



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Judgment of the Employment Tribunal in Case No: 8000503/2024 issued following Open Preliminary Hearing Held on the Cloud Based Video Platform on 15th November 2024

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Employment Judge J G d’Inverno

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Mr D Challenger

**Claimant
In Person**

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Panton McLeod Ltd

**Respondent
Represented by:
Mr Glass, 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 was a person possessing the protected characteristic of Disability, in terms of section 6 of the Equality Act 2010 (“the EqA”), at the material time for the purposes of his complaints, namely in the period 8th to 26th January 2024, by reason only of his mental impairment (medical condition) of Autism Spectrum Disorder (“ASD”) which

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claims should proceed to a Final Hearing subject to further Case Management Direction as appropriate.

(Second) The claimant's complaints of Disability Discrimination, in so far as founded upon possession of the protected characteristic of Disability, at the material time, and said to arise by reason of Attention Deficit Hyperactivity Disorder ("ADHD"), are dismissed.

Employment Judge: J G d'Inverno
Date of Judgment: 22 November 2024

Date sent to parties

22/11/2024

I confirm that this is my Judgment in the case of Challenger v Panton McLeod Ltd and that I have signed the Judgment by electronic signature.

REASONS

1. This case called on the Cloud Based Video Platform for Open Preliminary Hearing in terms of Judge Jones's Case Management Orders of 20th August 2024. In terms of the Notice of Hearing issued to parties on 21st August 24 the Preliminary Issue before the Tribunal for Determination was that of whether, at the material times for the purposes of his complaints, that is the period 8th to 26th January 2024, the claimant was a person possessing the protected characteristic in terms of section 6 of the Equality Act 2010 ("the EqA") by reason, jointly or separately, of the asserted mental impairments (medical conditions) of:-

(a) Attention Deficit Hyperactivity Disorder (ADHD); and/or

(b) Autism Spectrum Disorder ("ASD").

2. The claimant appeared on his own behalf and gave oral evidence on affirmation. The respondent was represented by Mr Glass, Solicitor who cross examined the claimant.

Documentary Evidence

3. There was before the Tribunal a respondent's Hearing Bundle extending to some 65 pages and, from the claimant, a number of documents lodged by him on the morning of the Hearing, to some of which reference was made by parties respectively in the course of evidence and submission.

4. The evidential part of the Hearing was concluded shortly before 1 pm. In taking the luncheon adjournment the Judge advised both parties asking that each in turn confirm and acknowledge which they did, that the Hearing was not concluded and that the Tribunal would sit again at 2 pm at which point it would hear parties' submissions.

5. At 2 pm the respondent's solicitor was in attendance. The claimant was not in attendance. The Clerk made various unsuccessful attempts to contact the claimant by telephone, on the number on which he had been available in the course of the morning, and by email. At 14:20, on the Judge's direction, the Clerk sent an email to the claimant referring to the claimant's acknowledgement, given at 1 pm that he was expected to log back in to the Hearing at 2 pm, to the fact that he was not answering his telephone or responding to emails sent, advising that the Judge would delay the start of the afternoon part of the Hearing until 14:30 to enable the claimant to log in and rejoin the Hearing but that in the event of his not doing so, the Tribunal would hear the respondent's representative's submissions and would thereafter proceed to Determination of the Preliminary Issue taking account of the claimant's evidence given orally by him in the course of the morning.

6. The claimant did not log back in to the Hearing.
7. At paragraph 5 of her Note of 20th August 2024 Judge Jones records the position confirmed by the claimant at the Closed Preliminary Hearing which proceeded before her for case management purposes, on 20th August 2024, viz:-

“5. The claimant’s position is that he is a disabled person by reason of ADHD and Autism. His position is that the respondents’ Directors were aware of his condition. I explained to the claimant that the respondent did not accept that he was disabled for the purposes of section 6 of the Equality Act 2010. I therefore ordered him to provide information to support his position. He will provide this within 14 days. This will include a Disability Impact Statement setting out in his own words what condition or conditions he has, when he was diagnosed with them, what medication or other treatment he has for these and in what way the condition impacts on his ability to perform normal day to day activities. He will also provide any reports or other documentations which might support his position.”

8. Such information as the claimant provided was partly timeously provided and partly provided on the morning of the Hearing (that is to say outwith the time parameters directed by Judge Jones). All of the documentary evidence tendered was, nonetheless, received by the Tribunal and considered by it.

9. The claimant did not provide any copies of his medical records *per se*, but rather, in the case of ASD a document which he described as a diagnosis by an Occupational Therapist and Specialist Practitioner Alexis Clayden dated 24th October 2017, and a copy of the response to a questionnaire completed by his medical practitioner GP Dr Rachel Walker dated 11th November 2024 (the date of the hearing) in which, at paragraph 3.3 the doctor answers yes to the question “*Does the [student] have a physical, sensory or mental impairment which has a substantial (more than minor or trivial) and long term adverse effect on their ability to carry out day to day activities (including education)?*”, and also gives, in response to the direction “*Give details*”

identification and confirmation as a “*diagnosis of ASD*”, the letter of 24th October 2017 earlier referred to”.

- 5 10. In relation to ADHD the claimant produces only a copy entry from his attendance at a clinic on the 25th of July 2019 which bears in one of the characterisation boxes the words “**Diagnosis:** ADHD”. Although signed by Dr S Maras the entry, in its body contains no reference to the claimant being diagnosed either on that occasion at that clinic, or on any previous occasion, with Attention Deficit Hyperactivity Disorder (“ADHD”). Rather, the note
10 focuses on an improvement in the claimant’s ability to concentrate which appears to be associated with the medication Atomoxetine.
11. On the documentary and oral evidence presented the Tribunal made the following essential Findings in Fact restricted to those relevant and necessary
15 to the Determination of the Preliminary Issue of Disability Status.
12. On or about the 24th of October 2017 the claimant was diagnosed, at the hands of Alexis Clayden, a Specialist Occupational Therapist who worked for the integrated Autism Service previously “ASD info Wales”. That organisation
20 is an organisation providing a service to individuals who are seeking a diagnosis of Autism Spectrum Disorder. The claimant was referred to ASD info Wales by his then General Medical Practitioner being the doctor who as at the material time (January 2024) and as at the date of today’s Hearing, 11th November 2024 remained his GP.
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13. ASD info Wales produced a Report dated 6th of November 2017 (some 6 years prior to the material time) and which is produced at pages 44 to 48 of the respondent’s Hearing bundle.
- 30 14. The document at pages 44 to 48 of the Bundle reflects the basis of the diagnosis of ASD which is contained in the letter of 24th October 2017 page 7 of the bundle of documents lodged by the claimant at the beginning of the Hearing. The latter contains no description of the symptoms being experienced by the claimant in January of 2024 (some 6 years later). Those

which are described in the 2017 document those which relate to the claimant's social skills were as follows:-

5 “David stated that he has issues with drink and drugs and keeps reverting
back to using them as they make him sociable and talkative and help him
feel more ‘normal’ as generally he is not sociable and does not “do” or
understand chit chat; and again under the heading “Reciprocal Social
Interaction – ‘David stated that he does have a few friends and a small
number of acquaintances. David finds approaching other people very
10 difficult, - David struggles to see things from other people’s point of view.
He feels he lacks empathy ...”

15. The above are not symptoms which are unequivocally referable to ASD nor
do they, on their face or of themselves, serve to establish on the balance of
15 probabilities that the claimant was, some 6 years later in January of 2024
suffering from an impairment which had a substantial long term adverse
effect on his ability to carry out normal day to day activities. .

16. Having been diagnosed with ASD in 2017 the claimant's GP noted and
20 accepted that diagnosis in terms of the questionnaire lodged by the claimant
at the start of today's Hearing.

17. ASD “Autism Spectrum Disorder” is a lifelong condition.

25 18. As at the 11th of November 2024 the claimant, on the balance of probabilities,
was also suffering from the condition of ASD.

19. At the material time, that is the period 8th to 26th January 2024 inclusive, the
claimant's condition of ASD having been diagnosed in 2017 was a condition
30 which, in so far as it had an adverse impact upon the claimant's ability to
carry out normal day to day activities, had a long term adverse impact on
those abilities.

20. At the material time the claimant's condition affected him such that he was unable to wash, get dressed and have breakfast in the mornings without the assistance of a carer. When going out he required to be accompanied by a carer who also required to drive him to any appointments which he had. He was incapable of using the bus on his own. He required family members to supply his shopping needs or, if seeking to shop himself required to be accompanied by a carer or a family member. In the work environment he was unable to sit for long periods without any useful work to carry out without becoming anxious and potentially aggressive.
21. The above impacts had an adverse effect on the claimant's ability to carry out normal day to day activities which adverse effect was substantial, in the sense of being more than minor or trivial, all in terms and for the purposes of, section 6 of the Equality Act 2010.
22. Finds in Fact and in Law, that at the material time for the purposes of section 13 EqA Direct Discrimination and section 26 EqA Harassment, that is in the period 8th to 26th January 2024 the claimant was a person possessing the protected characteristic of Disability in terms of section 6 of the Equality Act 2010 by reason only of his diagnosed mental impairment of Autism Spectrum Disorder "ASD".
23. As far as ADHD was concerned, the claimant relied entirely upon the extract record of his attendance at a clinic on the 25th of July 2019 being a two page document lodged by him with the Tribunal on the morning of the Hearing. The document bore to be signed by a medical doctor "Dr S Maras" a Senior House Officer to Dr Ranjimi Rao. Although the body of what is an eight line entry contains no express reference to the condition ADHD or diagnosis of it in the heading of the extract beside the title "**Diagnosis:**" the letters ADHD appear. The body of the document contains no description of symptoms or impact being exhibited or suffered by the claimant as at the 25th of July 2019 albeit it does contain a reference to the claimant, as opposed to his doctors, reporting that he was able to concentrate more when taking the medication

Atomoxetine, with improved concentration and thought process when listening.

24. Finds in Fact and in Law that the two page document being the extract
5 Report of the claimant's attendance at a clinic and dated 25th of the 7th 2019
does not, of itself, constitute a diagnosis of ADHD on the part of the claimant.
25. Further, let it be assumed that the claimant did so constitute a diagnosis,
which the Tribunal has not found to be the case, nor does it evidence a long
10 term and substantial adverse impact upon the claimant's ability to carry out
day to day activities.
26. The document, being the only evidence of diagnosis of the condition upon
which the claimant seeks to rely, the evidence before the Tribunal is
15 insufficient to discharge the claimant's burden of proof in respect of his being
diagnosed with that condition or of that condition having a long term and
substantial adverse effect upon the claimant's ability to carry out normal day
to day activities at the material time.

20 **Submissions**

27. The claimant opted not to rejoin the Hearing after the short (luncheon
adjournment) and accordingly made no express submissions to the Tribunal.
It was clear, however, from the statements made by him in the course of
25 giving his oral evidence, that he considered the following to be the case:-

- (a) The fact that he had qualified for the issue of a blue badge in
Wales (a disabled parking permit) and separately was in the
opinion of his GP likely to qualify for disabled student allowance
30 should mean, automatically that he was also disabled for the
purposes of the Equality Act 2010, section 6, sub paragraph (b)

- 5 (b) That the two conditions of which he gives notice of founding upon namely Autism Spectrum Disorder (ASD) and Attention Deficit Hyperactivity Disorder (ADHD) were both lifelong conditions and thus once he had been diagnosed with them, in respect of ASD on 24th October 2017 and, upon his unsubstantiated assertion, in the case of ADHD on or about the 25th of July 2019, it followed that he continued to suffer from both conditions some 4 years later in January of 2024
- 10 (c) That the persons who had diagnosed his ASD, Specialist Occupational Therapist Alexis Clayden and Special Practitioner Christine Fretwell (see the Report at pages 44 to 48 of the respondent's bundle) were, although not medical doctors, more qualified/better able to diagnose ASD than his General Practitioner was or would be. It was for that reason that his GP had referred him to these individuals as Specialists in order to be assessed for and ultimately diagnosed as suffering from, ASD.
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- 20 (d) He relied upon the diagnosis of 24th October 2017 (of ASD). It was the claimant's further submission that because each of the conditions upon which he relied were lifelong conditions it followed not only that he would have continued to be suffering from them at the material time (January 2024) but also that whatever symptoms he was experiencing respectively in 2017 and 2019, the Tribunal should accept and assume he continued to suffer from/experience in January 2024.
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Submissions for the Respondent

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28. For the respondent, Mr Glass dealing firstly with the condition of ADHD submitted that the evidence whether documentary or oral before the Tribunal was wholly insufficient to support a Finding in Fact that the claimant had been diagnosed as suffering from ADHD and when, including Findings as to the

basis of any such diagnosis. Nor, let it be assumed that such evidence was before the Tribunal, the impacts given notice of by the claimant in his Disability Impact Statement and or his oral evidence were not such as to satisfy the requirements of section 6 of the Equality Act 2010. Those relating to social intercourse and or awkwardness were experienced by many persons who were not disabled and were not, of themselves unequivocally referable to a person meeting the requirements of section 6 of the Equality Act. He invited the Tribunal to hold that the claimant had failed to discharge his onus of proof in establishing that he was, at the material time, a person possessing the protected characteristic of Disability by reason of ADHD. The only documentary evidence founded upon by him as evidence of a diagnosis of that condition was wholly insufficient to constitute such a diagnosis and in any event separately disclosed no relevant impacts.

29. In relation to the other condition relied upon, namely ASD, while recognising that there was a document before the Tribunal which bore to be a diagnosis of such a condition on or about the 24th of October 2017 that document, not being signed by a medically qualified doctor should not be accepted by the Tribunal as evidence of such a diagnosis, Mr Glass's submission being that only a medically qualified doctor and not a less qualified, albeit Specialist, Practitioner could do so. Mr Glass did not provide authority for that proposition but adhered to it as his primary position.

30. Separately, and in any event, the document referred to dated from 2017 and, it could not on any construction be said to contain evidence of an adverse long term or substantial effect upon the claimant's ability to carry out day to day activities at the material time, namely January 2024.

31. Separately, let it be assumed that the Tribunal were to consider the document sufficient to constitute a diagnosis of ASD which persisted at the material time the evidence before the Tribunal, whether documentary in terms of the claimant's witness statement, or evidence of his qualifying for a blue badge disabled parking permit or of likely eligibility for disability student allowance or again appearing in his Disability Impact Statement and or his oral evidence,

was all insufficient to discharge the onus of proof such as to establish, on the balance of probabilities, that at the material time the claimant was suffering from a mental impairment which had a long term and substantial adverse effect upon his ability to carry out day to day activities. Nothing in the diagnosis document of 24th October or Report document of 6th November 2017 could be regarded as evidence of the requirements of section 6 of the EqA as at the material time dating, as it did from some 6 years earlier.

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32. The matters given notice of in the Disability Impact Statement contained no distinction between or attribution by the claimant to one or other of the conditions upon which he sought to rely. Separately they fell to be described as falling into two categories; firstly, that the claimant “positively thrived on routine” and secondly, that he considered himself to be socially awkward and lacking in people skills, finding it difficult to understand or to do “small talk” and feeling uncomfortable in social intercourse situations.

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33. The above, in Mr Glass’s submission were not symptoms or impacts which could be regarded as being unequivocally referable to either of the conditions and in particular to ASD, let it be assumed that the Tribunal considered that there was evidence of such a diagnosis before it. They were symptoms or feelings experienced by many people in society who did not otherwise meet the requirements of section 6 EqA Disability. They were, of themselves, let it be assumed that notwithstanding the present tense used in the Impact Statement at page 59 were to be read as being experienced by the claimant at the material time January 2024 insufficient for that purpose. Regarding the matters described by the claimant in his oral evidence Mr Glass firstly submitted that the Tribunal should not be satisfied on the claimant’s oral evidence that what he was describing were impacts which were applying to him at the material time, as opposed to at some other time. Secondly, and in any event, that they also were not, of themselves, sufficient to satisfy the requirement of long term substantial adverse impact on ability to carry out normal day to day activities.

34. At the end of the day the onus of proof sat with the claimant in respect of these matters. He had been given clear direction by Judge Jones at the Case Management Discussion Closed Preliminary Hearing in August of 2024 as to what he required to produce by way of evidence and had not done so substantially within the timelines directed by Judge Jones.
35. Although accepting that the claimant had and had the right to lodge the additional documents which he had lodged today (the day of the Hearing) shortly before its commencement Mr Glass made the point that the timing of his doing so was such as to fail to give the respondent fair notice of the documents and their content or indeed to consider or reconsider their possession in relation to today's Hearing in the light of them. While he made no concession in relation to Autism Spectrum Disorder and adhered to his primary position, he also reserved the right, in the event that the Tribunal should hold that the claimant was disabled by reason of that condition and further in so doing considered the documentary evidence lodged by the claimant on the day of the Hearing to be material, to bring forward an Application for an Award of Expenses on the basis that the need for the Hearing might have been avoided had those documents been timeously made available to the respondent.
36. His primary submission remained however that the Tribunal lacked Jurisdiction to Consider the claimant's complaints of Discrimination because of the protected characteristic of Disability by reason of the claimant having failed to discharge his onus of proof and that those claims accordingly fell to be dismissed on that ground.

Discussion and Disposal

37. Of the two conditions given notice of by the claimant as relied upon I accepted the submission of the respondent's representative that, in relation to Attention Deficit Hyperactivity Disorder such limited documentary and oral evidence as was before the Tribunal was insufficient to discharge the claimant's onus of proof such as to establish on the balance of probabilities;

(a) that he had been diagnosed as suffering from that condition,

(b) that he had continued to suffer from that condition at the material time and or

(c) that it was a condition which, again at the material time, had a long term and substantial adverse effect upon his ability to carry out day to day activities.

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38. In his Impact Statement the claimant refers only to having been diagnosed with ADHD at a date later than that upon which, in 2017, he was diagnosed with Autism Spectrum Disorder. Beyond that bald and unspecific assertion the only evidence placed before the Tribunal was the two page document dated 25th of July 2019 being an eight line record of the claimant's attendance at a clinic on the 25th of July 2019. The only reference to ADHD which appears on the face of the document is in one of the heading lines where it appears against the category "**Diagnosis**". There is nothing on the face of the document or in its body which would go to show whether the reference to diagnosis is to a diagnosis made on that date or on some other earlier date. There is nothing which goes to show the basis upon which such a diagnosis has been made. The Tribunal considered the document to be inadequate for the purposes of establishing that the claimant had been so diagnosed or the date of any such diagnosis or again the basis of any such diagnosis. The Tribunal considered that the claimant had failed to discharge his onus of proof in respect of establishing that, at the material time that is in the month of January 2024, he was suffering from ADHD and further was so suffering such as to meet the requirements of section 6 of the Equality Act 2010.

39. Regarding the second condition relied upon, namely Autism Spectrum Disorder ("ASD"), the Tribunal was satisfied, on the oral and documentary evidence before it, that the claimant had;

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- (a) on 24th of October 2017 been diagnosed with the mental impairment of Autism Spectrum Disorder and
- 5 (b) had been so diagnosed upon a referral from his then and currently continuing General Practitioner,
- 10 (c) that his GP had, as at the day of the Hearing 11th November 2024 recognised, in terms of the disability allowance application questionnaire completed by her, the letter of diagnosis dated 24th October 2017 as a valid diagnosis of ASD;
- 15 (d) that ASD being a lifelong condition and the claimant having been diagnosed with it in 2017 and, as at the date of the Hearing, 11th November 2024 still suffering from it he had, on the balance of probabilities, also been suffering from the condition at the material time.

40. In respect of the effect of ASD upon the claimant at the material time, while the Tribunal accepted the force of the respondent's representative's

20 submissions in relation to the evidence presented relating to "social awkwardness" as being, of itself insufficient to satisfy the requirements of section 6 of the EqA. The Tribunal however accepted, as both credible and reliable, the claimant's oral evidence as evidence sufficient to establish that

25 as at the material time, January 2024, the claimant's Autism Spectrum Disorder had an adverse and substantial impact upon his ability to carry out normal day to day activities such as, for example, those which it has found in fact, viz; an inability to wash, dress and take breakfast in the morning without the assistance of a Social Care Worker, the inability to travel to and from

30 appointments without the company and assistance of a Social Care Worker, the inability to use a bus if unaccompanied, the inability to shop on his own behalf.

41. In the Tribunal's consideration, based upon the claimant's oral evidence which it accepted, these were impacts which the claimant experienced not

only at the material time but as had continued to experience since the date of diagnosis in 2017. The Tribunal was accordingly satisfied that the adverse effects were both long term and substantial such as to satisfy the requirements of section 6.

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42. The Tribunal has accordingly found in fact that the claimant was, at the material time namely 8th to 26th January 2024 inclusive, a person possessing the protected characteristic of Disability in terms of section 6 of the Equality Act 2010, but only in so far as arising from the diagnosed medical condition of Autism Spectrum Disorder (ASD). The Tribunal accordingly dismisses the claimant's complaints of Direct Discrimination because of and Harassment related to the protected characteristic of Disability in so far as the same are said to arise from the condition of ADHD ("Attention Deficit Hyperactivity Disorder").

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43. The residual complaints should now proceed to a Final Hearing on the claims but restricted in respect of complaints of Discrimination because of the protected characteristic of Disability to the extent that the possession of that characteristic arises from the mental impairment of Autism Spectrum Disorder.

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44. Date listing stencils in respect of the Final Hearing should now be issued to the parties.

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Employment Judge: J G d'Inverno
Date of Judgment: 22 November 2024

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Date sent to parties

22/11/2024

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I confirm that this is my Judgment in the case of Challenger v Panton McLeod Ltd and that I have signed the Judgment by electronic signature.