



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Trevor Averre-Beeson

**Respondents:** (1) Ortu Federation Limited  
(2) Ms Sophina Asong

**Heard at:** East London Hearing Centre

**On:** 14<sup>th</sup> January 2022

**Before:** Employment Judge Barrowclough

**Representation**  
**Claimant:** Mr David Rommer (Solicitor)  
**Respondents:** Ms Serena Crawshay-Williams (Counsel)

## RESERVED JUDGMENT

The judgment of the Tribunal is that at the material time the Claimant was a disabled person by reason of the physical impairment of severe asthma, and that he then had a disability as defined in s.6 Equality Act 2010. Accordingly, the Claimant's complaints of (a) discrimination arising from a disability and (b) failure to make reasonable adjustments will proceed to be determined by the Tribunal at the full merits hearing together with his other complaints.

## REASONS

1 This is a preliminary hearing, as directed by Employment Judge Elgot at an earlier preliminary hearing on 3 August 2021, to determine whether the Claimant was, as he contends, a disabled person within the definition set out in s.6 Equality Act 2010 by reason of severe asthma during his employment by the First Respondent between 1 July 2019 and 31 December 2020, when his employment was terminated. In particular, the Claimant says that he was disabled during the period between 1 August 2020 and 31 December 2020 when he was required to attend in person at the school where he worked as a teacher when he wanted to work remotely because of the risks to himself and his daughter arising as a consequence of the Covid-19 pandemic. The Claimant advances complaints of discrimination arising from a disability and of a failure to make adjustments, in breach of ss.15 & 20 Equality Act 2010.

2 This preliminary hearing took place remotely via the Cloud Video Platform on 14 January 2022, and at its conclusion and due to a lack of available time I reserved my judgment. The Claimant was represented by his solicitor Mr Rommer, and gave evidence in support of his claim; the Respondents were represented by Ms Crawshay-Williams of counsel, who called no evidence. I was provided with two agreed preliminary hearing bundles, one including the Claimant's disability impact statement. At the commencement of the hearing it was agreed that the issue of the Respondents' actual or constructive knowledge of the Claimant's alleged disability would not be considered or determined at this preliminary hearing.

## **Background**

3 The Claimant was born on 16 January 1961, and was therefore 60 years old at the date of the hearing before me. He first worked for the First Respondent at their Gable Hall School ('the school') as a supply teacher, via an agency, from March 2019 until 30 June that year. Immediately thereafter the Claimant was employed at the school by the First Respondent, initially as head of mathematics on a full time contract, from 1 July 2019 until 31 December 2020, when he was dismissed with one week's pay in lieu of notice, the reason for his dismissal apparently being the Claimant's refusal to attend work and teach in person, rather than remotely. The First Respondent is a multi-academy trust, which sponsors and operates the school and four other schools in the Stanford-le-Hope area of Essex. The Second Respondent is the First Respondent's chief executive officer, and it was she who wrote to the Claimant on 13 October 2020 terminating his employment with effect from 31 December that year with one week's pay in lieu of notice.

4 On 6 January 2021 the Claimant presented an ET1 claim form to the Tribunal, including complaints of (a) automatically unfair dismissal, (b) being subjected to a detriment on health and safety grounds (s.44 Employment Rights Act 1996), (c) discrimination arising from a disability, in breach of s.15 Equality Act 2010, (d) failure to make reasonable adjustments (s.20 Equality Act), and (e) for notice, holiday and arrears of pay owed to him. All the Claimant's complaints are resisted and disputed by the Respondents. As noted, the disability relied on by the Claimant is the physical impairment of severe asthma, from which he says he has suffered since childhood, and which is controlled by the use of inhalers, including a bronchodilator and corticosteroids. The Claimant says that as a consequence of his condition he is very prone to chest infections, and that in July 2015 he was seriously ill with pneumonia and was hospitalised. The Respondents do not accept that the Claimant's condition amounted to a disability, or that they had either actual or constructive knowledge of any such alleged disability.

## **The Evidence**

5 The Claimant had not prepared a witness statement for this hearing, but he adopted his ET1 claim form and his disability impact statement (pages 60 to 63 in the main bundle) as his evidence in chief. Additionally, the Claimant gave oral evidence in relation to a number of individual documents in the bundles to which he was taken.

6 The Claimant's evidence can be summarised as follows. He qualified as a teacher in 1982, and prior to joining the First Respondent had worked as a teacher for some 36 years, 17 of them as headteacher or executive headteacher in secondary schools in London and Somerset. Having initially worked as an agency supply teacher at the school

until the end of June 2019, he was employed by the First Respondent as head of maths there from 1 July onwards. In about November 2019 it was agreed that the Claimant's role be changed to teaching economics, and a few months later his working hours were reduced from full time to four days a week, once again by agreement.

7 The Claimant has suffered from severe asthma since childhood. Additionally, he has a daughter who underwent a bone marrow transplant in 2018, and who requires immunosuppressant medication. Whilst the Claimant's daughter does not live with him, she visits him once day a week or fortnight. The Claimant says that during the autumn term of 2019 he told both the Second Respondent and other school leaders about his own and his daughter's medical conditions, and that he had a period of 12.5 days' sick leave that term due to his asthma.

8 As a result of the first Covid-19 national lockdown in March 2020 it was agreed that the Claimant would work from home and teach remotely for the remainder of the school's spring and the summer terms, up until the end of August 2020. That was done via videoconferencing software, and seems to have worked satisfactorily, there being no complaints or concerns raised by pupils, parents or the Respondents. Simultaneously, the Claimant shielded strictly at home due to his own and his daughter's vulnerability. In June 2020 the Claimant and the Second Respondent agreed that with effect from 1 September onwards, his working hours would reduce to a fraction of 0.6, in effect three days per week.

9 In August 2020, during the school's summer holidays, the Claimant wrote to the Second Respondent asking to be allowed to continue working remotely from home when the new term started in September, on the basis that it would be '*catastrophic*' if he caught the Covid-19 infection. In support of his request the Claimant provided a letter from his doctor dated 17 August, summarising the Claimant's health problems, stating that he was in the '*extremely vulnerable*' category, that he would be '*very unwell*' if he caught Covid, and recommending that he should '*teach by videoconference wherever possible*'.

10 The Second Respondent refused the Claimant's request in her email to him dated 22 August. Further correspondence ensued, but the Second Respondent maintained that decision; and a risk assessment was undertaken on 26 August by the First Respondent's Business Manager, Mr Shillingford, who considered that a number of preventative measures, including masks and distancing, would reduce the Claimant's risk of catching Covid whilst working at the school from '*high*' to '*medium*'. The Claimant disagreed with that assessment, which he considered did not take account of the potentially very serious consequences should he or his daughter become infected.

11 The Claimant worked remotely during the first week of September, since that consisted of 'inset' days when he was not required to be at the school. On 4 September the Claimant consulted his GP, who diagnosed him as suffering from '*acute and severe anxiety*', signed him off as unfit to work from 7 September until 16 October 2020, and issued a Med3 fit note to that effect. A copy was provided to and acknowledged by the First Respondent, who responded that the Claimant would in fact be placed on unpaid leave for a period of two weeks, and that a meeting would be scheduled with the Claimant with a view to his '*full return*' to work. Thereafter the Claimant involved his union as a result of the First Respondent's refusal to pay him occupational sick pay; a sickness absence meeting took place via videoconferencing on 24 September, at which the

Claimant says his union representative was not allowed to attend and that he was then told by Mr Shillingford that he either attended work and was paid, but that would not be if he did not do so; early conciliation was commenced by the Claimant's union in respect of the First Respondent; and the Second Respondent's termination email was sent to the Claimant on 13 October. The Claimant says that in mid-October there was a very serious outbreak of Covid-19 at the school, as a result of which 21 teachers were infected and all pupils were required to self-isolate: in their ET3, the Respondents deny that there was such an outbreak, but accept that the Claimant was placed on unpaid leave by them up until 16 October.

12 In his disability impact statement, which he signed on 3 October 2021, the Claimant expands on the impact that asthma has had on him from the age of approximately 12 onwards – sports like football, running and cycling whilst at school, and then walking, climbing stairs and socialising whilst at university. In the 1980's asthma was becoming more widely recognised and treatable via steroids and inhalers, and the Claimant learnt through painful experience that he must always have access to inhalers. In 2015 the Claimant was admitted to hospital with pneumonia following a series of chest infections over the preceding year. He was very seriously ill, and took some three months to regain his normal state of health. Pneumonia had an enormous impact on his asthma, rendering walking upstairs virtually impossible and requiring a significant increase in his Salbutamol medication. The whole experience made the Claimant much more aware of his vulnerability, and also of changes in his lungs and chest due to variations in his surroundings, for example room temperatures or in the seasons.

13 The Claimant says that since his illness in 2015, his asthma has generally been well controlled and that he is able to function without too many problems, so long as he has his Seretide 250 and Salbutamol 100 inhalers. The former is a combined steroid bronchodilator, which the Claimant takes daily, two puffs at night and also in the morning, to prevent asthmatic attacks; the latter is a bronchodilator to be used when needed to relieve breathlessness. On average, there are two or three time or episodes a year when the Claimant's asthma is not under control. That can happen due to his having a cold, or simply randomly; when it does, the Claimant's symptoms include discomfort in his chest, shortness of breath, and difficulty in walking fast or uphill, and his doctor will either increase the dosage in his inhalers, prescribe alternative inhalers or antibiotics, anti-asthma drugs or steroids.

14 The Claimant says that he told the Second Respondent, the school head and other senior staff about his health problems in about October 2019, when he had a chest infection and problems with his asthma and had to take time off work. With the onset of the Covid-19 pandemic the Claimant was concerned that he might be in the '*extremely vulnerable*' category and would need to shield; and that was confirmed in March 2020 by Dr Peck, the Claimant's private doctor at Springfield Hospital, as he informed his employers.

15 When schools reopened in September 2020 after the first national lockdown, the Claimant did not feel safe and sought to continue teaching from home. Schools were closed again due to the virus in November 2020, after an outbreak at the school in which multiple staff and students there became infected.

16 The Claimant states that apart from the occasional flare-ups or exacerbation, his

asthma does not prevent him doing very much at all in life, so long as it is properly treated; although as he has discovered it does make him very vulnerable to respiratory disease, and he has to be careful. Finally, the Claimant says that his daughter Annie, who is now 26 years old, underwent a bone marrow transplant in 2018, and as a result takes immunosuppressant medication and is very vulnerable to infection. Whilst Annie was not living with the Claimant when he was working at the school, she would visit him once a week or fortnight.

17 In his oral evidence to the Tribunal, the Claimant was taken to page 98 in the bundle, which is the start of the Claimant's patient record with the John Tasker House NHS surgery. It confirms that the Claimant was first diagnosed with asthma in December 1979, and also his emergency admission to hospital in June 2015 with community acquired pneumonia. Page 64/65 is a more recent patient record from the surgery, and records his prescriptions for Salbutamol, Seretide and, as an alternative, Sirdupla, as well as the Claimant's performance on a peak flow breath meter, which he says can vary from good to shockingly low. Page 66 records that in May 2020 the Claimant was experiencing asthma symptoms once a day, and page 68 the regular disturbances to the Claimant's sleep in 2016. The Claimant's asthma was regularly monitored by the surgery, for example in February 2020 (page 73), and in April 2018 he reported that it sometimes restricted his exercising (page 74). The Claimant said that cold air or walking up multiple flights of stairs would set off his asthma, resulting in dizziness or feeling exhausted and shortness of breath, and that when he had pneumonia he could not manage the stairs at his home, and exercise was recorded as being an asthma trigger in April 2018 (page 75).

18 The Claimant also accesses medical advice and consultations as a private patient at the Springfield Hospital in Chelmsford, and has been doing so since June 2015, when he was registered with a different NHS surgery who had misdiagnosed and failed to identify his pneumonia, as a result of which he was hospitalised as an emergency patient. His medical records with that private GP service are at pages 125 to 143 in the bundle. There are numerous entries from the time of the Claimant's pneumonia in 2015 (page 140), his medication was changed in January 2017 (page 136), and he suffered from acute bronchitis in October 2019 and February 2020 (pages 132/134). On 17 March 2020, the Claimant wrote (page 131) to Dr Peck, one of the doctors at the hospital, requesting a letter confirming that he was one of those who should be shielding at home for a period of twelve weeks rather than going to work, and it appears that such a letter was sent to the First Respondent. On 17 April the Claimant consulted Dr Daniel about his current inhalers (page 130). On 13 May the Claimant wrote again to Dr Peck (page 129) asking whether his wife (also a teacher) and/or their young twins should be returning to school if he himself fell into the '*extremely vulnerable*' category; and in August 2020 the Claimant asked Dr Peck for a further letter to be sent to the First Respondent with recommendations as to how best the Claimant could provide teaching/tuition, given his health problems (pages 126/127). The letter dated 17 August from Dr Peck to the First Respondent is at page 147 in the supplemental bundle, and confirms that the Claimant was in the '*extremely vulnerable*' category because of his severe asthma, hospitalisation due to pneumonia and a resultant lung condition, and includes recommendations to reduce physical contact with the Claimant's students to a minimum, and ideally to teach by videoconference wherever possible, as other educational institutions were then doing.

19 In cross-examination, the Claimant confirmed that he had first been diagnosed with asthma in 1978/79, and that he had first registered with the John Tasker House NHS

surgery in August 2016, although some of his earlier health issues are mentioned in the practice's records. In relation to his disability impact statement, the Claimant confirmed that his sporting activities as a schoolboy which he says were affected by his condition pre-date that first diagnosis. The Claimant said that, following his hospital admission with pneumonia in June 2015, it took him about three months to get back to his normal condition, and that it was about eight weeks before he stopped feeling excessively tired and short of breath. For those eight weeks he had found getting upstairs at home very difficult and had needed to rest thereafter. Whilst working at the school, the Claimant had been assigned a classroom on the third or fourth floor in a different building and some distance away from the classroom which he had previously used. He had had difficulty in getting up those stairs due to his asthma, and had asked to be moved to a different room.

20 The Claimant said that he had felt able to write to the private GP practice at Springfield Hospital requesting the letter sent to the First Respondent in August 2020 because he had got to know the medical staff there well over the preceding five years since 2015, and Dr Peck knew his symptoms and understood his medical history. The Claimant had started going to Springfield Hospital and continued to do so because it was much easier and quicker to access medical help and advice there than through his NHS GP surgery, which often involved delays and difficulties in contact, whether by phone or email, which was still not possible. He had got to know Dr Peck over that period and trusted her to provide appropriate advice and assistance as required. The Claimant confirmed that there was no letter or report from Dr Peck or any other medical expert addressing the issue of his alleged disability, and confirmed that he could have asked her to provide such a document. The Claimant confirmed that all his relevant medical records were included in the bundles before the Tribunal, that he has had asthma for over 40 years, and that he had been hospitalised as an emergency with pneumonia in 2015, in fact passing out on being admitted to hospital.

21 There was no re-examination of the Claimant, and in answer to a question from the Tribunal the Claimant said that he had first been provided with an inhaler in 1979.

## **Submissions**

22 In her closing submissions, Ms Crawshay-Williams submitted that the 'material time' for the purposes of s. 6 was the period between 1 July 2019 and 31 December 2020, when the Claimant was employed by the First Respondent. The activities mentioned by the Claimant in the first paragraph of his disability impact statement – running, playing football and cycling – were all of a sporting nature, and not normal day-to-day activities. Whilst the Claimant said that he had been using inhalers since 1978/79, no medical evidence pre-dating 2015 had been produced, nor of the potential impact of his ceasing to do so since then. The Claimant's evidence was that doing so would result in severe asthmatic attacks, but there was no medical evidence of the likely impact on his ability to undertake normal activities.

23 The Claimant had said that due to his pneumonia in 2015, there was a period of eight weeks to three months during which he could barely get up the stairs at his home. But since then he had been able to do so, and Ms Crawshay-Williams submitted that the Claimant's having to get up to the third or fourth floor using the stairs in order to access the classroom assigned to him by the First Respondent at the school was not a normal day-to-day activity.

24 The Claimant had at all relevant stages been legally represented, and the Tribunal was invited to draw an adverse inference from the absence of any letter or report concerning his alleged disability from his doctors or another medical expert. Overall, there was a lack of evidence of any adverse effect of the Claimant's condition on his ability to carry out normal day-to-day activities at the material time, and insufficient evidence from which the Tribunal could conclude that he then had a disability.

25 In reply, Mr Rommer pointed out, correctly in my view, that the 'material time' was between 1 August and 31 December 2020, that being the period when the Claimant alleges he was required to work in person at the school, rather than remotely as had been the case earlier in that year, and as identified at the preliminary hearing on 3 August 2021. Mr Rommer reminded the Tribunal of the provisions in the Equality Act, including Schedule 1, and in the 2011 Guidance on matters to be taken into account relating to the definition of disability, concerning what amounts to 'significant' and 'long-term' for the purposes of section 6 of the Act, and of the effect of medical treatment on an individual's ability to carry out normal day-to-day activities.

26 Mr Rommer submitted that there was no doubt that the Claimant had the physical impairment of severe asthma, and indeed that that condition had been present since 1979, as evidenced and confirmed in both his NHS surgery and the Springfield Hospital records, which had given rise to at least one medical emergency, the Claimant's hospitalisation with pneumonia in 2015. The medical records established that the Claimant has been and indeed still is continuously dependent on daily drugs and medication to alleviate and control his asthma and its effects, and that even then he suffers occasional episodes or flare-ups when the Claimant's medication and treatment is changed, and when one consequence is that he cannot walk fast or uphill. The Tribunal should infer that, but for the asthma medication and antibiotics which the Claimant takes on a daily basis, his condition would indeed have had a substantial adverse effect upon normal day-to-day activities. As to those, Mr Rommer suggested that it was a false dichotomy to characterise running and cycling as not being normal day-to-day activities, and to limit them to the sporting arena; and that the ability to climb three or four flights of stairs in order to undertake his teaching duties at the school, as required by the First Respondent, could hardly be described as an abnormal activity. There was no letter or report from Dr Peck or any other medical expert, but no order or direction requiring such evidence had been made at the earlier preliminary hearing when the hearing of this preliminary issue had been set up; and Mr Rommer suggested that the combined medical records and evidence in the bundles together with the Claimant's largely unchallenged evidence was sufficient.

## **Discussion and Conclusions**

27 As defined in s.6 Equality Act 2010, a person has a disability if he has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. There is no doubt that the Claimant has suffered from the physical impairment of severe asthma, first diagnosed in about 1979, for many years and that he continues to do so, or that he takes and is dependent on daily medication to alleviate and control his condition. The medical records from both his NHS surgery and the Springfield Hospital, including the letter from Dr Peck dated 17 August 2020, confirm those facts, which were not disputed by the Respondents. The key issue here is whether the Claimant's impairment had at the material time, which I find to be the period between 1 August and 31 December 2020 when the alleged discrimination

took place, a substantial adverse effect upon his ability to carry out normal day-to-day activities; and whether that effect was then long-term, in the sense that it had lasted, or was likely to last, for twelve months.

28 On behalf of the Respondents, Ms Crawshay-Williams relies on the absence of any expert medical evidence or report addressing the issue of the Claimant's alleged disability, and the effect of the impairment upon his ability to carry out such activities, with or without the drugs and medication he was taking, and she invites the Tribunal to draw the appropriate adverse inferences. In my judgment, whilst such an expert report might very well have assisted both the Claimant and the Tribunal, its absence is not necessarily fatal to the Claimant's case. I bear in mind that there is no legal requirement for any such expert evidence and that, as Mr Rommer points out, there was no order or direction made at the earlier preliminary hearing requiring such evidence. Additionally, whilst expert medical evidence can be and frequently is of assistance, the disability issue is ultimately a matter for determination by the Tribunal; and there was nothing to suggest that a conscious decision had been taken by the Claimant or his advisers not to provide such evidence for any particular reason.

29 The Claimant's evidence was that, since his emergency admission to hospital with pneumonia in 2015 and his gradual recovery thereafter over a period of about three months, his asthma has generally been well controlled, apart from occasional flare-ups perhaps two or three times a year, and has not prevented him from doing much in his life, so long as it is properly treated. That is helpful, since at the material time (August to December 2020) the Claimant was not attending the school in person and shielding, or at least taking significant precautions as someone falling within the '*extremely vulnerable*' Covid-19 category, so that it is difficult if not impossible to assess how the Claimant's everyday abilities had actually been affected at that particular time whilst on his regular daily medication, in accordance with the approach set out by the EAT in **Goodwin v The Patent Office [1999] ICR 302**. Accordingly, and in the light of the Claimant's evidence that his asthma and its associated symptoms had plateaued, which was not challenged by the Respondents, it seems to me appropriate and fair to look at the problems arising related to the Claimant's health over the course of the Claimant's time with the First Respondent from March 2019 onwards, and particularly in the period before the onset of the Covid-19 pandemic one year later.

30 Whilst the Claimant's asthma was then generally under control, he said that he had found the three or four flights of stairs to his new classroom at the school to cause him issues and difficulties, to the extent that he asked to be moved to a different room. Whilst no date was provided for that incident, it must have been before March 2020, since the Claimant effectively stopped attending the school in person then, so far as I am aware. Additionally, it seems to me that climbing three or four flights of stairs is very much an ordinary or normal day-to-day activity, not least since otherwise it is unlikely that the First Respondent would have expected the Claimant to do so whenever he was teaching at the school. Secondly, the Claimant's unchallenged evidence was that when he was subject to a flare-up of his asthma symptoms, which could happen two or three times a year, he found walking fast or uphill to be difficult to do, and his medication would be changed. Once again, in my judgment those are plainly normal day-to-day activities. Thirdly, the Claimant's evidence (which for the avoidance of doubt I accept, since it was virtually uncontested and since I found him to be a straightforward and truthful witness on whose account I can rely) was that in about October 2019 he had had a chest infection which had

affected his asthma, and that he had to take a period of 12.5 days, or by my calculation two weeks or so, off sick as a result. Finally, when considering the effect of the Claimant's impairment on his ability to undertake everyday activities, it seems to me that the very fact that he was within the '*extremely vulnerable*' category in relation to Covid-19 from March 2020 onwards, as Dr Peck confirmed, is significant. Had it not been for his impairment, the Claimant would not have been in that category, with its associated restrictions on normal everyday activities.

31 What would have been the effects of the Claimant's impairment on his everyday abilities during that period, but for the medication he was taking? Assessing those deduced effects is a difficult question, as the EAT observed in Goodwin. I bear in mind that at that time, the Claimant had been dependent on daily inhalers in order to control his condition, as well as on other medication, for a period of approximately 40 years, and that, as the Claimant says at paragraph 3 of his disability impact statement, as a young man in the 1980's he occasionally forgot to take or collect his inhalers, resulting in very severe asthmatic attacks which necessitated a doctor or ambulance being called out to provide him with oxygen. Doing the best I can, and given the length of time over which the Claimant has had his impairment and been taking daily medication for it, together with the limitations and occasional debilitating episodes he suffered despite taking the drugs prescribed, I conclude that it is highly likely that the Claimant's asthma would have had a substantial adverse effect on his ability to carry out normal day-to-day activities, including mobility, getting to and from work and being able to cope and communicate when there, as well as in undertaking ordinary domestic life at home, had he not been taking the medication prescribed by his medical advisers. In my judgment, both the actual and the deduced effects on the Claimant's everyday abilities are substantial, and clearly more than minor or trivial. Focusing only on the actual effects, an inability to walk fast or uphill and having to request a new workspace due to the difficulties in accessing the one assigned satisfy that requirement. It is equally clear that at the material time the Claimant's physical impairment was long-term, in the sense that both it and its associated adverse effects had lasted for at least twelve months.

32 For these reasons, I conclude that at the material time the Claimant was a disabled person by reason of the physical impairment of severe asthma, and that he then had a disability as defined in s.6 Equality Act 2010. The Claimant's complaints of (a) discrimination arising from a disability and (b) failure to make reasonable adjustments will proceed to be determined by the Tribunal at the full merits hearing together with his other complaints.

**Employment Judge Barrowclough  
Dated: 11 February 2022**