



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4104695/2024 (V)**

**Held on 9 December 2024**

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**Employment Judge N M Hosie**

**Mr J Starrs**

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**Claimant  
Represented by,  
Ms L MacDonald,  
Fiancée**

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**Mr D Hollands**

**1<sup>st</sup> Respondent  
Represented by,  
Ms S Mackay,  
Solicitor**

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**Northern Engineering & Welding Co Ltd**

**2<sup>nd</sup> Respondent  
Represented by,  
Ms S Mackay,  
Solicitor**

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## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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**The Judgment of the Tribunal is that:-**

1. the claimant was not a disabled person, in terms of s.6 of the Equality Act 2010; and
2. the claim is dismissed for want of jurisdiction.

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**E.T. Z4 (WR)**

## REASONS

1. The claimant, Joe Starrs, brought complaints of disability discrimination following the termination of his employment by the second respondent,  
5 Northern Engineering and Welding Co Ltd ("Newco").
2. It was common ground between the parties that Mr Starrs was employed by Newco as a Fabrication Welder from 23 October 2023 to 11 March 2024.
- 10 3. The respondents' solicitor disputed that Mr Starrs was a disabled person, within the meaning of s.6 of the Equality Act 2010 ("the 2010 Act"). This case called before me, therefore, by way of a preliminary hearing to consider and determine that issue. The hearing was conducted by video conference using the Cloud Video Platform ("CVP").  
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4. I heard evidence at the hearing from Mr Starrs and on behalf of the respondents from Neil Worsdall, Newco's, General Manager.
5. A Joint Bundle of Documentary Productions was also submitted ("P"). Mr  
20 Starrs also submitted his own productions ("C").
6. Having heard the evidence and considered the documentary productions, I was able to make the following findings in fact, relevant to the issue of Mr Starrs' disability status.  
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7. Mr Starrs has Myelopathy, a spinal chord condition which causes pain. His condition was caused as a result of "severe decompression sickness", which he experienced on 30 June 2021 when working as a Welder underwater for a previous employer. He had to be airlifted to hospital where he remained for  
30 around a week. After his discharge from hospital, he consulted his G.P. and he was prescribed a variety of pain killers, with varying degrees of success.

8. Although Mr Starrs' evidence was inconsistent and unconvincing, in parts, in particular so far as dates were concerned, I accepted his evidence that he was never completely pain free.

5 9. As the medication prescribed by his G.P. was having less effect he considered another form of medication to relieve his pain namely, medicinal cannabis which can be prescribed legally by a private clinic. On 28 November 2021, he first consulted the Curaleaf Clinic (C1) and in due course after further enquiries and *"discussion with their multi-disciplinary team of*  
10 *specialists"* it was agreed that he was *"a suitable candidate for cannabis treatment"*.

10. Mr Starrs claimed that he first started taking medicinal cannabis around the time he started his employment with Newco on 23 October 2023 and he has  
15 continued to take this medication since then but this was disputed.

11. On 17 June 2024, some three months after he was dismissed by Newco, he consulted another clinic namely, "Integro Medical Clinics" which *"specialises in the provision of medical cannabis treatment for a variety of medical*  
20 *conditions, including pain and psychiatric conditions"* and his representative produced a letter from Integro dated 19 September 2024 with further details of his treatment at it's clinic for pain management and the medical cannabis products which had been prescribed for him (C2).

## 25 **Respondents' submissions**

12. The respondents' solicitor made written submissions which are referred to for their terms. The following is a brief summary.

30 13. In support of her submissions she referred to the following cases:-

***Aderemi v. London & South Eastern Railway Ltd*** [2013] ICR 591;  
***Goodwin v. Patent Office*** [1999] IRLR 4;

***McDougall v. Richmond Adult Community College*** [2008] IRLR 222;  
***Mahon v. Accuread Ltd*** UKEAT/0081/08;  
***Mowat-Brown v. University of Surrey*** [2002] IRLR 235.

5     14.     She reminded me that the burden of proof was on the claimant to establish that he satisfied the statutory definition and, significantly so far as the present case was concerned, that the assessment of disability had to be made at the relevant time, namely when he was employed by Newco.

10    15.     The respondents' solicitor drew to my attention that, according to Mr Starrs' G.P. records which were produced (P.116-118), he had no contact with his G.P. in the 16 months before his employment with Newco started or during the 6 months of his employment. The first record of Mr Starrs' being prescribed medical cannabis is in March 2024 (sic), after his dismissal.

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16.     She further submitted that the letter from Curaleaf (C1) should be disregarded in its entirety. It is unsigned, there is no evidence of Mr Starrs paying for this service and although he states in his ET1 claim form that he was first prescribed medical cannabis in November 2023 the G.P. does not record details of medical cannabis being prescribed until after his dismissal.

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17.     Further, the letter from Integro (C2) is dated 19 September 2024 after Mr Starrs was dismissed and it states that he has "**recently** been prescribed specific medical cannabis products to address his needs". It was submitted that this letter "*is of no assistance in proving the disability of the claimant at the relevant time*"

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18.     Although Mr Starrs maintained that he was prescribed medication by Curaleaf at the relevant time when he was employed by the Newco there was no supporting evidence of this.

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19.     Further, when Mr Starrs completed the Health Questionnaire when he started his employment with Newco, he did not intimate any impairment or disability

and there was no evidence of any visits to his G.P. during the relevant time when he was employed by the respondent.

20. Also, the medical records on "18/04/2024" record that Mr Starrs, "*Exercises regularly, sometimes does 200 push ups in a day*" (P.116).

21. It was submitted that, "*the medical evidence as proffered can at best be said to paint a confusing picture of treatment history in relation to medical cannabis which is at the heart of the claimant's substantial claim.*"

*There are no medical reports, no occupational health reports, nothing that substantially shows a disability at the relevant time. The claimant was exercising regularly at the relevant time. The claimant worked in a physically demanding job, handling large pieces of metal and industrial equipment. The claimant drove every day to work."*

22. It was submitted that the claimant had failed to discharge the onus showing that he was a disabled person under the 2010 Act.

### **Claimant's submissions**

23. The claimant's representative also made written submissions as follows:-

*"The definition of disability states that the impairment has a 'substantial and long-term' adverse effect on normal day-to-day activities. These were listed by the claimant who cannot undertake daily tasks or previous activities without medication reducing his pain levels to 3 or 4.*

*The claimant afforded low level pain management due to his medication is thus unable to work and undertake daily activities otherwise, as stated today, he would endure pain at a level of 8 to 10 and be curled up to try to sleep to block it out.*

*In relation to Statutory Guidance at paragraph A8 and the ‘effect of an impairment’, severed nerves remained severed and dictate that the pain is constant through daytime and nighttime and ‘controlled’ by medications, currently legal medicinal cannabis where others have failed.”*

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## Discussion and Decision

24. It was for Mr Starrs to establish that he had a disability. Not just disabled generally, but disabled within the meaning of s.6 of the Equality Act 2010 (“the 2010 Act”) which is in the following terms:-

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### **“6. Disability**

*(1) A person (B) has a disability if –*

*(a) B has a physical or mental impairment, and*

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*(b) The impairment has a substantial and long-term adverse effect on B’s ability to carry out normal day-to-day activities.....”*

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25. In considering the circumstances relating to Mr Starrs, I had regard not only to the foregoing definition and also Schedule 1, which amplifies the definition, but also to the “Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011).”

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26. I was also mindful that Langstaff J, laid down a three-stage process of assessment in **Aderemi**, to which I was referred by the respondent’s solicitor, as follows:-

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*“It is clear from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, the Tribunal has then to assess whether that is or is not substantial. Here, however, there has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. 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*

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*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 little room for any form of sliding scale between one and the other."* (paragraph 14, p.591)

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27. I was also assisted by the observations of the EAT and the principles laid down in **Goodwin**, to which I was also referred, and which remains good law.

28. The first requirement is that Mr Starrs had a physical or mental impairment.

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29. It was clear that he did. He has Myelopathy: nerve damage in his spinal chord caused by a diving accident.

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30. I then went on to consider, therefore, whether the impairment could be said to have an "adverse effect" and, in doing so, I was mindful that the s.6 definition is directed towards an impairment of a person's ability to carry out normal day-to-day activities and that the EAT have commented in **Goodwin** that it was important to remember that the focus is on the things that the claimant cannot do and can only do with difficulty, rather than on the things that the person can do.

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31. There was no doubt that Mr Starrs suffered pain as a consequence of his impairment and that he took medication, from time-to-time, including latterly medicinal cannabis but the evidence about when and how often he took medication was not established. It was unclear.

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32. I was mindful that in determining whether a person's impairment has a substantial effect on that person's ability to carry out normal day-to-day activities, the effects or measures taken to treat or correct the impairment should be ignored (para.5(1), Schedule 1 to the 2010 Act. I was required to examine, therefore, how the claimant's abilities had been affected, **at the material time**, benefiting from any medication and then I had to consider the effects which are likely to have prevailed but for that medication. This is often referred to as the "deduced effects".

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33. I have stressed the term “at the material time”, as this was a pivotal aspect of my decision. As the respondents’ solicitor submitted, with reference to the cases of **MacDougall** and **Mahon**, whether or not Mr Starrs was a disabled person needs to be assessed as at the date of the alleged discrimination and this assessment has to be judged on the basis of the evidence available at the time when the discrimination is said to have taken place. In the present case that was during Mr Starrs’ period of employment with Newco from 23 October 2023 to 11 March 2024 and not by reference to subsequent events.
34. Although Mr Starrs claimed that he started taking medicinal cannabis around the time he started to work for Newco in November 2023 there was no other evidence to support this, quite the contrary in fact.
35. He made no reference to his impairment and that he was taking any medication in the Health Questionnaire he completed for Newco as part of his induction. He stated, specifically, that he did not have “backache” or “any other relevant health problems” (P.64).
36. Also, I heard no evidence that he ever advised his employer that he suffered from back pain and that he was taking any medication.
37. Neil Worsdall, Newco’s General Manager, gave his evidence in a measured, consistent and convincing manner and presented as credible and reliable. He was not aware of Mr Starrs having had any issues with his ability to do his job which he described as “*fairly physical*”. It involved lifting steel off a rack and fabricating metal structures by welding.
38. Mr Starrs drove to work in Fort William every day from his home for a 7.30am start and back home again when he finished work, a round trip of some 3 hours. There was no evidence that his time-keeping was unsatisfactory.
39. While the Reports his representative submitted from the private clinics which were able to prescribe medicinal cannabis namely, Curaleaf (C1) and Integro



(C2) made reference to the prescription of medical cannabis, the reports post-dated Mr Starrs' dismissal and neither gave a date when he started this medication.

5     40.     Further, as the respondents' solicitor submitted, according to the G.P. records (P.116-118), Mr Starrs had no contact with his G.P. in the 16 months before he started his employment with Newco and none during his employment, the relevant time for the purposes of his claim, from 23 October 2023 to 11 March 2024.

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41.     The first entries in the medical records after 29 June 2022 were on 18 April 2024, after Mr Starrs was dismissed. This is the first mention that Mr Starrs was using medical cannabis.

15     42.     Further, when he gave evidence Mr Starrs claimed that his ability to engage in any physical activity and sport was severely restricted. However, in direct conflict with his evidence his medical records on 18 April 2024 record that he *"Exercises regularly, sometimes does 200 push ups"*.

20     43.     All of this cast considerable doubt on the credibility and reliability of Mr Starrs' evidence. I did not find, on the evidence, that he was taking medicinal cannabis, or any other form of medication, at the material time, of the alleged discrimination when he was employed by Newco.

25     44.     I arrived at the view, on the evidence, that Mr Starrs' impairment, his Myelopathy, did not have an adverse effect on his ability to carry out normal day-to-day activities at the material time.

30     45.     Mr Starrs failed to discharge the onus on him of establishing that he was a disabled person in terms of s.6 of the 2010 Act, at the material time.

46. The Tribunal does not have jurisdiction to consider his disability discrimination claim and it is dismissed.

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**Employment Judge: N M Hosie**

**Date of Judgment: 18 December 2024**

**Date Sent to Parties: 18 December 2024**

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