



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001702/2024 (V)

Held on 27 February 2025

Employment Judge J M Hendry

Mr J Mitchell

**Claimant
Represented by,
Mr R Clarke,
Solicitor**

Bilfinger UK Limited

**Respondent
Represented by,
Mr A McCrone,
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal finds that between the 10 May and 28 June 2024 the claimant was a disabled person in terms of s.6 of the Equality Act 2010.

REASONS

1. The claimant in his ET1 sought a finding that he had been discriminated against on the grounds of his disability in that the respondent company had refused to make a reasonable adjustment in relation to allowing him to wear a particular safety helmet. The claims were opposed. The respondent did not accept that the claimant was disabled at the relevant times or at all.

E.T. Z4 (WR)

2. The case proceeded to a Case Management Hearing on 17 January 2025 before Judge S Maclean. She arranged for a Full Hearing of the case to take place in April 2025 and for a Preliminary Hearing to take place on 27 February 2025 to determine the issue of whether the claimant was disabled under s.6 of the Equality Act 2010 between 10 May 2024 and 28 June 2024. Prior to the Hearing the respondents had helpfully lodged further particulars of claim (JB57-58). A Joint Bundle was also provided to the Tribunal.
3. The Tribunal heard evidence from the claimant. A small Bundle of Documents was lodged and referred to during the hearing.

Facts

4. The claimant is employed as a Scaffolder by the respondent company. He works offshore. As part of his employment he is required to wear PPE including overalls, gloves and a “hard” hat/safety helmet.
5. Working as a Scaffolder offshore is a hazardous and dangerous occupation requiring skill and concentration.
6. The claimant has worked for the respondent for approximately three years.
7. The claimant has a long history of being susceptible to various allergies.
8. In or about 1992 he was working as a car mechanic with Kwik Fit. His work involved changing tyres and car oil changes. Despite wearing gloves his hands would regularly come into direct contact with motor oil. He tried to combat the problem by wearing latex gloves under his work gloves. Despite taking this precaution he developed a sensitivity to these materials and Dermatitis particularly on his hands. This led to his entire skin becoming sensitive to non-natural fibres and to body sweat.
9. He found that he was prone to regular “flare-ups” of his Dermatitis condition when his skin came in contact with irritants. This would include dirt and sweat.

It would include sunlight or harsh weather. During a flare-up his skin on the most affected part that had become exposed to an irritant of some sort would become cracked, would bleed and/or weep. The claimant would become embarrassed as his condition often affected his face or hands which are visible to others.

10. The claimant treated these flare-ups himself. He does not recall taking medical advice.

11. Over a period of some years the claimant developed a rigorous regime to minimise flare-ups of his Dermatitis which can affect any part of his body exposed to irritants. Nevertheless, such flare ups occur periodically. He uses the following products daily:

- Sanex Dermosensitive shower gel and soap;
- Certraben moisturising cream following showering applied to his hands, face and ears;
- Loratadine antihistamine medicine;
- Hydrocortisone cream; and
- Germolene antiseptic cream.

12. The claimant takes antihistamine daily to try and prevent allergic reactions. He discovered that if his skin was not clean or if he became sweaty this would lead to an irritation of his skin particularly on areas where sweat or dirt collected. He could not wear the same clothes for two days in a row. On occasion he found that if he took public transport such as a train or a bus he would find that close contact with seating through his clothes would lead to a flare-up in his Dermatitis.

13. As part of his regular routine the claimant ensures that only clean cotton clothes are close to his skin. He wears cotton socks, briefs, T-shirts and other cotton clothes. He changes his clothes daily. He keeps his bedding and pillows clean and washes them regularly.

14. The claimant only takes lukewarm showers daily. He will only use soaps in showers once a day because of the impact such products have on his skin. He uses Sanex special soap for sensitive skin. After the shower he would apply Sanex skin care cream to his skin. If an area was red or inflamed he would apply a Hydrocortisone steroid cream. If an area of skin had broken out and become weepy or bleeding he would apply Germolene cream to the affected area.
15. The claimant's skin condition affects his day-to-day activities. Not only does he have to carry out the aforementioned skin care regime but in relation to his clothing, bedding and skin care he would have to actively assess situations where he might come in contact with potential irritants. To avoid them. He would wear rubber gloves when washing the dishes at home to prevent contact with detergents. He would ensure that oils did not come in contact with his skin. He would use battery operated garden machinery rather than petrol powered machinery which might result in contact with petrol or oil.
16. During intimate relations with his wife, the claimant would remain clothed in cotton clothes to prevent direct physical skin to skin contact. If direct physical contact occurred particularly if the claimant or his partner sweated this would lead to irritation of his skin at the site of contact.
17. Despite adhering to this daily routine of preventative measures he would be conscious of his skin itching throughout the day as he worked. The itching regularly affects his ability to concentrate.
18. At work the claimant had to wear a hard hat/helmet as part of the necessary PPE. For many years the claimant had difficulties using hard hats because the front insert or lining would come in contact with his forehead. Sweat would gather there and he would develop an unsightly rash across his forehead. This would become itchy and sore. He would be embarrassed by it.
19. The claimant attempted to mitigate the problems with safety hats by cleaning the part of the helmet lining that touched his forehead regularly and by

wearing a cotton bandana over his forehead. He discovered that an improved helmet had come on the market some years ago called a "Big Ben Hat" which allowed the lining to be removed and cleaned and which did not make contact his forehead in the same way as his previous hat. Following this discovery he insisted on wearing this type of hat. He found he could remove the lining and wash it before use.

20. When working offshore the claimant will ask for new pillows. If new pillows are not available he will wash his bedding before use. He will use the barrier cream supplied by his employers. He will change his gloves regularly and wash the overalls regularly.

21. The claimant's skin condition and reaction to irritants has remained stable and unchanged for many years.

22. The claimant obtained a letter from his G.P. (JB62) which stated:

"John Mitchell needs headwear with removal lining due to chronic dermatitis and having a sensitivity to the one provided....."

23. The claimant was seen by the respondent's Occupational Health provider "TAC Healthcare" in May 2024. A Report was prepared by them (JB59-60). It makes reference to a letter from the claimant's G.P.

Witnesses

24. I found the claimant to be an honest witness. He was credible, and generally reliable although he was unable to recall if he had ever consulted his G.P. in relation to his skin condition prior to contacting Dr. Massarani in 2024. He explained that he was embarrassed about his condition and preferred to try and deal with his symptoms himself which he had done with some success for many years.

Submissions

25. Both parties had lodged authorities in relation to the legal framework that applies. This generally was not in dispute.

5 26. Mr Clarke took the Tribunal though the factual position. In his view the claimant was entitled to rely on paragraph 5, schedule 1 of the Equality Act 2010 and it was for the Tribunal to discount the impact of the various medications that he took for his condition. He pointed out that the claimant's medical treatment, as he described it, is wide ranging. He referred to
10 paragraph 5(2) in particular and commented that "measures" includes both medical treatment and the use of a "prosthesis" or "other aid". He suggested that the various strategies that the claimant had adopted and the medications he took could be covered by this. He saw no reason why a medicine bought from a Chemist or even Supermarket ceased to be broadly "medical
15 treatment". In any event his position was that the other aid needed was the Big Ben Hat which the claimant needed to prevent a rash occurring on his forehead. Mr Clarke took me to the medical evidence provided and to the Occupational Health Report. His submission was that the claimant fell within the definition of section 6 having a condition that was more clearly than trivial.

20 27. Mr McCrone took the position that what the claimant did may be sensible but was not medical treatment. It was also insufficient to suggest that he had a disability. He made reference to the statutory guidance at paragraph B7 and to the various modifications the claimant made to his lifestyle which he
25 regarded as minor. He pointed out that the claimant had not seen fit to visit his G.P. or get referred to a Dermatologist in relation to his condition and this might be an indication of how serious the dermatitis actually is. I discussed with Mr McCrone a product regarded or advertised as having "medicinal use" should be discounted because it had not been prescribed by a G.P. Mr
30 McCrone's position was that the treatment was not supervised or prescribed by a G.P and that the section could not apply.

Discussion and Decision

28. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability contained in Section 6(1) of the Equality Act (the Act) which provides:

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

29. Schedule 1 of the Act contains supplementary provisions in relation to the determination of disability. Paragraph 2 is in these terms:

“2 (1) The effect of an impairment is long-term if- (a) it has lasted at least 12 months, (b) it is likely to last for at least 12 months, or 20 (c) it is likely to last for the rest of life of the person affected.”

30. Paragraph 5 headed Medical Treatment states:

“5 (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.”

31. It should be noted that the “Guidance on matters to be taken into account in determining questions relating to the definition of disability” (the Guidance) does not impose legal obligations, but the Tribunal must take it into account where relevant. The Guidance at paragraph A8 states:

“It is not necessary to consider how an impairment is caused... What is important to consider is the effect of an impairment, not its cause.”

32. The Guidance at paragraph B1 deals with the meaning of “substantial adverse effect” and provides:

5 *“The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.” Paragraphs B4 and B5 say: “An impairment might not have a*
10 *substantial adverse effect on a person’s ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effect on more than one activity, when taken together, could result in an overall substantial adverse effect. For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of day-to-day activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.”*

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33. Paragraph B1 should be read in conjunction with Section D of the Guidance 15, which considers what is meant by “normal day-to-day activities”. The paragraph states that it is not possible to provide an exhaustive list of day to-day activities but: ***“In general, day-to-day activities are things that people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.”***

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34. The Equality and Human Rights Commission: Code of Practice on Employment (2011) at Appendix 1, sets out further guidance on the meaning of disability. It states at paragraph 7 that: ***“There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause.”*** It continues: ***“Someone with impairment may be receiving medical or other treatment which alleviates or removes the effects (although 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. This does not apply if the substantial adverse effects are not likely to occur even if the treatment stops (that is, the impairment has been cured).”***

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35. In the case of ***Goodwin v Patent Office*** [1999] IRLR 4, the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are: (1) Does the person have a physical or mental impairment? (2) Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities? (3) Is that effect substantial? (4) Is that effect long-term?
36. The Act does not require a diagnosed condition as a prerequisite for a finding that someone is disabled or the lack of a diagnosis but a diagnosis usually also comes with an indication of the likely duration or course of the illness and the expected effects provides important information. In this case the claimant has symptoms or effects but the condition or conditions have not been diagnosed.
37. Parties also referred to the following paragraphs of the Guidance:
- “B7**
Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.”
- “B12**
The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, ‘likely’ should be interpreted as meaning ‘could well happen’. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (Sch1, Para 5(1)).”

“B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment

is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.”

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38. Mr McCrone placed some weight on the first part of paragraph B7 suggesting that the claimant could and did modify his behaviour (by adhering to the regimen he had adopted) to avoid any substantial effects of his condition and that this showed that he could not meet the definition of being disabled. I think that care needs to be taken as much depends on the extent to which someone has to modify their behaviour and it is important to read the section as a whole.

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39. I raised with parties how the definitions should be applied and whether the different treatments the claimant took could be regarded as “Medical Treatment” for the purposes of Paragraph 5 of Schedule 1. Mr Clarke suggested that the words “other aid” should not be interpreted strictly and this could take account of the specialised soaps and ointments used by the claimant. They were clearly not prescribed by a physician although they are no doubt advertised as in some was “medicated” or approved by health professionals. I agree that where possible the definitions given need to be looked at broadly but the difficulty I have is that “other aid” appears under the heading of medical treatment. In lay terms medical treatment is treatment that is given under the guidance of a health professional. If the soaps and ointment had been prescribed by a GP or a Chemist or some other health professional I would have no compunction in accepting that their effect, which is to prevent recurrences of the condition and make daily life more bearable should be discounted.
40. Nevertheless, the impact of the claimant taking these precautionary measures in itself has a substantial impact on day-to-day activities. He needs to take active steps every day to manage his conditions. He needs to avoid

exposure of his skin to numerous possible irritants. He needs to wear cotton clothes and becomes embarrassed if the rash becomes visible.

41. I would observe that the matter needs to be considered broadly. In relation to the precautionary steps the claimant takes one step in itself might be minor but the cumulative effect is that he has to follow this regimen daily devoting time and energy to it and to think ahead to avoid exposures. This does not appear to be in any way trivial or minor. In addition, he has to take care not to have skin contact with a wide range of materials including human skin. Even with these numerous steps his condition can affect exposed areas such as his face and ears which can develop itch rashes within hours of exposure. Considering the matter in the round I concluded that the claimant meets the definition of a disabled person under the act.

Employment Judge: J M Hendry

Date of Judgment: 26 March 2025

Date Sent to Parties: 26 March 2025