



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111140/2021

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Held in Edinburgh on 16 June 2022

Employment Judge A Jones

10 **Mr A Paterson**

**Claimant
In person**

Edinburgh Napier University

**Respondent
Represented by:
Mr B Nichol,
solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The claimant was a disabled person by reason of both the condition of asthma and autism at the material time.

The claimant's application to amend his claim of 19 November 2021 is granted.

Date listing letters will be issued to list the claim for a final hearing before an Employment Judge sitting with members in person in Edinburgh.

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REASONS

Introduction

30 1. The claimant lodged a claim of disability discrimination on 30 August 2021. The claimant said that he suffered from two conditions being asthma and autism both of which he said amounted to a disability,. The respondent resisted the claim and did not accept that the claimant was a disabled person for the purposes of section 6 Equality Act 2010 (EA). A preliminary hearing for the purposes of case management took place on 29 October 2021. In advance of that hearing, the claimant had indicated that in addition to his claim

being pled in terms of section 15, 26 and 27 of the EA (which was set out in his ET1), he wished to argue that the respondent's conduct also amounted to discrimination in terms of sections 13, 19 and 20 EA.

2. The claimant appeared in that hearing as he did before me, in person. The respondent was represented by Mr Nichol solicitor.
3. Orders were made at that hearing requiring the claimant to provide a medical report in support of his position that he was a disabled person, together with supporting medical records, to provide a disability impact statement and to set out further particulars of his claim.
4. The claimant provided the further particulars and formal notice of his application to amend his claim in an email of 19 November 2021. The respondent's response was that it objected to any amendment to his claim to include a claim in terms of section 13 or 19 EA.
5. The claimant subsequently provided two reports and a disability impact statement. A report from his GP dated 12 November 2021 stated 'I confirm that the above patient is diagnosed with asthma and he takes relvar ellipta 92mcg/22mcg inhaler every day and has a salbutamol inhaler for use as required, he also takes oral tablets called montelukast 10mg at night time for the asthma.'
6. A further report from Dr Mathias, an Associate Specialist in Psychiatry dated 21 October 2019, stated: 'I reviewed Allan today and was able to take a more detailed developmental history. Allan describes that he passed most developmental milestones (including talking) early, using complex phrases before starting nursery. He preferred to play alone and disliked imaginative play, feeling that he 'didn't see the point'. Allan recalls being more interested in how his toys worked than using them for their suggested purpose. Allan struggled when starting school and disliked mixing with the other children. At primary school he had some 'friends' but did not see them outside school, and he recollected not knowing how he was expected to behave in school until this was explained to him. In secondary school Allan struggled to make sense of social interaction and was unable to understand others' emotional

reactions. This led to him buying books on body language and studying this. He also 'taught' himself to make more eye contact. At home Allan's room was untidy but in a stereotypical way (as he knew where every way stored), he tended to become over-involved in hobbies and he described a longstanding
5 reliance on routine and predictability. Allan described some hypersensitivity to the temperature of food, and to light touch. I was not able to take a corroborative history but within the limits of this assessment I feel there is enough evidence to conclude that Allan is at the milder end of the autistic spectrum, with evidence of social difficulties, communication difference and a
10 strong reliance on predictability. This continues to cause him difficulties in the workplace and I have directed him to Number 6 for further support. I have not arranged to see Allan again."

7. The respondent sent an email to the claimant dated 23 February 2022 which stated 'We do not appear to have been sent the supporting medical records
15 referred to. Please can you send these to us at your earliest convenience and no later than by 2 February.'. The claimant responded in an email later that day by saying 'If this is not what you require or you believe it not to be in keeping with the judges orders, could you please specify further, the information you do require.?' The respondent's response in an email the
20 following day was 'If you are unsure about what information or documentation to produce and or compliance with the orders of the Tribunal we would encourage you to seek legal advice.'

Issues to determine

- 25 8. The hearing before me was to determine two issues:
- a. Was the claimant a disabled person for the purposes of section 6 EA at the material time either by reason of asthma and/or autism, and
 - b. Should the claimant's amendment application of 19 November 2021 be allowed.

Findings in fact

9. The claimant gave evidence under oath. He adopted his disability impact statement as evidence in chief. Mr Nichol was content with this approach. He was then cross examined. He was not cross examined on the content of the disability impact statement. A joint bundle of documents was produced which included the reports referred to above. The respondent helpfully provided a written skeleton argument in advance of the hearing.
10. Having heard the evidence of the claimant, whom I found to be both credible and reliable, and having considered the documentation (including the claimant's disability impact statement) and submissions, I found the following facts to have been established.
11. The claimant was diagnosed with asthma around 1988. He controls his asthma with an inhaler and additional medication set out in the medical report from his GP. He attends a clinic with an asthma nurse annually but only otherwise sees his GP when he feels his condition is difficult to control.
12. If the claimant ceased all asthma related medication he would become very short of breath and be unable to walk short distances or undertake any activity which required him to exert himself. The claimant suffered from asthma during his employment with the respondent and continues to do so.
13. The claimant was diagnosed as being on the autistic spectrum in October 2019 following a referral by his GP. He is currently taking Sterline medication for anxiety. In general he has adopted coping strategies to allow him to reduce the effects of the condition. The condition affects how he perceives the world and interacts with others.
14. The claimant has difficulties in social situations as he finds it difficult to make eye contact and is not readily able to interpret body language or subtleties in the use of language. An example he gave was when he was told by a line manager 'it would be nice if you....'. He did not understand this as an instruction from her, although he later found it to be so. The claimant has

sought to educate himself by reading books on body language but he continues to find the effort of concentrating on trying to understand what others are trying to communicate with him exhausting.

5 15. The claimant finds a change in routine very difficult to deal with and this makes him very anxious. He found lockdown very difficult because of the change in routine and became depressed, seeking treatment from his GP. The claimant moved house to be nearer work so that he could avoid the stress and anxiety caused by taking public transport.

10 16. The claimant has sensory issues and in particular hypersensitivity to light touch and smell. This causes him difficulty in getting dressed in the morning and it can take 20 minutes to put on socks and shoes. He wears the same clothing all the time made of the same materials in order to limit the impact of this on day. He generally eats the same food every day and follows the same routine.

15 **Disability status**

Submissions

20 17. The respondent's position was that neither condition amounted to a disability for the purposes of section 6. The respondent's challenge was directed at the claimant's failure to provide his medical records in addition to the reports provided by him. It was said that as a result there was insufficient evidence to substantiate the claimant's position and in particular nothing in the way of corroborative evidence. Reference was made to **Dunham v Ahsford Windows** [2005] IRLR 608, **J v DLA Piper UK LLP** UKEAT/263/09, **Rayner v Turning Point and others** UKEAT/397/10, **Royal Bank of Scotland plc v Morris** UKEAT/436/10, **Morgan v Staffordshire University** [2002] ICR 475, **Royal Borough of Greenwich v Syed** UKEAT/244/14, **The Guinness partnership v Szymoniak** UKEAT/0065/17 and **Primaz v Carl Room Restaurants t/a McDonalds' Restaurants Ltd** [2021] 7 WLUK 749 all of
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30 which I considered. It was also highlighted that the claimant had not, prior to raising this claim, been off work sick. The claimant was criticised for not agreeing to attend Occupational Health and that the claimant had not advised

the respond of any particular adverse impact either condition had on him prior to the issues relating to this claim. The respondent said that the claimant's evidence and reports were not sufficient to meet the requirement of proof to establish that the claimant was a disabled person.

- 5 18. The claimant said that he had been willing to attend occupational health although at the time he was advised against this by his union representative. He made reference to **Cruickshank v VAW Moorcast Ltd** [2002] ICR 729 and a decision of the Employment Tribunal in **Aire v HFTrust** Case number 1400983/2021 in his submissions. He said that while he accepted that there
10 was limited corroboration of his conditions or the impact of them, his evidence was that he had to plan his day around his condition of autism as otherwise he would have a mental shutdown and that both conditions were life-long and amounted to disabilities. He said that the work environment (in particular the requirement to wear a name badge) exacerbated his autism and caused him
15 panic attacks. He said that both asthma and autism are lifelong conditions with no cure for either and that he will have both conditions for his whole life.

Discussion and decision

19. In order for person to establish that they are disabled for the purposes of the
20 Equality Act 2010, they are required to prove that they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day to day activities. The burden of proof is on the claimant. The statutory guidance on matters to be taken into account when determining this question was considered by me in addition to the authorities
25 to which I was referred. It should also be noted that in terms of paragraph 5 of Schedule 1 to the EA, if 'measures' have been taken to treat or correct an impairment, the assessment of whether an impairment has a substantial adverse effect is to be considered if, but for those measures, it would have such an effect. This is generally referred to as 'deduced effects', that is how
30 a person would be if they did not have treatment for their condition.
20. The respondent was highly critical of the claimant for failing to provide his GP records. However, I have noted above the terms of the email exchange

between the parties in relation to this matter. It is disappointing that the respondent simply suggested the claimant take legal advice on the issue of the documents he should produce. The claimant is unrepresented. He has no experience of tribunal proceedings. His occupation is fitness instructor. Although he is clearly intelligent, bearing in mind parties' during to comply with the overriding objective, it would have more constructive for the respondent to specify to the claimant what it was that they thought he ought to do. In any event, I accepted the claimant's evidence that he did not attend his GP very often and that it was unlikely that the information in his GP records would add much to the reports provided and his own evidence.

21. The respondent also highlighted that the claimant had not been off sick prior to the raising of this claim. While that may well be a relevant factor in determining the issue of disability status, I noted that the claimant makes significant effort, which causes him both anxiety and exhaustion to take steps to live as normal a life as possible.

22. The respondent also indicated that the claimant had not raised the issue of his disabilities with the respondent until the time of the COVID pandemic. While that issue is relevant when considering the question of credibility or reliability of evidence, I have found the claimant to be both credible and reliable in his evidence and merely point out that it is not uncommon for those with disabilities to be reluctant to give their employer information in relation to their conditions until such times as the condition causes them difficulty in the workplace.

23. I accepted that both asthma and autism were impairments for the purposes of the EA. Asthma is a physical impairment in that it impacts on a person's ability to breathe and autism is a mental impairment which (although impacts individuals very differently) in general causes a person difficulties in communication with others and their perception of the world.

24. I then considered whether the conditions had substantial adverse effects on the claimant's ability to perform normal day to day activities.

25. In terms of the claimant's asthma, I had little hesitation in concluding that the deduced effects of his condition had a substantial adverse effect on his ability to perform normal day to day activities. The claimant said that when he had no inhaler, he was so incapacitated that he could not go to get a refill as he could not walk across a room without difficulty. I accepted that evidence and that the claimant had to persuade a friend to collect a refill for him even though the chemist was a five minute walk away.
26. I then considered whether the adverse effect was long term. I had no hesitation in doing so. The claimant has suffered from the condition since 1988, he continues to suffer from the condition and therefore he was a disabled person at the material time (being from September 2000 to September 2021).
27. I then turned to consider the condition of autism. While I accepted that the only evidence before me in relation to this issue was the claimant's evidence and the report produced by him from 2019, as indicated, I found the claimant to be a credible and reliable witness. He gave specific examples of how the condition of autism affects him and causes him anxiety and on occasion panic attacks. I accepted his evidence regarding coping strategies he has adopted such as looking at the top of a person's nose to make it less obvious that he cannot make eye contact. I accepted that he has difficulties communicating with people and understanding the subtleties of language used by others, both verbal and body language and that this causes him both anxiety and misunderstandings. I accepted that he avoids using public transport and that it can take him 20 minutes to put on socks in the morning. I accepted that change in routine causes him considerable anxiety and difficulties and that he avoids going to shops when they are busy.
28. I therefore concluded that the condition has an adverse effect on his ability to perform normal day to day activities and that the adverse effect was more than minor or trivial.
29. I then considered whether the adverse effect was long term. The claimant was diagnosed with the condition in 2019. His position was that he had sought

advice after being encouraged to do so by others and that his behaviour when he was young was consistent with having the condition. Although the claimant's position was that this was a life-long condition, I am not required to make a determination on that issue. The question for me to address is whether at the material time the condition amounted to a disability. I am satisfied that the claimant continues to have this condition and that the adverse effect of the condition on his ability to perform normal day to day activities is continuing at present. While the specialist to whom the claimant was referred diagnosed him as being at the milder end of the autistic spectrum, the question for me was whether the condition had a substantial and long term adverse impact on his ability to perform normal day to day activities at the material time. I was satisfied that it did. I therefore concluded that the claimant was also a disabled person by virtue of the condition of autism.

Amendment application

30. Turning to the issue of the amendment application, I noted that the respondent did not object to factual basis of the further particulars provided by the claimant. Although in written submissions Mr Nichol suggested that the amendment was more than a relabelling exercise, before me he accepted that amendment application was a relabelling exercise rather than an entirely new claim (in that no new factual matters were introduced). He also accepted that the respondent understood the case against it. Mr Nichol candidly acknowledged that there would be little prejudice to the respondent if the amendment application were allowed and that this would be limited to the additional cost involved in drafting submissions on the additional legal issues and the additional time taken to deliver such submissions. There would be no additional evidence.

31. I was mindful that the claimant is unrepresented. He had highlighted the proposed amendment in the agenda he completed in advance of the preliminary which took place on 29 October 2021. He submitted that

application on 19 November. His position was that as he was not legally qualified it had been an oversight on his part not to make reference to claims under sections 13 and 19 EA in his claim form.

5 32. I took into account the principles set out in **Selkent Bus Co Ltd v Moore** [1996] ICR 836 which should be considered by an employment tribunal when deciding whether to exercise its discretion to grant an application to amend. I also considered the issue of hardship to the parties as required in **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650.

10 33. Taking into account all these factors, I concluded that it was in the interests of justice to allow the amendment.

Further procedure

15 34. The respondent will have 21 days from the date of this judgment in which to make any amendment to its grounds of resistance to this claim to answer the amendment to the claimant's claim.

20 35. Date listing letters should be issued to list this case for a final hearing before a full Tribunal to take place in person in Edinburgh. In that regard the claimant should send any further documentation on which he wishes to rely at a final hearing to the respondent as soon as possible. The respondent should produce a joint bundle of documents and provide this to the claimant at least 28 days in advance of the commencement of the final hearing and ensure that sufficient copies are available for use by the Tribunal.

25 36. If either party is of the view that preliminary hearing for the purposes of case management would be of assistance in making preparations for the final hearing, then they should advise the Tribunal as soon as possible.

37. It is also noted that previously the respondent had indicated a willingness to enter into judicial mediation in order to resolve the claimant's claim but that the claimant was unwilling to do so. Should the claimant's position have altered in that respect he should advise the Tribunal accordingly and

consideration will be given to whether to refer the claim to the Vice-President for consideration as to whether to allocate judicial resource in this regard.

5 Employment Judge: Amanda Jones
Date of Judgment: 22 June 2022
Entered in register: 22 June 2022
and copied to parties