



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105887/2022

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Preliminary Hearing held by CVP (Cloud Video Platform) on 13 March 2023

Employment Judge R Mackay

10 **Mr C McArthur**

**Claimant
Represented by:
Ms L Simpson -
Solicitor**

Houlihan Pharmacy Ltd
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**Respondent
Represented by:
Mr Ridgeway -
Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The judgment of the Employment Tribunal is that the claimant was a disabled person, for the purposes of section 6(1) of the Equality Act 2010, at the relevant time.

REASONS

Introduction

25 1. This is a claim for unfair dismissal and discrimination arising from disability. The claimant's position is that he is a disabled person as defined in section 6 of the Equality Act 2010 by virtue of having both depression and chronic obstructive pulmonary disease (COPD). In its response to the claim, the respondent stated that it was unable to confirm disability status in the absence
30 of medical evidence. The claimant's full medical records were subsequently produced along with a report from the claimant's GP. Having received that information, the respondent continued to dispute disability status. The

question came before the tribunal at a preliminary hearing to determine the matter.

2. The tribunal heard from the claimant himself. On behalf of the respondent, evidence was provided by Mr Rodney Haugh, Operations Manager.
- 5 3. The tribunal found the claimant to be a wholly credible and reliable witness. The evidence he gave was consistent with his medical records and the views of his GP. He answered questions openly and clearly and did not seek to embellish his evidence.
4. The tribunal found the evidence of Mr Haugh to be credible and reliable. He
10 was not, however, directly involved with the claimant and was not in a position to counter the substance of the claimant's account.

Findings In Fact

5. The respondent is a pharmacy chain with a number of branches in the Glasgow area. The claimant was employed as a delivery driver based at the
15 respondent's Riddrie branch. His role involved delivering medication to customers of the pharmacy as well as related collection and delivery tasks.
6. His employment started on 15 November 2018. He was dismissed with effect from 22 July 2022.
7. The claimant was diagnosed with COPD in 2007. He was prescribed two
20 inhalers at that time, one a reliever and one a steroid treatment. Over time, his condition has deteriorated and his steroid inhaler treatment has been increased.
8. The main effect of the condition is breathlessness. It also makes the Claimant prone to chest infections.
- 25 9. In August 2022, he was diagnosed with a breathlessness score of Grade 3. This equates to someone who walks slower than most people on a level, stops

after a mile or so, or stops after 15 minutes walking at own pace. This score applied to the claimant taking account of the effect of the medication.

10. The tribunal accepted the claimant's GP's account that the COPD would have a substantial long term adverse effect on the claimant's ability to carry out normal day-to-day activities were there to be any more exertional than walking at own pace for more than 15 minutes.
11. The claimant takes his inhaler medication every day. The steroid treatment is taken once daily, the reliever inhaler a number of times each day.
12. Around March last year, the claimant went on holiday for four days and omitted to pack his steroid inhaler. He had the reliever inhaler. Over the course of the holiday, the claimant became very short of breath. He felt his chest restricted. He required to avoid exertion and take more regular breaks. On returning to Edinburgh Airport, he required to take breaks to catch his breath at the top of each flight of stairs on entry into the building.
13. In the past 12 months, the claimant has had more frequent chest infections. COPD renders the claimant vulnerable to more severe conditions. When there is an exacerbation of COPD, the claimant can become too breathless to attend work.
14. The claimant was first diagnosed as suffering from depression around 2016. He has been taking anti-depressants ever since then with one short break.
15. Around March 2017, the claimant stopped taking anti-depressant medication resulting in a significant worsening in his mood. He became very irritable. He was not able to concentrate. He had no interest in being with other people. He had consistent dark thoughts and suicidal ideation.
16. His GP resumed his anti-depressant medication at that time such that his mood improved.
17. With medication, the claimant's mood is more stable but remains low at times. There are days when he finds it difficult to motivate himself and has dark

thoughts. Reactions to things like work pressures can exacerbate his condition. This happened in May 2022. At that time, the claimant had racing thoughts, poor concentration, was tearful and experienced a deterioration in his relationship with his partner. His anti-depressant medication was increased at that time.

18. When it is at its worst, the claimant's depression can lead to him spending excessive time in bed and not attending to personal hygiene.

Relevant Law

Disability Status

19. Section 6(1) EqA 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.'

20. Schedule 1 of the EqA contains supplementary provisions in relation to the determination of disability. Paragraph 2 states:

'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

(c) it is likely to last for the rest of life of the person affected.'

21. Paragraph 5 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.'

22. The 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (the **Guidance**) does not itself impose legal obligations, but the Tribunal must take it into account where relevant
5 (Schedule one, Part two, paragraph 12 EqA).
23. 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.'
24. The Guidance at paragraph B1 deals with the meaning of '*substantial adverse effect*' and provides:
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'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.'
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25. Paragraphs B4 and B5 provide that:
*'An impairment might not have a 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
20 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
25 amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.'*
26. 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'.

27. Paragraph D2 states that it is not possible to provide an exhaustive list of day-to-day activities.

28. Paragraph D3 Provides that:

5 *'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.'*

10 29. D16 provides that normal day-to-day activities include activities that are required to maintain personal well-being. It provides that account should be taken of whether the effects of an impairment have an impact on whether the10 person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, or personal hygiene.

15 30. 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

20 *'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.'*

31. At paragraph 16 it states:

25 *'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).'*

32. In **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:
- 5 a. Does the person have a physical or mental impairment?
- b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
- c. Is that effect substantial?
- d. Is that effect long-term?
- 10 33. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability

Submissions

34. Ms Simpson invited the tribunal to find that the claimant was disabled both by virtue of his depression and his COPD. She referred to the GP report and the evidence contained within the medical records. She maintained that the conditions were long term and that the tribunal should have regard to paragraph 5 and assess whether the impairments would have the substantial adverse effect absent the measures being taken to treat or correct the conditions.
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- 20 35. In relation to COPD, she highlighted the progressive nature of the condition.
36. If not qualifying disabilities in their own right, the claimant's solicitor submitted that the combined effect was to achieve that status.
37. The "relevant time" for the purposes of the claim she specified as 2 February 2022 to 22 July 2022.
- 25 38. On behalf of the respondent, Mr Ridgeway accepted that the claimant had a diagnosis of the two conditions in question. He questioned, however, whether

the effect of either was substantial and submitted that the effect on day-to-day activities did not meet the statutory test. In relation to the COPD, he invited the tribunal to find that the effect on day-to-day activities was not sufficient as it related only to the claimant's ability to walk certain distances.

- 5 39. So far as the depression is concerned, he described the condition as more in the nature of the claimant's "character" than an illness. He sought to argue that the cause of the depression was relevant as it related to issues of work as opposed to stemming from another source.

Decision

- 10 40. The tribunal had no hesitation in finding that the claimant was a disabled person both by virtue of his depression and by virtue of his COPD. He has, respectively, a mental and a physical impairment both of which have lasted for several years. Both, even with medication, have an adverse effect on the claimant's ability to carry out normal day-to-day activities.

- 15 41. With medication, the effect on the claimant's ability to carry out normal day-to-day activities is reduced. Taking account of the treatments he is prescribed and takes for each condition, the tribunal had no hesitation in finding that without the medication, the claimant's conditions would be very substantially worse and would in those circumstances have a substantial adverse effect on day-to-day activities. In relation to COPD, this includes an inability to walk short distances without becoming breathless, and an inability to climb a flight of stairs without requiring to pause to regain breath. It was not clear to the tribunal whether the claimant's COPD was necessarily a condition which would become worse or whether his condition could remain stable with medication. As it stands, however, it already meets the statutory test.

- 25 42. In relation to his depression, even with medication, the claimant is clearly prone to severe symptoms including feelings of worthlessness, leading to an inability to concentrate, very poor motivation and an inability to engage in

normal communications. Without medication, these symptoms would be even more severe and more frequent.

43. The tribunal was satisfied that the deterioration in the claimant's depression from time to time was relevant for the purposes of assessing its severity
5 regardless of the cause of that deterioration.

44. In conclusion, therefore, the claimant was disabled both by virtue of depression and COPD at the relevant time, being 2 February 2022 to 22 July 2022.

10 **Employment Judge: R Mackay**
Date of Judgment: 11th April 2023
Entered in register: 11th April 2023
and copied to parties