EMPLOYMENT TRIBUNALS

Claimant: **Mr G Tonder**

Respondent: **Ascott Transport Limited**

Heard at: **Nottingham** **On:** **14 July 2025**

Before: **Employment Judge McTigue sitting alone**

Representation
Claimant: Mr M Tard of Counsel
Respondent: Ms S Harty of Counsel

Polish Interpreter: Ms E Jaciewicz

RESERVED JUDGMENT

1. At the relevant times the claimant was not a disabled person as defined by section 6 Equality Act 2010 because of depression.

2. At the relevant times the claimant was not a disabled person as defined by section 6 Equality Act 2010 because of Sleep Apnoea.

3. The claimant was a disabled person as defined by section 6 Equality Act 2010 from 1 April 2023 to 23 May 2024 because of his Knee Injury.

4. At the relevant times the claimant was a disabled person as defined by section 6 Equality Act 2010 because of his Back Pain/Sciatica.

5. At the relevant times the claimant was not a disabled person as defined by section 6 Equality Act 2010 because of Hiatus Hernia.

6. At the relevant times the claimant was not a disabled person as defined by section 6 Equality Act 2010 because of Kidney Stones.

REASONS

Introduction

1. This hearing was listed by Employment Judge Broughton on 8 April 2025 in order to determine the issue of disability, in connection with the following

impairments:

1.1. Depression
1.2. Sleep Apnoea
1.3. Knee Injury
1.4. Back pain/Sciatica
1.5. Hiatus Hernia and IBS
1.6. Glaucoma
1.7. Insulin Resistance
1.8. Kidney Stones.

2. At the start of the hearing, the claimant stated that he was no longer relying on the impairments of:

2.1. IBS
2.2. Glaucoma
2.3. Insulin Resistance.

Consequently, there was no need for the Tribunal to consider whether or not those impairments amounted to a disability.

3. The Claimant has been employed by the Respondent as a Warehouse Operative/VNA Driver since 10 June 2019. His employment continues but he has been absent from work since November 2024. The claim concerns allegations of direct discrimination, discrimination arising from disability and a failure to make reasonable adjustments. A central part of the Claimant's case is his allegation that when applying the Bradford Factor to his absences, the Respondent took into account absences due to his disabilities when they should not have done. The final hearing is listed for 10, 11, 12 and 13 August 2026 at Nottingham Employment Tribunal.

4. I was provided with a 454-page bundle and heard oral evidence from:

4.1. the Claimant who gave evidence by affirming an Impact Statement running to 117 paragraphs and also a Witness Statement running to 55 paragraphs. The Claimant was then cross-examined by the Respondent's counsel.
4.2. the Claimant's partner, Mrs Wioletta Tonder, who affirmed a Witness Statement running to 22 paragraphs. Mrs Tonder was not cross-examined by the Respondent's counsel.

5. Both the Claimant and his partner were assisted by a Polish Interpreter. Adjustments were discussed and agreed at the start of the hearing. The Claimant was able to have a break whenever he wished. He also said he might need to go to the bathroom at short notice. I agreed that was no problem and, on one occasion, the claimant had to leave the hearing room at short notice. The claimant also stood on occasion whilst giving evidence to alleviate his back pain.

6. The parties were unable to agree the material time for determination of the issue of whether the Claimant can rely on the protected characteristic of disability. The Respondent said it should be 8 June 2023 until 23 May 2024, as it was said that 8 June 2023 was the first time the Claimant had complained about being impacted by the application of the Bradford Factor. Alternatively, the Respondent said the period should be 23 January 2023 until

23 May 2024. The Claimant said the time period should be 28 March 2021 until 23 May 2024. It was said that the time period should run from 28 March 2024 as that was when the claimant's first period of absence due to one of his claimed disabilities commenced.

7. After hearing briefly from both parties, I determined that material time period was 28 March 2021 to 23 May 2024. I took into account that a central issue in this case will be whether the Respondent took into account absences due to the claimant's disabilities when the Bradford Factor was applied and whether ot not they should have done that. In reaching that decision I had regard to the fact that the Claimant self-certified his period of absence from 28 March 2021 to 4 April 2021 as being due to "problem with liver, kidney stones and hiatus hernia" (page 303 of the bundle). He relies of hiatus hernia and kidney stones before me today as amounting to disabilities. This period of absence will, in my opinion, be relevant to assessing whether the Bradford Factor was applied in a manner consistent with the Equality Act 2010 and so should serve as the start point in time for the material period.

The Issue

8. The issue for determination at this hearing is whether, at the material time, the Claimant was a disabled person. I have to decide:

- Did he have a physical or mental impairment?
- Did it have a substantial adverse effect on his ability to carry out day-to-day activities?
- If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
- 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?
- Were the effects of the impairment long-term? I will decide:
  - did they last at least 12 months, or were they likely to last at least 12 months?
  - if not, were they likely to recur?

The Law

9. Section 6 of the Equality Act 2010 ("EQA") provides the definition of disability:

> *A person (P) has a disability if—*
>
> *P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

10. A reference to a disabled person is a reference to a person who has a disability.

11. Schedule 1 contains various supplementary provisions. Paragraphs 2(1) and 2(2) of the Schedule provide:

> *The effect of an impairment is a long-term one if either it has lasted for at least 12 months or it is likely to last for at least 12 months (or it is likely to last for the rest of the life of the person affected.)*
>
> *If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities it is to be treated as continuing to have that effect if it is likely to recur.*

12. Sub paragraphs 5(1) and 5(2) provide:

> *(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.*
>
> *(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.*

13. In summary, the Tribunal must consider whether the relevant person has a physical or mental impairment; whether the impairment affects the person's ability to carry out normal day to day activities, whether the effects on such activities are substantial (which means more than trivial) and the effects must be long-term. The third and fourth matters, long-term and substantial, can be analysed separately but also they go hand in hand with each other. The substantial effects must also be long-term.

14. In **Walker v SITA Information Networking Computing Ltd [2013] 2 WLUK 272** the Employment Appeal Tribunal noted that when considering whether an individual is disabled, the Tribunal must concentrate on the question of whether she has a physical or mental impairment. The cause of the impairment (or the apparent absence of a cause) is not of zero significance, but the significance is evidential rather than legal. In other words, a cause identified by a medical expert might corroborate that the evidence that impairment actually exists. Or the lack of a proven cause might lead the tribunal to conclude that the claimant does not genuinely suffer from the alleged impairment. However, provided the tribunal is satisfied that the symptoms are genuine, then lack of a specific diagnosis of the cause does not mean that the claimant cannot have an impairment.

15. Day to day activities are things that people do on a regular or daily basis. Examples include shopping, reading, writing, having a conversation, using a phone, using the internet, watching TV, getting washed, getting dressed, preparing food, eating food, carrying out household tasks, walking, travelling by various modes of transport and talking part in social activities. Activities which are not performed by the majority of the population can still be day to day activities and activities. Some activities which are usually only performed in connection with work (such as – say - attending job interviews or maintaining shift pattern, those kinds of things) might potentially be considered day to day activities. If the activities are highly specialised or they involve high levels of attainment, then that might mean that they are not normal day to day activities. It is a matter for the Tribunal to decide.

16. The issue of whether the claimant meets the definition is to be decided as of

the date of the alleged contravention of the Equality Act. This is particularly important when considering the part of the definition that refers to long-term. If, by the time of the alleged contravention the impairment already had a substantial adverse effect on the ability to carry out normal day to day activities for at least 12 months then it is unnecessary to consider the alternative parts of the definition of long-term. However, if that is not the case it is necessary for the tribunal to analyse the situation as of the date of the alleged contravention and ask itself whether as of that particular date the effects were likely to last for 12 months in total (or until death, if sooner). The tribunal has to avoid hindsight. Having said that, the fact that there might not have been - by the date of the contravention - a diagnosis from the doctor does not in itself prevent the tribunal deciding that it was likely - as of the date of the contravention – that the adverse effects were likely to last for 12 months.

17. Finally, the burden lies with the Claimant to prove, on the balance of probabilities, that they were a disabled person, within the meaning of the Equality Act 2010, at the material time.

The Evidence

18. In his witness statement the Claimant referred to the medical reports from his GP at Newhall Surgery, Dr Mirza, (page 283 to 286) and from what he describes as his Polish doctor, Dr Fortuna (page 451). Dr Mirza's report is dated 1 May 2025 and Dr Fortuna's 15 January 2025.

19. In reality, the Claimant's Polish doctor is a private GP based in Harrow in England whom the Claimant sees on an occasional basis. Where there is a conflict between the evidence of those two doctors, I prefer the evidence of Dr Mirza. That is because it is apparent that the Claimant has more frequent contact with his GP, as demonstrated by his medical records. His GP has also served as the conduit between the claimant and any relevant hospital Consultants that he sees. For those reasons, in my opinion, Dr Mirza's report is more reliable.

20. The Claimant has referred to medical procedures and treatment in evidence that he had in Poland. Unfortunately he has not supplied evidence of the majority of those to the Tribunal. In the absence of that evidence I have based my fact finding and conclusions on the contents of the medical evidence contained in the bundle before me. Clear Orders were previously given in regard to the provision of relevant medical evidence and the Claimant was clearly aware of those Orders.

21. I did not find the Claimant to be a reliable witness. He often avoided answering the question that had been asked of him and instead choose to talk about things he would have preferred to have been asked about. His recollection of past events was poor as best demonstrated when he was asked about the formal absence meeting which took place on 27 June 2023. To explain why he had not raised certain matters with the Respondent, he said that he received no support at that meeting. He then had to concede, when it was put to him, that he was accompanied by a Trade Union representative and that a member of HR, Ms K Gonslawska, assisted him with interpretation.

22. I also did not find the Claimant to be credible. Before lunch Ms Harty raised that there is a note in his GP medical records on 19 April 2023 that reads as follows, "Patient fraudulently (admitted to) adding blood requests to forms." That note had been redacted from the Claimant's medical records but Ms Harty could read it and put it to the Claimant that is what the record said. On behalf of the Claimant, it was accepted those were the words contained under the redaction. Under cross-examination, the Claimant initially gave an explanation as to they he had altered the form in question before saying he could not remember the event.

23. I asked why that note was redacted. The Claimant said he did not redact it and that it must have been done by his legal representatives. Initially, I found that curious as although the redacted record was not relevant to the issue of disability, it was clearly relevant to credibility and I find it surprising that a legal representative would redact such an entry. I gave Mr Tard the opportunity to obtain instructions about this matter and after lunch it was explained that ant redaction of the Claimant's medical records was done by one of two individuals at the Claimant's legal representatives, either Ms Laura Nelson-Gill or Ms Angela Gill. I was informed by Mr Tard that Ms Nelson-Gill cannot recall redacting the relevant entry and that Ms Gill has now retired. Whoever undertook the reaction in question, I find that the contents of the redacted entry, coupled with his contradictory answers to questions about the blood request forms, calls into question the Claimant's credibility about his health conditions. I do not find that means all of the claimant's witness evidence lacks credibility but where I find it does, I shall explicitly detail with the issue and explain why I find it lacks credibility.

Findings of Fact and Conclusions

24. I shall deal with each of the Claimant's impairments in turn. Insofar as my findings extend beyond facts strictly necessary for a finding on the issue of disability they should not impinge on the evidence or facts at Final Hearing.

25. Findings of Fact - Depression

26. The Claimant first started to experience symptoms of depression in 2021. He does not say approximately when in 2021 his symptoms commenced. He refers to the following documents in the bundle - page 130, 207, 208 and 245.

27. Those evidence that:

    27.1. On 19 October 2022 the Claimant approached his GP and informed them that he had been prescribed 15mg of Citalopram once a day by his private GP. He said he had been taking those tablets for three weeks and requested a further supply as he said they helped his anxiety. The GP prescribed 20 mg Citalopram once a day on a repeat prescription basis. The entry also reads, "has been having problems at his work with his manager for few months ... he suffers from various medical problems including OSAS ... he works as a fork lift driver and he has been doing nights all the time ... the consultant recommended proper sleep hygeine and with his night shifts he is not able I to obtain it and consultant and his private Polish doctor wrote to his work regarding that and its been months and no action has been taken .. he still has been doing night shifts only and that has made him very anxious and depressed. he feels he has been

discriminated at work and has raised this issue further to concerned authorities."

27.2. On 19 August 2024 the Claimant was reviewed by a Clinical Pharmacist at Newhall Surgery who undertook an annual review of his medication and agreed to continue the Claimant's prescription for Citalopram 20mg.

28. The Claimant also failed to mention his depression to the Respondent on 3 August 2022 at a meeting regarding his sickness and on 27 June 2023 at a a disciplinary sickness meeting.

29. In terms of the report from Dr Fortuna, it provided very little information on Depression merely saying that the Claimant is treated for depression which requires chronic therapy with antidepressants.

30. Dr Mirza states, "Depression - diagnosed on 19 October 2025. It was previously controlled with Citalopram; however, this was recently switched to Duloxetine to help both mood and chronic pain. His dose was increased to 90mg on 27 March 2025."

31. The Claimant had no absence from work with the Respondent due solely to his depression.

Conclusion - Depression

32. I accept that the Claimant has had depression since October 2021. I reach that conclusion as that is when the Claimant first approached his private GP for support. The fact that he was not formally diagnosed until 19 October 2025 does not mean he did not have the impairment.

33. I am unable to accept that the Claimant's depression had a substantial adverse effect on his ability to carry out day-to-day activities during the material time period. The Claimant's impact statement evidence describes the alleged effect of his depression on his day-to-day activities. It is however vague as to when precisely these effects started. I assume that the Claimant's case is that the affects started in 2021 as that is when he says he started to experience the symptoms of his depression ([5] of the Claimant's W/S). However, the witness statement contradicts the answers provided by the Claimant during cross examination.

34. In his witness statement, the Claimant stated that his depression left him unable to attend work (paragraph 9) but during cross examination the Claimant accepted that he had no time off for depression during 2022 and 2023. The Claimant also accepted that he had not mentioned that he had depression to the Respondent in the meeting of 27 June 2023. It appears that at no point has the claimant described the effects of his depression to any of his doctors. Indeed, the medical records indicate very little mention of his depression during the material time period save for the Claimant requesting medication from his GP.

35. It may be the case that these effects have now resolved themselves due to the Claimant taking medication. If that is the case, I now consider whether the Claimant's depression would have had a substantial adverse effect on his ability to carry out day-to-day activities without his prescribed medication. I do

not conclude that the Claimant's depression would have had a substantial adverse effect on his ability to carry out day-to-day activities without his prescribed medication. The Claimant has not led evidence specifically on this point but I would say that, in reaching my conclusion, I do not find the Claimant's evidence credible with regard to the effects of his depression. In his impact statement, he describes a number of very severe effects of his depression both in the past and even today. Apart from difficulty sleeping, the effects have not been mentioned to his GP. With regard to the difficulty sleeping, there is no indication that it is linked to depression but rather, at that point in time, sleep apnoea.

36. I also observe that the claimant states at [17] of his Impact Statement, "During a depressive episode my fingers go numb to the point I cannot hold a scanner at work, a cup of tea or a pen." These are very serious effects and, on the balance of probabilities, it is implausible that the Claimant would neglect to inform his GP of such serious effects if they were present.

37. In light of the above, I find that the claimant was not a disabled person because of depression at the relevant time.

Findings of Fact: Sleep Apnoea

38. The medical evidence demonstrates that the Claimant was informed by Dr C Whale, a Consultant Respiratory Physician, that there was evidence he had mild obstructive sleep apnoea on 30 May 2022 (page 89). He was also informed that his oxygen levels were satisfactory overnight and that the initial management strategy should be to try and lose weight. He was not prescribed any medication or treatment. He was not provided with a CPAP machine for use on a regular basis at night time

39. On 2 August 2022 Dr Whale wrote a letter to the Respondent stating:

> *"Mr Tonder is a patient of mine in the Sleep Disorder Clinic. He has mild sleep disordered breathing together with chronic back pain. His MRI scan shows evidence of disc problems in the lumbar and sacral spine which is causing significant pain.*
>
> *Optimal sleep hygiene is important to try and manage any degree of sleep apnoea. Gerard currently finishes shifts at 02.30am and by the time he is able to get to bed, it is almost 05.00am. I suspect that his shift pattern is detrimental to his sleep and his overall health. I would be grateful if you could consider alternative shift patterns that allow better sleep hygiene."* (page 95)

39.1. On 13 November 2024 the Claimant was referred to a Sleep Clinic by his GP who stated:

> *"This 44 year old gentleman says he stops breathing for a few seconds at night.*
>
> *His wife has to shake him to wake him up when he stops breathing. He thinks he has sleep apnoea.*
>
> *On examination of his mouth I could not find any lumps or masses. His uvula was central and he does not have any tonsillar swellings.*

Examination of his neck did not reveal any abnormal masses. He is a smoker.

He has had a gastroscopy as well as a nasal endoscopy in the past for his swallowing problems.

I would be very grateful for your further management of his suspected sleep apnoea. His Epworth score today was 11." (page 143).

Whilst I record that referral it is, of course, outside the material time period.

40. The Claimant was only investigated for sleep apnoea on one occasion during the material time period. He also accepted that an Epworth Score of 11, as he had in November 2024, would indicate that he was on the borderline of having sleep apnoea.

41. The Claimant also accepted that the notes of his meeting with the company on 27 June 2023 record that he stated he did not have sleep apnoea anymore (page 397). I am satisfied that he did make that statement. When he was asked by Ms Harty if the note accurately recorded that he did not have sleep apnoea in June 2023, he did not directly answer her question but tried to evade it by saying that he had no support in that meeting. His evidence on that issue was not credible as he later accepted that he was accompanied by a Trade Union representative and that a member of HR, Ms K Gonslawska, assisted him with interpretation.

Conclusion - Sleep Apnoea

42. The Claimant had mild sleep apnoea from 2 August 2022 until approximately 27 June 2023, that is a period of approximately 11 months. It is clear that by 27 June 2023 he was not having issues with his sleep apeoa as recorded by the note of his meeting of that same day. There is then insufficient medical evidence that he had any difficulty with this impairment until 13 November 2024 which is outside the material time period.

43. The claimant describes the effect his impairment had upon him at paragraphs 35 to 39 of his impact statement. I do not find his evidence on that issue to be credible. It runs contrary to the medical evidence which indicates that the condition is mild at best, that he has not been prescribed medication or treatment, and that the initial management strategy for this impairment was that he should lose weight. The impairment did not have a substantial adverse effect on his ability to carry out day-to-day activities and, if I am wrong on that, the effects were not long-term. There is also insufficient evidence that the effects were likely to recur i.e. that they could well happen. On that point I bear in mind **SCA Packaging Ltd v Boyle [2009] UKHL 37**.

Findings of Fact - Knee Injury

44. The Claimant's knee injury occurred following an accident when he was playing football with his son in 2022. There is no mention in his medical records of when this accident occurred but on 12 December 2022 the Claimant had an appointment with his GP where the possibility of a referral for

an MRI regarding his right knee was discussed. On the balance of probabilities I conclude that was shortly after the footballing accident. I therefore find that the knee injury occurred in December 2022. I prefer the GP note over the claimant's statement as to when the accident is likely to have occurred as it is a more contemporaneous record.

45. The medical evidence demonstrates the Claimant had surgery on his right knee in Poland on 27 April 2023. That procedure was an arthroscopy (page 215).

46. On 13 January 2024, the Claimant saw a doctor about his knee with reference to it being as painful as it was prior to the arthroscopy. The notes state that examination shows a full range of the right knee, the knee is stable, no swelling, no patella rolling, and the only symptom is self-reported pain projecting upon the central gap. It is also noted that the left leg is about 2cm shorter (page 115).

47. On 3 May 2024 the Claimant's GP observed him after the Claimant attended at surgery. The Claimant had lifted a wardrobe eight days previously, heard a click and then experience musculoskeletal pain. He was described as "Able to walk - though using walking aids". The power in his lower limbs was assessed as 4 out of 5 (page 237).

48. On 10 May 2024, the the Claimant attended at A & E due to worsening knee pain due to a road traffic accident. The Doctor who saw him recorded, "His right knee (which has known loss of medial joint space} had worsening lateral pain since the RTC. Mr Tonder was sent for XR of the knee which did not show any acute bony injury. Mr Tonder was therefore discharged with increased dose of tramadol. He has been encouraged to take this regularly."

49. Dr Mirza report states, *"Right knee pain since 2022. MRI 4th December 2023 confirms 5mm loss in the inner aspect of the medical femoral condyle cartilage. This is consistent with severe chondromalacia. He reports having had multiple steroid injections, knee arthroscopy and hyaluronic acid injections, done in Poland."*

50. Dr Fortuna states, "…despite the surgery there is still knee disfunction which requires orthopaedic treatment with steroid intra-articular injections (last one on 27 11 2023) and physiotherapy which temporarily improve the joint function."

<u>Conclusion – Knee Injury</u>

51. At the start of the hearing Ms Harty stated that the Respondent accepted the Claimant had this impairment and that it had a substantial adverse effect on his ability to carry out day-to-day activities. The Respondent did not however accept that the effects were long-term. It is that issue I turn to now.

52. On the balance of probabilities I find that the Claimant's knee injury started to have a substantial adverse effect on his ability to do normal day-to-day activities from 1 April 2023. I reach that conclusion as it is apparent that by the end of April the Claimant was so concerned about his knee that he booked in for an arthroscopy in Poland. I therefore conclude that the claimant's knee would have started to effect his activities from approximately the start of that month and that is why he booked in for that procedure. I also find that the

effects continue to this day as there is no evidence that the Claimant's right knee has improved to date.

Findings of Fact - Back pain/Sciatica

53. The Claimant grouped these impairments together in his impact statement and witness statement. I adopt the same approach.

54. Dr Mirza's report of 1 May 2025 states, *"Back pain/Sciatica - He suffers with Chronic lower back pain and sciatica. He initially presented with this in 2017. It had steadily progressed since. He walks with a limp and is in daily pain with this. This has a significant impact on his quality of life and ability to work. His MRI 16" June 2024 shows L4-5 degenerative disc disease with disc extrusion, resulting in left L5 nerve root impingement. He has seen the orthopaedic team on 3"° July 2024 who advised against surgical interventions and for referral to pain management clinic (currently awaiting the outcome of this)."*

55. The Claimant's medical records indicate the Claimant experiencing back pain from 2017 (page 65). He was prescribed Co-codamol for his back pain in 2017.On 23 July 2021, the GP records state, "complains of sciatica since 2012 had accident at work , lifting heavy pallet pain radiates to left leg and intermediate numbness for past 6-7 years, explains pain is there all the time, worse at night difficult sleeping".

56. There is also mention of the Claimant experiencing back pain in December 2021 and experiencing spasms (page 190). There was also discussion about the claimant taking diazepam to alleviate his symptoms at that point in time.

57. The Claimant's GP medical entry of 22 April 2022 states, "*Has also seen orthopaedic surgeon on 05/02/2022 and 09/04/2022, re ongoing back pain, had MRI scan and on both instances a Kenalog injection was administered by the Consultant*."

Conclusion – Back Pain/Sciatica

58. Again, at the start of the hearing Ms Harty stated that the Respondent accepted the Claimant had Back Pain/Sciatica and that there was a substantial adverse effect on his ability to carry out day-to-day activities. The Respondent did not however accept that the effects were long-term. It is that issue I turn to now.

59. On the basis of the evidence before me I conclude that the Back Pain/Sciatica has affected the Claimant's ability to undertake normal day-to-day activities for the entirety of the material time period i.e. 28 March 2021 to 23 May 2024. I make this conclusion as it is apparent that Claimant's has had this impairment since 2017. In addition, the medical evidence of 23 July 2021, which is four months after the start of the material time period, describes the pain as being there all the time. I conclude that with the level of pain recorded as of that date would most likely also have been present at the start of the material time period and would have had the requisite effect on the Claimant's ability to undertake normal day-to-day activities.

Hiatus Hernia – Findings of Fact

60. The Claimant was diagnosed with a small Hiatus Hernia on 10 December 2020 (page 72). No follow up medical treatment was required. The Claimant is not prescribed medications or treatment by his GP or any Consultant for this condition.

61. Dr Mirza's report of 1 May 2025 states, "Hiatus hernia and IBS - from the GP record he was diagnosed with acid reflux and a small hiatus hernia on endoscopy at Burton Hospital in 2021. He takes Esomeprazole for this to manage his symptoms. There is no record of irritable bowel syndrome in his GP notes."

Hiatus Hernia - Conclusion

62. The Claimant's small hiatus hernia had no effect on his ability to undertake normal day-to-day activities during the material time period. He states that he cannot lift heavy objects, has to be careful of what he eats, and due to chest pain often has to change his plans and ask others to do tasks for him. I do not find his evidence on the effects of his hiatus hernia to be credible as it bears little reality to the treatment or advice he has received from medical professionals in relation to his hiatus hernia.

63. Esomeprazole, the medicine that he takes, assists with indigestion and heartburn The remaining medications cited in his statement are 'over the counter' medicines. The Claimant describes problems with needing to use the toilet frequently in his statements but there is no evidence of that being mentioned to his GP.

64. I also conclude that his hiatus hernia would not have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment. Again, his evidence on that point lacks credibility as he stated that without medication he would be in so much pain that he could not leave the house. Given the size of the hernia in question, such a statement lacks credibility.

Kidney Stones – Findings of Fact

65. On 27 May 2022, the Claimant received a letter from a Consultant Urologist which stated, "I now have the CT scan result which was arranged following your urology consultation. The scan has shown 3 tiny stones in the left kidney measuring 2mm in size. These are not causing any blockages to the kidney, and these should not cause any ongoing pain that you have had. The blood tests showed normal levels of calcium and uric acid. To prevent any new stones from forming, I have enclosed a diet sheet for prevention of urinary stones. This may be of help. You should maintain a high amount 'of fluid intake at all times. I have discharged you from the clinic." (page 90).

66. Dr Mirza's report of 1 May 2025 states, "Kidney stones - He has a diagnosis of previous kidney stones - on 11" March 2021, Mr Tonder had told his previous GP he has been suffering with this since the age 16. On 27th May 2022 he attended Urology who found x3 kidney stones, but this was conservatively managed. He had a further flare of this on 7" May 2023 - this was also managed conservatively with pain relief."

Conclusion – Kidney Stones

67. During the material time period, the Claimant had kidney stones in March 2021 and May 2023. I do not however find that they had a substantial adverse effect on the Claimant's ability to carry out day-to-day activities. I reach that conclusion by examining the activities that the Claimant states he cannot engage in due to kidney stones. They are:

    67.1. Sitting on cold surfaces,

    67.2. Performing intense, long-term physical exertion,

    67.3. Working in extreme temperatures,

    67.4. Digging in the garden,

    67.5. Jumping,

    67.6. Running,

    67.7. Intense exercise,

    67.8. Quick movements,

    67.9. Lifting heavy objects e.g. moving a bed or wardrobe,

    67.10. Lifting children.

    None of the above are, in my opinion, day-to-day activities. Whilst I note the decision of **Banaszczyk v Booker Ltd UKEAT/0132/15**, , this is a case where the Claimant has not put forward that he is required to lift heavy objects at work and the heavy objects that he cites, i.e. a bed or wardrobe, are not items that most people would move on a day-to-day basis.

68. If I am wrong on that, I also find his evidence on the effects of his kidney stones to lack credibility as it bears little reality to the treatment or advice he has received from medical professionals which had been aptly summarised by Dr Mirza.

69. I also do not conclude that his kidney stones would have had a substantial adverse effect on his ability to carry out day-to-day activities without treatment or medication. His evidence as to the medication or treatment he receives for this impairment contradicts Dr Mirza's report. That report indicates both episodes of kidney stones were managed conservatively, the latter with pain relief. Dr Mirza's report therefore does not indicate that the claimant is prescribed any ongoing medication specifically for his kidney stones when he is not experiencing an acute episode.

70. As I have concluded that this impairment did not have a substantial adverse effect on his ability to carry out day-to-day activities, I do not go on to determine whether the effect was long term.

71. This matter will now proceed to the final hearing.

Approved by:

Employment Judge McTigue

25 July 2025

JUDGMENT SENT TO THE PARTIES ON

.....29 July 2025.....

.....

FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/