



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4109680/21 (V)

Held on 16 & 17 November 2021

Employment Judge P O'Donnell

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Mr J Kirkbright

**Claimant
No Appearance
& No Representation**

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20 **Birchwood Highland Ltd**

**Respondent
Represented by
Ms Mills,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is the Claimant has not established that he is disabled as defined in s6 of the Equality Act 2010. The Tribunal does not, therefore, have jurisdiction to hear those claims which rely on the protected characteristic of disability (that is, the claims of discrimination arising from disability, indirect discrimination, breach of the duty to make reasonable adjustments and harassment) and those claims are hereby dismissed.

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REASONS

Introduction

1. The Claimant has brought complaints of unlawful discrimination under the Equality Act 2010 against the Respondent, all of which are resisted by the Respondent.

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2. In relation to the claims of discrimination arising from disability, indirect discrimination, breach of the duty to make reasonable adjustments and harassment, the Claimant relies on the protected characteristic of disability.

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3. The Respondent does not concede that the Claimant is “disabled” as defined in s6 of the 2010 Act and so this hearing was listed to determine this issue. If the Claimant does not meet the definition then the Tribunal would not have jurisdiction to hear the claims identified above which rely on this protected characteristic and so this issue is fundamental to the future progress of the claim.

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4. The Claimant also brings a claim for victimisation under s27 of the 2010 Act which does not depend on the protected characteristic of disability and it will proceed regardless of the finding on disability status.

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5. The hearing was conducted remotely by way of Cloud Video Platform (CVP).

Non-attendance of the Claimant & his representative

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6. Neither the Claimant nor his representative attended the hearing. This had been intimated to the Tribunal and the Respondent’s agent by email dated 2 November 2021 from the Claimant’s representative. This email was sent in response to contact from the CVP clerk assigned to the case seeking to arrange tests ahead of the hearing to ensure those attending were familiar with the CVP system.

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7. No reason is given in the email of 2 November for the non-attendance of the Claimant or his representative. In relation to the representative, there is nothing in the correspondence seen by the Tribunal from which any reason why he could not attend can be identified.

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8. In relation to the Claimant, there has been a concern raised on his behalf previously about difficulties he may have in giving evidence. This is based on what appears to be a misapprehension on his part that he would be required to give evidence about the cause of the conditions he relies on as a disability

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and that he may be challenged on this. There is considerable focus in the written submissions lodged on the Claimant's behalf for this hearing, his disability impact statement and other correspondence on the cause of his medical conditions.

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9. However, the caselaw is very clear that the Tribunal should be focussed on the effects, and not the cause, of any condition when assessing if it amounts to disability for the purposes of the 2010 Act. This was certainly the position adopted on behalf of the Respondent by Ms Mills who confirmed at the outset of the hearing that Respondent did not intend to lead evidence about the cause of the impairment and that it accepted that the cause asserted was true and genuine.

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10. After intimating that neither the Claimant nor his representative would attend the hearing, the Claimant's representative sent an email dated 10 November 2021 which attached various documents on which the Claimant relied as well as written submissions.

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11. The email also made an application for the hearing to effectively be converted to a hearing in chambers and for the issue of disability status to be dealt with on the papers. The Respondent objected to that course of action and, by email dated 10 November, the Tribunal refused the Claimant's application.

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12. By email dated 15 November 2021, the Claimant's representative lodged further written submissions.

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13. Although the email of 10 November from the Claimant's representative mentions that the Claimant's attendance at a hearing would be against medical advice, no application for postponement on this, or any other, ground was made.

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14. The Tribunal did consider whether the hearing should proceed in the complete absence of anyone from the Claimant's side. It did so before hearing any evidence (or reading any documents relied on as evidence) and before hearing (or reading) any submissions on the substantive issue to be determined.

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15. The Tribunal noted that this was not a case where the Claimant and his representative had not attended “out of the blue” where the interests of justice might require the Tribunal to investigate the reasons for that and allow a party the opportunity to present their case. Rather, the non-attendance of the Claimant and his representative was a deliberate decision on their part made well in advance of the hearing.
16. In this regard, the Tribunal noted that the Claimant was represented. Although his representative is not a legally qualified agent such as a solicitor, neither was he a friend or family member assisting the Claimant. Rather, he was from an organisation which describes itself in its name as a disability rights organisation. Therefore, whilst not placing expectations on the representative which would be placed on a solicitor or other legally qualified representative, the Tribunal does consider that the Claimant was represented by someone who it could be expected had some understanding of the legal issues and process.
17. The issue of disability status was an important one which had to be determined in order for the claim to be advanced. It was in the interests of all the parties for any delay to be avoided particularly where there was no indication that the non-attendance was due to a temporary impediment and that the Claimant (and his representative) would be able to attend in the future if the hearing was postponed.
18. In these circumstances, the Tribunal considered that it was in keeping with the overruling objective and the interests of justice for the hearing to proceed.

Rule 50 application

19. At the end of both sets of written submissions lodged on behalf of the Claimant, there was an application under Rule 50 for the hearing to be conducted in private. No application in these terms had been made in correspondence in advance of the hearing and the emails of 10 & 15 November 2021 lodging these submissions did not draw attention to the Rule 50 application.

20. The Tribunal had not read the submissions in advance of the hearing. In Scottish procedure, there are normally no opening submissions, remarks or arguments from parties and the Tribunal would proceed to hear evidence from witnesses and then hear submissions. In this case, the Tribunal followed that same process and so only read the written submissions after hearing from the Respondent's witness and before hearing submissions on behalf of the Respondent.
21. The Tribunal, therefore, only became aware of the application towards the end of the hearing. By that point, much of the hearing had been conducted in "public" although, in reality, the only people present were the Judge, the Respondent's agent and, for the period of time in which she gave evidence, the Respondent's witness.
22. Given those circumstances, the Tribunal made no determination of the application as it was, effectively, academic by the time the Tribunal became aware of it.
23. The Claimant and his representative would be well served to bear in mind that, if they do intend to make similar applications in the future, they should do so in advance of the hearing and in such a manner that it would be clear to the Tribunal and the Respondent that such an application is being made rather than including it at the end of a document which would not normally be read until the end of the hearing.

Evidence

24. Given the absence of the Claimant, there was no oral evidence given by him. Rather he relied on the disability impact statement lodged during the case management process and the medical records lodged in the bundle.
25. The difficulties that could be faced by the Claimant in giving evidence had been raised during the case management process and he had sought accommodations from the Tribunal for him to give evidence-in-chief by way of witness statement.

26. These issues did arise at the preliminary hearing held on 21 September 2021 at which the present hearing had been listed. At the September hearing, EJ Hendry had suggested the use of a witness statement and the Respondent did not object to that.
27. It is worth noting that, at that hearing, there was no suggestion that the Claimant would not attend the present hearing and so there would have been an expectation that, even if evidence-in-chief was given by way of a statement, the Claimant would be present to speak to the documents, be cross-examined and to be asked questions by the Tribunal. For that reason, there was no mention of any steps, other than the use of a witness statement, which could have been used to address any issues with the Claimant giving evidence.
28. In the event, the Claimant did not produce a witness statement and the only information produced directly from him was the disability impact statement. The Tribunal notes that at paragraph 30 of the submissions lodged on 10 November it is said that the Claimant did not consider that he could add anything to the disability impact statement and that doing so would involve *"pointless duplication"* and subject him to reliving past trauma.
29. The Claimant's absence and his reliance on the disability impact statement does cause him a number of evidential problems.
30. First, despite the assertion in the submissions that nothing could be added to the disability impact statement, the Tribunal does consider that there are issues with the sufficiency of the evidence provided by the disability impact statement.
31. It describes effects on the Claimant in very broad terms and does not give any real detail of these effects. For example, at paragraph 9, it is said that the issues with the Claimant's health have a *"substantial impact on my ability to negotiate all situations involving other people"* but gives no detail of this. This is a very broad assertion which would suggest that the Claimant has difficulties in every social interaction from making a simple purchase in a shop all the way to dealing with complicated relationships. Similarly, there is an assertion at

paragraph 8 that the Claimant struggles in his role as a parent but, again, gives no detail of this.

- 5 32. The Tribunal is not suggesting that the Claimant does not have difficulties with these and the other matters described in his disability impact statement. Rather, the Tribunal has not been given sufficient evidence about these matters; the Tribunal has to make findings of fact from which it can determine whether the Claimant meets the definition of disabled in the 2010 Act. If there is not sufficient evidence then the Tribunal cannot make findings of fact on
10 which to base its decision.
- 15 33. If the Claimant had attended the hearing then the Tribunal could have asked him to provide further details of these matters. However, he has not done so and the Tribunal considers that the broad assertions in the disability impact statement do not provide sufficient evidence of how the Claimant's day-to-day living activities are affected by his anxiety and depression.
- 20 34. The statement is also completely silent on a number of factual matters which are potentially important to the Tribunal's determination. For example, it does not describe any measures taken by the Claimant to avoid the effects of his conditions (for example, medication, therapy or coping techniques) and what the effects would be if he did not take these steps. The only mention of anything which could, taking the statement at its highest, amount to a measure taken to avoid the effects of his impairment is a reference to avoiding contact
25 with other people.
- 30 35. Similarly, to the extent that the effects of his condition may vary or may cease for periods of time, there was no evidence about this or about the likelihood of any effects recurring.
36. Again, if the Claimant had attended the hearing then the Tribunal could have explored these issues with him. As it is, however, the Tribunal simply has no evidence from which it can make findings of fact in relation to these issues.

37. The second evidential problem which arises for the Claimant is the question of what weight the Tribunal should place on the disability impact statement especially where there was live evidence led before the Tribunal which contradicts certain assertions in the impact statement.

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38. Where the Tribunal is faced with such circumstances then it would, in most cases, place little weight on a witness statement where there has been no opportunity for the evidence in that statement to be tested by way of cross-examination.

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39. In particular, it may have been the case that the Claimant could have given evidence which rebutted what was said by the Respondent's witness but, in his absence, no such evidence was led and the Tribunal cannot speculate as to what the Claimant might have said.

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40. The Tribunal is conscious of the Claimant's difficulties in giving evidence and there had been discussion about how that could be addressed. However, until the email of 2 November 2021, there was no suggestion that the Claimant would not attend at all and had this been raised then there would have been an opportunity to discuss the problems that this would raise and how to address these.

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41. Even after the Claimant made the decision not to attend the hearing, the only application made by him was to deal with the matters on paper which, had it been granted, would have left the case in the same situation.

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42. There are also evidential difficulties in the reliance placed upon the medical records and the various letters from the Claimant's GP and the Respondent's occupational health adviser in the absence of any witnesses (from either side) to speak to these documents.

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43. Ms Mills confirmed that the Respondent accepted that any contemporaneous documents said what they bore to say and so the Tribunal considered that it could make findings of fact from the contents of those documents. However, there is then a question of what findings could be made.

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44. The three letters from the Claimant's GP which appear in the bundle confirm that he has had anxiety and depression for a number of years. However, none of the letters set out what effects these conditions have on the Claimant's day-to-day living activities nor do they address matters such as the likelihood of past effects recurring (or even what the past effects were) or what measures the Claimant took to avoid any adverse effects and what the effects would be if he did not take those steps.
45. Other than confirming the medical conditions which the Claimant has, these letters from the Claimant's GP do not provide any evidence from which the Tribunal can make findings of fact about whether those conditions have a long-term and substantial adverse effect on the Claimant's day-to-day living activities.
46. The same applies to the letters from the Respondent's occupational health adviser, Dr Hinov. The letter dated 27 January 2021 addresses the issues of the Claimant's fitness to work and his reasons for not wearing a face mask. It identifies the medical condition which the Claimant has but, other than the effect this has on wearing a face mask, the letter is completely silent on any effects this condition has on the Claimant's day-to-day living activities.
47. The letter from Dr Hinov dated 19 August 2021 does address the question of the effects on the Claimant's day-to-day activities and expresses the view that his condition does not have a substantial impact on these. However, Dr Hinov simply makes this bare assertion without setting out the factual basis on which he has formed this opinion. Although he says that he reached this conclusion after his consultation with the Claimant, he provides no further details of the facts on which he has based his conclusion. He does not, for example, set out what activities he discussed with the Claimant or what the Claimant described in terms of the effects of his conditions.
48. The Tribunal cannot, therefore, make any findings of fact based on this letter. It also places no weight on the view expressed by Dr Hinov; he is entitled to

his opinion but the question of whether the Claimant is disabled is, ultimately, one for the Tribunal to answer based on the factual evidence available to it.

- 5 49. Finally, in terms of documents, there are the Claimant's medical notes produced in the bundle. The difficulty for the Claimant is that these notes do not provide evidence of any effects on the Claimant's day-to-day activities at the relevant date (see below) and are completely silent about any effects in the later entries.
- 10 50. The records do describe the Claimant's sleep being disturbed in 2015 and 2016 but with little detail of what this entailed nor whether this was a manifestation of his anxiety or depression. There is no mention of such an issue in the later records and no evidence as to whether this was likely to recur.
- 15 51. The medical notes do record various medications prescribed to the Claimant over the years but, with no-one to speak to the document, the Tribunal has no evidence of why these were prescribed (the notes record the Claimant attending his GP for issues other than anxiety and depression so it cannot be assumed that all the medication prescribed related to depression and anxiety) and what effects the relevant conditions would have on the Claimant's activities in the absence of this medication.
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- 25 52. The only witness from whom the Tribunal heard evidence was Annabel Mowat who was the manager of the Respondent's recovery centre at which the Claimant worked.
- 30 53. It is worth noting that, although she is a registered nurse, Ms Mowat was not called as an expert witness but as a witness of fact. The Tribunal did not, therefore, permit any questions that were intended to elicit Ms Mowat's professional opinion on medical matters.
- 35 54. Ms Mowat was called by the Respondent to dispute certain of the assertions in the Claimant's disability impact statement. In particular, the Claimant had asserted that he had struggled to interact with other people, that he was prone to panic attacks which were triggered by such interactions especially if he hears

people shouting, that normal social interaction was not possible for him, that he did not trust others especially men and that he avoided contact with other people to avoid the risk of abnormal emotional reactions.

5 55. In contrast, Ms Mowat's evidence was that the Claimant had worked at the Respondent's recovery centre which supports service users with what she described as "*significant and enduring*" mental health issue. These individuals could display challenging and unpredictable behaviours. The service users were also mainly men. It was her evidence that the Claimant had interacted
10 with his colleagues and service users with no difficulty observed by her. Indeed, she described the Claimant as "*impressive*" in his practice at work. She was unaware of any panic attacks suffered by the Claimant during the periods when he worked for the Respondent.

15 56. Given the absence of the Claimant and his representative, the evidence of Ms Mowat was unchallenged. It may have been the case that the Claimant could have provided evidence that explained the contradiction between what is described in his disability impact statement and the evidence of Ms Mowat as to how he interacted with people at work but he did not attend to provide such
20 evidence and the Tribunal is not prepared to speculate on this or make findings based on speculation as to what the Claimant might have said in evidence.

57. The Tribunal has no reason to question the reliability and credibility of the evidence given by Ms Mowat. The question for the Tribunal is how to address
25 the dispute between her evidence and what is said in the Claimant's disability impact statement taking into account the reasons why the Claimant chose to give his evidence-in-chief by way of that statement.

58. The difficulty for the Claimant is that the disability impact statement describes
30 him as someone who is incapable of any social interaction at all. If the Claimant was entirely incapable of interacting with other people then the Tribunal would have expected to see something to that effect in his medical records or in the letters from his GP and Dr Hinov but there is nothing that comes close to suggesting that he is incapable of any social interaction. It

also stands at odds with the fact that he was able to secure employment in an environment where he would be interacting with service users who could display unpredictable and challenging behaviour.

5 59. In these circumstances, the Tribunal has not placed great reliance on what is said in the disability impact statement to the extent that it purports to describe every interaction the Claimant has with other people. As stated above, the statement makes broad assertions with no detail and is silent on a number of potentially relevant issues. The assertions made are not supported by any
10 other evidence and are directly contradicted by the evidence of Ms Mowat in relation to how the Claimant interacts with others when at work.

60. In relation to the evidence of Ms Mowat, the Tribunal prefers this to the extent to which it describes the Claimant's interactions with other people in the
15 workplace but only to that extent; the Tribunal is conscious that people can behave differently when at work as compared to other circumstances. Ms Mowat did not give evidence about how the Claimant interacted with people in other circumstances and so the Tribunal does not rely on her evidence to make findings of fact about such interactions.

20 61. However, this does not mean that the Tribunal simply accepts the Claimant's disability impact statement as providing credible and reliable evidence in relation to his interactions with people outside of the workplace. As set out above, there are issues with the sufficiency of the evidence given in the
25 statement on a number of issues and the fact that the assertions made in are not supported by the medical records relied on by the Claimant. The Tribunal will address the impact of this in its decision below.

Findings in fact

30 62. The Tribunal made the following relevant findings in fact.

63. The Claimant was employed by the Respondent as a health and social care practitioner from 7 January 2020 to 15 March 2021 when he was dismissed.

The disciplinary process which led to the Claimant's dismissal ended on 1 April 2021 when the appeal decision was communicated to the Claimant.

- 5 64. The Respondent is an organisation which supports people who experience mental health issues. This support is provided both in the community and in a recovery centre.
- 10 65. The Claimant worked at the Respondent's recovery centre. This provides accommodation and support for people with enduring and significant mental health issues. Residents can have unpredictable and challenging behaviour. They are a mix of men and women with men tending to predominate.
- 15 66. The Claimant first worked at the recovery centre on a student placement during 2019. There were no apparent issues with his interaction with the staff and service users. The Respondent was impressed with how the Claimant had worked whilst on a placement to the extent that when he applied for the post of relief support worker in May 2019 he was appointed. The Claimant was not able to take up shifts for personal reasons. He subsequently applied for a permanent role in December 2019 and was appointed with effect from 7
20 January 2020.
- 25 67. There were no issues with the Claimant's interactions with staff and service users during his time with the Respondents and his performance at work was well regarded. The duties of his role involved assisting service users with daily activities such as housework, shopping, making and keeping appointments with their doctor, the bank or other organisations. This required the Claimant to interact with service users.
- 30 68. There was no record of the Claimant reporting having a panic attack at work and Ms Mowat did not observe this happening during his employment nor was anything of this nature reported to her by other staff.
- 35 69. The Claimant has had a long standing diagnosis of anxiety and depression which dates back to 1997. He has also had alcohol addiction/dependency for a similar period although he has been sober since late 2017.

70. The medical notes from the Claimant's GP were produced in the bundle and the Tribunal makes the following findings of fact from those notes:-

- 5 a. In 2017-2020 the Claimant did not visit his GP for any reasons which, on the face of what the GP describes, relate to his depression and anxiety. He did visit for a variety of other reasons unrelated to these conditions.
- 10 b. From the start of the records in 2013 up to March 2018, the Claimant was in receipt of repeat prescriptions for trazodone, propranolol and fluoxetine. It is not said in the notes why these were prescribed. There were other medications prescribed for short periods during this period such as co-codomal (a well-known painkiller) and naproxen.
- 15 c. In 2015 and 2016, the Claimant attended his GP on several occasions at which he describes disturbed sleep patterns including nightmares and insomnia. At a consultation on 29 March 2019, the Claimant describes himself as sleeping better and the issue of disturbed sleep patterns is not mentioned in subsequent consultations.

20 Claimant's submissions

71. Much of the two sets of written submissions lodged on behalf of the Claimant was focussed on the procedural history of the case, criticisms of the Respondent's approach to the issue of disability status and the matter which was the cause of the Claimant's medical conditions. For the sake of brevity, the Tribunal does not intend to set out the submissions made in relation to these matters as they are not relevant to the issue for determination at this hearing.

30 72. In relation to the issue of disability status, Mr Dean made submissions regarding the opinion asserted by Dr Hinov and the fact that his discussions with the Claimant were not concerned with the effects of the Claimant's condition on his day-to-day activities. On the other hand, it was submitted that

the Claimant's GP had a much more extensive knowledge of the effects of the Claimant's medical conditions.

5 73. Reference was made to the definition of disability in s6 of the 2010 Act and to s212 of the Act.

74. The submissions also make reference to the contents of the Claimant's disability impact statement in terms of the effects on the Claimant.

10 75. Comments were made about the fact that Ms Mowat was being called to give evidence and it was submitted that no employee would ever be found to be disabled if this was being judged by a manager.

15 76. The submissions state that the Claimant was managing the effects of his condition when he was working for the Respondent. However, the Tribunal notes that there is no description of what measures the Claimant was taking to manage his condition nor is there any reference to anything in the documents bundle which evidences such measures.

20 77. It was submitted that the Claimant suffering from mental illness cannot be reasonably said to have only a minor or trivial effect on his day-to-day activities and this is clear from the disability impact statement.

Respondent's submissions

25 78. Ms Mills opened her submissions by making reference to s6 and schedule 1 of the 2010 Act as well as paragraph 8A of the statutory guidance.

30 79. It was submitted that it is not necessary for the Tribunal to consider the cause of any impairment but, rather, its effect. In this case, there has been a lot of emphasis by the Claimant as to why he has an impairment but that the focus should be on effect and there is a lack of evidence about this. It was said that the burden of proof was on the Claimant.

35 80. The question of whether the Claimant is disabled has to be assessed at as the relevant time (*McDougall*, below) which is the date of the alleged

discrimination. This is important because the correspondence from the Claimant's GP post-dates the alleged discrimination. In this case, the Claimant alleges discrimination over a period of time from 8 January 2021 (when the Claimant was first asked to wear a mask) up to 1 April 2021 (when the Claimant was dismissed) and it was submitted that this period was the relevant time for assessing whether the Claimant was disabled.

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81. In terms of the impairment relied on by the Claimant, the Respondent understands, from paragraph 23 of the ET1, that this is anxiety. However, it is noted that the Claimant also refers to depression and alcoholism in his pleadings and submissions. It was submitted that the Tribunal should make findings as to what symptoms relate to each condition as it is not clear from the Claimant's evidence that all of the symptoms described relate to anxiety.

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82. There needs to be clear, reliable and credible evidence on these issues but the Claimant has failed to lead this.

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83. In relation to the Claimant's disability impact statement, Ms Mills made the following submissions:-

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a. It was not credible and reliable with discrepancies between it and the evidence of Ms Mowat.

b. It was not clear from the Claimant's submissions as to what day-to-day activities were affected but that this was clearer in the statement.

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c. Ms Mowat's evidence contradicted the statement with the description of the Claimant in the statement being unrecognisable to her.

d. Ms Mowat found it surprising that the Claimant described having panic attacks given the environment in which he worked.

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e. None of the matters raised in the statement had been reported by the Claimant to the relevant regulatory body.

84. It was accepted that the requirement that any adverse effect be more than minor or trivial is a low bar but there still needs to be some evidence.

85. There was a submission that the Claimant and his representative are prone to exaggeration with reference to the correspondence sent by the Claimant in response to the request he wear a face mask in the workplace as well as paragraph 23 of the submissions lodged on 10 November.

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86. Reference was made to the case of *London Luton Airport Operations Ltd v Levick* UKEAT/0270/18 for the proposition that it is not sufficient for a Claimant to simply put a document into a bundle and that they require to draw attention to the evidence on which they rely.

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87. Ms Mills submitted that the GP and Occupational Health records did not record the substantial effect on the Claimant's day-to-day activities; there was a focus on historical issues and there was no evidence of the effects as at the relevant date. There can be a range of effects from a particular condition and different
15 people can be affected differently; the Tribunal should not make assumptions how the Claimant was affected without evidence.

88. Ms Mills went on to highlight the various correspondence from the GP and OH doctor, pointing out that none of these gave details as to adverse effects.

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89. In relation to the question of the impairment ceasing to have effect then it was submitted that the question was whether these were likely to recur in terms of Paragraph 2(2) of Schedule 1 of the 2010 Act. It was submitted that the Claimant's case was not pled in these terms nor did the submissions address
25 this. In any event, it was submitted that there was no evidence of substantial adverse effect at any time which it could then be said was likely to recur.

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90. Ms Mills did note that the medical records did record the Claimant having anxiety at certain points in his life when there were adverse circumstances and this was a reaction to those.

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91. It was submitted that it was not clear if the Claimant relied on his alcohol dependency as a disability given that it is a condition which is excluded from the definition of disability. Further, there was no evidence as to whether the anxiety arose from the alcohol dependency or vice versa.

92. In relation to the long term element, it was submitted that there was nothing to suggest that any effects are long term; there was no formal prognosis and the only record of the Claimant having anxiety has been a reaction to adverse circumstances.

Relevant Law

93. Disability is one of the protected characteristics covered by the Equality Act 2010 and s6 of the Act defines disability as a physical or mental impairment which has long-term, substantial adverse effects on a person's day-to-day living activities.

94. Schedule 1 of the 2010 Act sets out further provisions in relation to the definition of "disability":-

"Paragraph 2

(1) *The effect of an impairment is long-term if—*

- (a) *it has lasted for 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 the life of the person affected.*

(2) *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 that effect is likely to recur.*

(3) *For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.*

(4) *Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.*

Paragraph 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.*

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

95. In *Goodwin v Patent Office* 1999 ICR 302, the Employment Appeal Tribunal gave guidance as to how the Tribunal should approach the issue of disability by addressing the following questions:-

- 5 a. did the claimant have a mental and/or physical impairment? (the 'impairment condition')
- b. did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition')
- c. was the adverse condition substantial? (the 'substantial condition'),
- 10 and
- d. was the adverse condition long term? (the 'long-term condition').

96. However, in *J v DLA Piper UK LLP* 2010 ICR 1052, it was said that the Tribunal did not have to rigidly adhere to answering these questions consecutively

15 although it is good practice for the Tribunal to set out its findings on these issues separately. In particular, if the issue of impairment is in dispute then it may assist for the Tribunal to set out its findings on the long term, substantial and adverse effect conditions first then address the issue of impairment in light of its findings.

20 97. The term "impairment" is to be given its ordinary and natural meaning and has broad application (*McNicol v Balfour Beatty Rail Maintenance Ltd* 2002 ICR 1498).

25 98. In considering whether there is an impairment, it is the effect and not the cause of any impairment which is of importance to the Tribunal's determination of whether a claimant is disabled (*Walker v Sita Information Networking Computing Ltd* UKEAT/0097/12).

30 99. The Government Guidance on the definition of disability addresses the issue of what can be considered "normal, day-to-day" activities at D2-7.

100. Section 212(2) of the 2010 Act states that the word "substantial" means more than minor or trivial.

101. The Government Guidance on the definition of disability deals with the issue of disabilities with recurring effects at paragraph C9:-

5 *“Likelihood of recurrence should be considered taking all the circumstances of the case into account. This should include what the person could reasonably be expected to do to prevent the recurrence. For example, the person might reasonably be expected to take action which prevents the impairment from having such effects (e.g. avoiding substances to which he or she is allergic). This may be unreasonably difficult with some substances.”*

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102. The word “likely” appears in a number of contexts in the provisions relating to the definition of disability. The House of Lords in *SCA Packaging Ltd v Boyle* [2009] IRLR 746 held that this should be interpreted as meaning “could well happen”.

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103. The Tribunal must assess the issues relevant to disability status (for example, whether there are substantial adverse effects, whether the effects are long-term, the likelihood of recurrence) as at the date of the alleged discrimination (*McDougall v Richmond Adult Community College* [2008] IRLR 227).

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104. Regulation 3 of the Equality Act 2010 (Disability) Regulations 2010 excludes certain conditions from amounting to an impairment for the purposes of the definition of disability and one of those conditions is an addiction to alcohol.

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105. However, where an impairment is caused by an excluded condition then this does not mean that such an impairment is itself excluded. For example, if a claimant has liver disease as a result of an addiction to alcohol then the liver disease is capable of being an impairment even though the underlying cause is excluded (*Walker*, above).

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Decision

106. The first question for the Tribunal is the relevant date for assessing whether the Claimant meets the definition of disabled. The Tribunal agrees with the submissions from the Respondent that this is the date of the act of discrimination which, in this case, covers a period from 8 January 2021 (when the Claimant was first required to wear a face mask at work) to 1 April 2021
35 (when the appeal decision was communicated to the Claimant bringing an end

to the disciplinary process). This is the period over which the Claimant alleges he was discriminated against and so this is the period during which the Tribunal must be satisfied that the Claimant meets the definition of disabled.

5 107. The next question for the Tribunal is whether the Claimant has a physical or mental impairment. The letters from the Claimant's GP confirm that he has depression and anxiety which has not been challenged by the Respondent and the Tribunal accepts that the Claimant has these conditions which amount to impairments for the purposes of s6 of the 2010 Act.

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108. There was a submission made on behalf of the Respondent that the Tribunal should make findings about which effects described by the Claimant relate to which condition. The Tribunal rejects this submission for a number of reasons.

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109. First, although the Claimant focusses on his anxiety more than his depression, the Tribunal considers that, on a fair reading of the ET1 and other documents which provide particularisation of the claim, the Claimant relies on both of these conditions in asserting that he is disabled for the purposes of the Equality Act 2010.

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110. Second, such an exercise would be somewhat artificial. It is clear from the Claimant's disability impact statement and his medical records that no distinction has been drawn between the effects of these conditions. These are conditions which can potentially have overlapping effects which, in the absence of clear evidence on which to make relevant findings in fact, would be impossible for the Tribunal to distinguish.

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111. Third, and most importantly, an attempt by the Tribunal to draw a distinction between the effects of these two conditions would lead to the Tribunal making the error of focussing on the cause rather than the effects.

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112. The error would arise if the Tribunal also sought to distinguish the effects of these conditions from those of the Claimant's alcohol addiction. Although that latter condition is excluded from being an impairment for the purposes of s6,

the Tribunal would be falling into the error of focussing on cause rather than effects if it sought to identify effects caused or exacerbated by the Claimant's alcohol addiction separately from effects caused by anxiety and/or depression.

5 113. The Claimant has also fallen into the same error in focussing on the cause of his conditions. For example, at paragraph 19 of his ET1 paper apart, he makes reference to the cause of his conditions being something which is well known to cause severe and lasting harm and that its impact could not reasonably be considered to be minor or trivial. This conflates the cause of
10 the impairment with the impairment itself and its effects.

114. In these circumstances, the Tribunal finds that the Claimant has the impairments of anxiety and depression.

15 115. The Tribunal now turns to what is the central question for this hearing, that is, whether those impairments have a long-term and substantial adverse effect on the Claimant's day-to-day living activities.

20 116. In answering this question, the Tribunal bears in mind that any effects need only be more than minor or trivial and that this is a relatively low bar for the Claimant to get over. However, the Tribunal needs some evidence from which it can conclude the Claimant has met the definition and it is at this point that the absence of the Claimant at the hearing gives rise to the evidential difficulties described above.

25 117. In this respect, it is important to remember that the burden of proof is on the Claimant in relation to establishing that he is disabled for the purposes of the Equality Act. It is for the Claimant to produce the relevant evidence from which the Tribunal can conclude that he meets the definition of "disabled".

30 118. The only evidence produced by the Claimant has been his disability impact statement and his medical records (including the letters from his GP and the Respondent's Occupational health advisers). The Tribunal can only proceed to reach its conclusions on the basis of that evidence.

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119. As set out above, none of the letters from the Claimant's GP or the Respondent's Occupational Health adviser provide any evidence of the effects of the Claimant's impairments on his day-to-day living activities and, for the most part, neither do the medical notes relied on by the Claimant.

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120. The medical notes do record issues in the past (for example, sleep disturbance) but these are not the same as the effects relied by the Claimant in his disability impact statement which is only sets out effects relating to social interactions. In any event, none of the issues noted in the medical records are said to have an effect at the relevant period in January to April 2021. In such circumstances, the question of whether these are likely to recur (so as to be deemed long-term under Paragraph 2(2) of Schedule 1 of the 2010 Act) arises and the Tribunal will address this further below.

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121. The only evidence presented by the Claimant that gives any description of the effects of his conditions is his disability impact statement. The Tribunal has already noted above the issues with the sufficiency of the evidence provided by this document in relation to a number of matters relevant to the question of disability status.

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122. The Tribunal has also addressed the contradiction between what is asserted in the statement and the evidence of Ms Mowat. However, there is also a contradiction between what is said in the statement and other evidence in the medical notes; the statement asserts that the Claimant cannot engage in normal social interactions whereas the medical notes record a number of visits by the Claimant to his GP at which he was accompanied by his partner or a friend. This suggests that the Claimant can engage in the sort of social interactions necessary to form such relationships and stands at odds with what is being suggested in the statement.

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123. The Tribunal does bear in mind that the statement, as well as using language which describes absolutes in terms of the Claimant's ability to interact with others (for example, "cannot"), does describe the Claimant as "struggling" with social interactions which is something less and does allow for the possibility

that he can interact with others in some circumstances or can only do so with difficulty. The Tribunal has given the Claimant the benefit of the doubt in this regard but, even then, there is no evidence of how the Claimant struggles with social interactions from which the Tribunal can make findings of fact on which to base its decision.

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124. In any event, the problem remains that the statement consists of very broad assertions from which the Tribunal has found it impossible to make findings of fact about the effects of the Claimant's impairments, particularly where those
10 assertions are not wholly consistent with the other evidence in this case and there has been no evidence led by the Claimant to explain those discrepancies.

125. The same applies to the "long-term" element of the definition of disability. Whilst it is quite clear that the conditions which the Tribunal has found to be
15 impairments have existed for many years, the question for the Tribunal is not how long a claimant has been diagnosed with a particular medical condition but how long that any such condition has had substantial adverse effects on the claimant's day-to-day living activities.

20 126. To the extent that the disability impact statement might be said to describe how the Claimant's condition affected him in the past and that his medical notes describe adverse effects in the past, no evidence was led to this effect nor was evidence led about whether such effects were likely to recur.

25 127. Again, the Tribunal bears in mind that the threshold for determining whether effects are likely to recur is relatively low (*Boyle*, above) but it still needs evidence from which it can reach such a conclusion and no evidence whatsoever was led in relation to this issue.

30 128. Similarly, to the extent that the disability impact statement might be said to describe the effects of his condition if measures were not taken to avoid these, there is no evidence to this effect. In particular, the medical notes do not record the Claimant being prescribed any medication or other treatments in relation to his anxiety and depression in the relevant period.

129. This is a case which the Tribunal has found troubling and it has a great deal of sympathy for the Claimant. The Claimant has not been well served by the decision to not attend the hearing and give evidence. He has clearly been
5 under a misapprehension that he would have to give evidence about the cause of his impairments and the Tribunal can well understand why he would find this difficult.

130. However, in the Tribunal's view, this misapprehension has led the Claimant to
10 wrongly assume that he only requires to assert the cause of his impairments and assert that these have an adverse effect to succeed. As a result, he has not presented sufficient evidence from which the Tribunal can make the findings of fact necessary for it to then reach conclusions on the various elements of the test for disability.

15 131. The Tribunal does bear in mind that the Claimant has not been represented by a legal representative. However, he is also not a party litigant trying to navigate the Tribunal process without assistance and is represented by an organisation which describes itself, in its name, as being as an organisation
20 dealing with disability rights who can be expected to have knowledge of the relevant law and Tribunal procedures.

132. Unfortunately, no matter how much sympathy the Tribunal may have for any party, it can only make its decision based on the evidence before it.

25 133. In this case, the Claimant has not presented sufficient evidence from which the Tribunal has been able to make findings of fact which allow it to conclude the effects of his impairments on his day-to-day living activities are long-term and substantial adverse effects; the medical notes and letters from medical
30 advisers contain no information about any such effects especially as at the relevant dates; the disability impact statement makes broad assertions about effects on the Claimant's activities without setting out any evidence of what these are; the assertions in the statement are not wholly consistent with the other evidence in this case; the statement is also silent on a number of matters

relevant to the Tribunal's consideration such as what measures the Claimant takes to avoid any effects on his living activities, what the effects would be without such measures and the likelihood of any effects which have ceased recurring in the future.

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134. Bearing in mind that the burden of proof is on the Claimant, the Tribunal does not consider that he has satisfied this burden and so finds that, based on the evidence before the Tribunal, he has not established that he is disabled as defined in s6 of the Equality Act 2010.

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135. The consequence of that finding is that the Tribunal does not have jurisdiction to hear those claims which rely on the protected characteristic of disability (that is, the claims of discrimination arising from disability, indirect discrimination, breach of the duty to make reasonable adjustments and harassment) and those claims are hereby dismissed.

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136. For the avoidance of doubt, the finding that the Claimant has not satisfied the definition of disabled has no impact on the jurisdiction of the Tribunal to hear the claim of victimisation and that claim will proceed.

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Employment Judge	P O'Donnell
Date of Judgement	2 December 2021
Date sent to parties	2 December 2021