as three times a day".
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11. The claimant has symptoms of IBS every day and has done so for many years. Some days the symptoms are worse than others. Before and during his employment, he managed his symptoms through medication, namely Omeprazole and Imodium. Omeprazole is a drug which helps with acid reflux. Acid reflux is a symptom of IBS which the claimant experiences. Although the claimant used medication, he still experienced flare ups when the symptoms became worse. It is during flare ups that he would need to go back and forth to the bathroom “pretty much constantly”. This in turn made him uncomfortable going out and because of how much he was using the bathroom, he showered frequently.
12. The claimant also manages his IBS symptoms by way of his diet. He eats a controlled diet of mainly plain foods. He tries to avoid stressful situations which exacerbate the symptoms. He used these management techniques both before and during his employment. Although he used these techniques, he still experienced regular flare ups when the symptoms would become worse.
13. The claimant was experiencing some other medical issues in addition to those which he says are disabilities for this claim. He felt anxious at times about his health generally, not limited to one or more specific medical issues.
14. On 11 August 2021 the claimant attended a GP appointment having recently moved house and moved GP surgery. He told his GP he had IBS. He asked for a repeat prescription for Omeprazole, which was prescribed with one to be taken each day (page 97).
15. On 25 September 2021 the claimant contacted NHS out of hours service. He reported nausea, abdominal pain, a headache and dizziness. He told them that he had IBS and had been taking Imodium with some relief, but it was worse that night (page 78).
16. On 25 July 2022 the claimant attended Ayr hospital emergency department complaining of persistent abdominal pain. He was discharged home with analgesia and advised to speak to GP if pain persisted (page 105).

17. On 16 April 2023 the claimant contacted NHS out of hours service about back pain which he said he had had for nine days (page 107). As a result of this back pain, he had difficulty in carrying heavy objects. At times he lost feeling in the lower half of his body. He was unable to drive and had difficulty walking.  
5 He was absent from work from around 24 April 2023 to 30 April 2023. His back pain was easing by 5 May 2023. After he had returned to work for a couple of weeks his back pain had resolved.
18. On 16 June 2023 the claimant was referred to a specialist clinic for a medical condition, unrelated to his IBS or back issues. The GP referral noted that the  
10 claimant “keeps otherwise well” (page 133).
19. On 10 July 2023 the claimant underwent a day case operation. This was for the medical issue for which he had attended the specialist clinic on 16 June 2023 (page 118). The claimant developed an infection after the operation, for which he was prescribed antibiotics (page 123).
- 15 20. On 28 July 2023 the claimant contacted NHS out of hours service. The claimant’s IBS had been exacerbated by the antibiotics. He reported that he had been suffering from severe diarrhoea for a couple of days and had pain in his abdomen. He told the doctor that he had IBS. He said that he was worried that the antibiotics had made his stomach worse, as he had not taken  
20 antibiotics for such a lengthy period before (page 123).
21. On 7 August 2023 the claimant contacted NHS out of hours service. He reported that he had “constant uncontrollable diarrhoea” and “tightness in his upper abdomen” (page 125). He was advised to take paracetamol and speak to his own GP.
- 25 22. On 8 August 2023 the respondent dismissed the claimant.

### **Observations on the evidence**

23. I found the claimant to be both a reliable and credible witness. He did his best to assist the tribunal. The claimant made various concessions in relation to his back issues during his oral evidence. Whilst the claimant described the  
30 adverse effect on his day-to-day activities due to back issues during the period

in early April 2023 to May 2023, he said that his back pain was easing by early May 2023, and that after he had returned to work for a couple of weeks his back pain had resolved. He said that the description in his disability impact statement about the effects of his back issues was related to the period of his back injury in early April 2023 to early May 2023. He said that apart from the two-week period when he was off work and the couple of weeks after that in 2023, he had nothing else to add to say about his back issues.

24. I found the respondent's witness Ms Ryan did her best to assist the tribunal. Her evidence was brief. She worked at the same premises as the claimant only once a week or once a fortnight. Her evidence was that she was not aware of the claimant experiencing difficulties in the workplace related to either of his two impairments. However, the claimant's evidence did not focus specifically on activities in the workplace but rather on a wider range of day-to-day activities, about which Ms Ryan would be unable to comment.

25. In cross examination the respondent took the claimant to medical records which had been produced in the bundle about another medical condition, unrelated to the two impairments relied upon by the claimant as disabilities. The respondent put to the claimant that the anxiety which the claimant said he experienced about his IBS was more likely to be anxiety about the other unrelated medical condition. The claimant's evidence was that he was anxious about more than one health issue. I accepted this evidence of the claimant. It is likely that the claimant would have anxiety about his IBS, at least in so far as not making it to the bathroom in time during flare ups, as he said.

26. The respondent put to the claimant that in the medical entries in the bundle there was no record of the claimant having told the respondent about the effects of his impairments on his ability to carry out normal day to day activities. The claimant said he could not recall exactly what had told the doctor on each occasion. The respondent submitted that this was a factor which had a bearing on whether the test in section 6 EqA had been satisfied by the claimant. I do not agree. The test which the claimant must meet under section 6 EqA is a legal one, not a medical one. I was satisfied that in a short

medical appointment there would be insufficient time and no requirement for the claimant to go through the effects of his condition, as required for an assessment under section 6 EqA.

27. The respondent put to the claimant that in the medical entries in the bundle about the medical condition for which he had had a day case operation, there was no reference to either of the two impairments he relied upon for his claim. The claimant said that he did not refer to more than one medical condition at each appointment and that he did not always need to discuss all his medical issues with a doctor. I accepted this as a credible response. I am aware that doctors often require that different appointments are made for different medical matters. In any event at the time of consulting about one medical matter, I accepted that he may not have needed to consult about others.

### Relevant law

28. Section 6(1) EqA provides that a person has a disability if they have ‘a physical or mental impairment; and the impairment has a substantial and long term adverse effect on the person’s ability to carry out normal day to day activities.’ The burden of proof is on the claimant to show that he satisfies the definition.
29. The statutory definition of ‘substantial’ in section 212(1) EqA is, ‘more than minor or trivial’.
30. Supplementary provisions for determining whether a person has a disability are found in part 1 of schedule 1 to the EqA. For example, schedule 1, paragraph 2 provides that the effect of an impairment is long-term if it has lasted at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person.
31. Schedule 1, paragraph 5(1) EqA provides that an impairment is treated as having a substantial adverse effect on the ability of the person concerned if measures are taken to correct it and, but for that, it would be likely to have that effect.

32. The Equality and Human Rights Commission Code of Practice on Employment 2011 sets out guidance on the meaning of disability at Appendix 1 (the Code). Supplementary provisions on disability status are also contained in the Guidance on matters to be taken into account in determining questions relating to the definition of Disability (the Guidance),
33. There is no need for a person to establish a medically diagnosed cause for their impairment. What it is important to consider is the effect of the impairment, not the cause (paragraph 7, the Code).
34. A substantial adverse effect is something which is more than a minor or trivial effect (paragraph 8, Appendix 1) and “Account should also be taken of where a person avoids doing things which, for example, cause... substantial social embarrassment.....” (paragraph 9, the Code).
35. If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur; that is, if it might well recur (paragraph 13, the Code).
36. Day to day activities are things people do on a fairly regular and frequent basis and include but are not limited to –walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for oneself (paragraph 15, the Code).
37. Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (though not the impairment). In such cases the treatment is ignored, and the impairment is taken to have the effect it would have had without such treatment (paragraph 16, the Code).
38. The leading case on the examination of whether a person is disabled is the EAT decision of **Goodwin v Patent Office [1999] ICR 302**. While that case concerned the predecessor legislation to the EqA, the four questions identified in Goodwin remain appropriate: (1) The impairment condition: Does the claimant have an impairment which is either mental or physical? (2) The



adverse effect condition: Does the impairment affect the claimant's ability to carry out normal day-to-day activities, and does it have an adverse effect? (3) The substantial condition: Is the adverse effect (upon the claimant's ability) substantial? (4) The long-term condition: Is the adverse effect (upon the claimant's ability) long-term?

39. The time at which to assess the disability (i.e. whether there is an impairment that had a substantial adverse effect on normal day to day activities) is the date of the alleged discriminatory act (**Cruickshank v VAW Motorcast Ltd [2002] ICR 729, EAT**). This is also the material time when determining whether the impairment has a long-term effect.

### Submissions

40. The claimant provided written submissions and made oral submissions to supplement these. The respondent made oral submissions. The submissions are not repeated here, but the relevant points are dealt with in my discussion and decision below.

### Discussion and decision

#### *Irritable bowel syndrome*

41. Dealing first with the asserted impairment of IBS, I have considered each of the questions set out in Goodwin in turn.

42. I accepted the claimant's evidence that he suffered from IBS, which is a physical impairment, and had done so for many years. He said that he had been diagnosed with IBS approximately ten years ago. There was no formal diagnosis of IBS in the medical records provided to the tribunal. The records provided were from around 2021 to date only. There were however several references in his medical records from 2021 onwards where he told medical health professionals that he suffers from IBS, when he was consulting them about his symptoms. The earliest of these to which I was taken was on 11 August 2021. The most recent reference, specifically to IBS, during his employment was on 28 July 2023.

43. Next, I considered whether the claimant's impairment of IBS has an adverse effect on his ability to carry out day-to-day activities. I concluded that it does. The assessment of adverse effect is personal to the claimant. As the EAT in **Goodwin** observed: "The focus of attention ... is on the things that the applicant either cannot do or can only do with difficulty, rather than on the things that the person can do."
44. Paragraph 15 of the Code states that 'normal day-to-day activities' are activities that are carried out by most people on a fairly regular and frequent basis. It gives examples including eating, going to the toilet, taking part in normal social interaction and nourishing and caring for one's self.
45. In evidence which I accepted the claimant said that he had regular flare ups of his IBS. During such flare ups he had to remain close to a toilet as he needed to make frequent trips there. This made socialising with family and friends difficult. He had declined or missed social events as he was anxious about not making it to the bathroom on time if he needed to go. Due to the number of times he needed to go to the toilet he needed to shower often, sometimes as many as three times a day. The claimant was careful with his diet, eating mainly plain foods. These are all matters which I concluded have an adverse effect on the claimant's ability to carry out day-to-day activities.
46. Next, I considered whether the adverse effect was substantial. This is a question of fact. The effect must be "more than minor or trivial" (section 212(1) of the EqA). Appendix 1 to the Code states: "The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people". I am satisfied that the evidence of the adverse effects experienced by the claimant on a regular basis go well beyond normal differences which might exist among people. The adverse effects are more than minor or trivial. I concluded that the adverse effects are substantial.
47. The respondent submitted that as the medical entry on 16 June 2023 said "keeps otherwise well" there was no substantial adverse effect. I do not agree. The claimant's evidence was that he had symptoms of IBS every day. Some

days the symptoms were worse than others. He managed his symptoms by medication namely Omeprazole and Imodium. He also managed his symptoms by way of diet and trying to avoid stressful situations. Although he took these steps to manage his symptoms, he still experienced flare ups.

5 48. Paragraph 16 of the Code provides that someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (though not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. The fact that the claimant was taking medication and taking other  
10 steps such as diet to alleviate the effects of his IBS does not mean that there was no substantial adverse effect. The fact that the claimant was recorded as “keeps otherwise well” on 16 June 2023 does not mean that there was no substantial adverse effect.

15 49. Next, I considered whether the adverse effects are long term. The time at which to assess whether the impairment has a long-term effect is the dates of the alleged discriminatory acts. The claimant asserts that the first of these was the date of his first absence from work on 17 April 2023 and the last of these was his dismissal on 8 August 2023.

20 50. Paragraph 2(1) of Part 1 of Schedule 1 EqA provides that the effect of an impairment is long-term if (a) it has lasted for at least 12 months; (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected.

25 51. From the medical records provided to the tribunal, the claimant was prescribed medication for his IBS on 11 August 2021. The claimant’s evidence was that the adverse effects of his IBS had started before this and continued throughout his employment. I am satisfied that this was the case. I accept the claimant’s evidence that he had been suffering from the substantial adverse effects of IBS since his diagnosis around ten years previously and continued to do so at the time of the events the claim is about. His IBS had  
30 lasted for at least 12 months. I concluded that the claimant’s IBS had a

substantial and long-term adverse effect on his ability to carry out normal day to day activities at the time of the events that the claim is about.

52. The respondent submitted that the abdominal pain and diarrhoea on 28 July 2023 and 7 August 2023 was because of antibiotics the claimant was taking and was unrelated to the claimant's IBS. The respondent submitted that the claimant had not discharged the burden to show that abdominal pain and diarrhoea on these two occasions were related to IBS. Thus, submitted the respondent, the claim that he is a disabled person by reason of his IBS at the time of the events the claim is about must fail. In submissions the respondent took me to a report from the claimant's GP in the bundle. I had not been taken to the report during evidence from either party. The report appeared to summarise various entries in the medical records. The report summarised a medical entry on 28 July 2023 and commented that the diarrhoea and abdomen pain "was thought to be secondary to antibiotics for another issue". The respondent submitted that this meant that the abdominal pain and diarrhoea was unrelated to or had nothing to do with his IBS. The impact of the antibiotics had been put to the claimant in cross examination. The claimant's evidence, which I accepted, was that the antibiotics had likely exacerbated his IBS. This was reflected in the claimant's disability impact statement where he said that external factors, such as medication, can exacerbate his IBS and he needs to be cautious to avoid or limit such use when possible.

53. I am satisfied that the claimant does not need to prove that the episodes of abdominal pain and severe diarrhoea on 28 July 2023 and 7 August 2023 are related to his IBS to satisfy section 6 EqA. He needs to prove that he has an impairment of IBS which has a substantial and long term adverse effect on his ability to carry out normal day-to-day activities at the time of the events the claim is about. I am satisfied, for the reasons already given, that he has done so. For completeness however I also conclude that on balance it was more likely than not that the antibiotics had exacerbated his IBS, as the claimant said, and thus that the episodes on 28 July 2023 and 7 August 2023 are related to his IBS. It was the claimant's lived experience that the use of

medication can exacerbate his IBS and I am satisfied that on balance this was likely to be the case with the antibiotics, in accordance with the claimant's evidence.

54. I have concluded that at the time of the events that the claim is about, the claimant's IBS impairment had a substantial and long term adverse effect on his ability to carry out normal day to day activities.

55. Accordingly, I am satisfied that the claimant is a disabled person under section 6 EqA by reason of his IBS at the time of the events that the claim is about.

*Back issues*

56. Dealing next with the asserted impairment of back issues, I have again considered each of the questions set out in **Goodwin** in turn.

57. The claimant's evidence which I accepted was that he had sustained an injury to his lower back in 2021. However, there was no evidence led about the nature or effect of the injury. There was no evidence led about any back issues from the date of injury in 2021 until 16 April 2023 when the medical records show that the claimant had been experiencing back pain for 9 days. He was then off work for a period and by 5 May 2023 the claimant said his back pain was easing. I am satisfied therefore that the claimant was suffering from back issues, which is a physical impairment, from around 7 April 2023 until 5 May 2023.

58. Next, I considered whether the claimant's impairment of back issues had an adverse effect on his ability to carry out day-to-day activities. I concluded that it did, from around 7 April 2023 (9 days before he consulted a doctor) until 5 May 2023

59. The claimant's evidence was that at that time he had difficulty in carrying heavy objects. At times he lost feeling in the lower half of his body. He was unable to drive and had difficulty walking. He was absent from work from around 24 April to 30 April 2023. These are all matters which I concluded had an adverse effect on the claimant's ability to carry out day to day activities from around 7 April 2023 until 5 May 2023.

60. Next, I considered whether the adverse effect was substantial. This is a question of fact. The effect must be “more than minor or trivial” (section 212(1) of the EqA). I am satisfied that the evidence of the adverse effects experienced by the claimant in the period from around 7 April 2023 until 5 May 2023 go beyond normal differences which might exist among people. The adverse effects are more than minor or trivial. I concluded that the adverse effects from around 7 April 2023 until 5 May 2023 were substantial.
61. Next I considered whether the adverse effects are long term. The time at which to assess whether the impairment is long term is the time of the events which the claim is about. Schedule 1, paragraph 2 EqA provides that the effect of an impairment is long-term if it has lasted at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person.
62. The claimant did not lead evidence about any substantial adverse effects of back issues apart from in the relatively short period of around 7 April 2023 until 5 May 2023. He was candid in saying that he was only able to give evidence about back issues in this period. The claimant did not lead evidence that the substantial adverse effect in this relatively short period was likely to recur such that the substantial effect is treated as continuing or that it might well recur (paragraph 13, the Code). Accordingly, it cannot be said that at the time of the events the claim is about the claimant’s back issues were long term.
63. Accordingly, I am not satisfied that the claimant is a disabled person under section 6 EqA by reason of his back issues at the time of the events that the claim is about.

**Employment Judge: J McCluskey**  
**Date of Judgment: 31 July 2024**  
**Entered in register: 31 July 2024**  
**and copied to parties**