



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Stirland

**Respondent:** St John Ambulance

**Heard at:** Midlands East Tribunal via Cloud Video Platform

**On:** 21 November 2024

**Before:** Employment Judge Brewer

## Representation

**Claimant:** In person

**Respondent:** Ms E Greening, Counsel

# JUDGMENT

The judgment of the Tribunal is:

1. that the claimant was not disabled by reason of Asperger's Syndrome at the material times,
2. the claimant's claims for direct and indirect disability discrimination are hereby dismissed.

For the avoidance of doubt the claimant's claims for constructive unfair dismissal and victimisation are unaffected by this judgment.

# REASONS

## Introduction

1. This case came before me at a public preliminary hearing to consider the sole question of whether the claimant met the definition of disabled in section 6 of the Equality Act 2010 at the material times.
2. The claimant says he is disabled by reason of Asperger's Syndrome which he says he was diagnosed with at the age of 9 in 2006. The term Asperger's Syndrome is

not in use today, it is considered to be a subset of and subsumed within a diagnosis of Autism Spectrum Disorder.

3. For the hearing, I was provided with a bundle of documents within which, as ordered, were the documents provided by the claimant in compliance with the case management orders of Judge Fredricks-Bowyer made on 4 June 2024. The relevant order was for the claimant to provide the following information:

*What are/were the effects of the impairment on the claimant's ability to do day-to-day activities at the relevant times?*

*The claimant should give clear examples. The examples should be from the time of the events the claim is about. The Tribunal will usually be deciding whether the claimant had a disability at that time.*

*In general, day-to-day activities are things 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. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.*

*Has the claimant had medical treatment, including medication? If so, what and when?*

*Has the claimant taken other measures to treat or correct the impairment? If so, what and when?*

*What would the effects of the impairment have been without any treatment or other measures? The claimant should give clear day-to-day examples, if possible.*

*Any other information the claimant relies on to show that they had a disability.*

4. The claimant was also ordered to send to the respondent:

*copies of the parts of his GP and other medical records that are relevant to he had the disability at the time of the events the claim is about...and*

*any other evidence relevant to whether he had the disability at that time.*

5. In compliance with this the claimant produced a two-page statement and a single page from his medical notes. In response to the respondent's request for further details of the matters set out in his statement the claimant also provided a learning agreement that he had entered into with Sheffield Hallam University.

6. In response the respondent accepted that the claimant had been diagnosed with Asperger's Syndrome but did not accept that he was disabled.
7. At the hearing I heard evidence from the claimant and submissions from both parties. I have taken all of the above into account in reaching my decision.

## Law

8. I set out below a brief description of the relevant law.

### Meaning of disability

9. Section 6 of the Equality Act ("EqA") provides that a person has a disability if
  - 9.1. they have a physical or mental impairment, and
  - 9.2. the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
10. The EqA defines a 'disabled person' as a person who has a 'disability' —(S.6(2) EqA). The burden of proof is on the claimant to show that he or she satisfies this definition.
11. Although the definition in S.6(1) is the starting point for establishing the meaning of 'disability', it is not the only source that must be considered. The supplementary provisions for determining whether a person has a disability are found in the Equality Act 2010 (Disability) Regulations 2010 SI 2010/2128.
12. In addition, the Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ('the Guidance') under S.6(5) EqA. The Guidance does not impose any legal obligations in itself but courts and Tribunals must take account of it where they consider it to be relevant — para 12, Sch 1, EqA.
13. Finally, the Equality and Human Rights Commission (EHRC) has published the Code of Practice on Employment (2015) ('the EHRC Employment Code'), which has some bearing on the meaning of 'disability' under the EqA. Like the Guidance, the Code does not impose legal obligations, but Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.
14. The requirement to 'take account' of the Guidance or Code only where the Tribunal considers them relevant means we must always give way to the statutory provisions if, on a proper construction, these differ. In **Elliott v Dorset County Council** EAT 0197/20 the EAT noted that where '*consideration of the statutory provision provides a simple answer, it is erroneous to find additional complexity by considering the Code or Guidance*'.

## Material time for establishing disability

15. The time at which to assess the disability (i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act (**Cruickshank v VAW Motorcast Ltd** 2002 ICR 729, EAT).
16. In **All Answers Ltd v W** 2021 IRLR 612, CA, the Court held that the EAT was wrong to decide in *C v A* EAT 0023/20, that the Tribunal's failure to focus on the date of the alleged discriminatory act was not fatal to its conclusion that the claimant satisfied the definition of disability. The Court held that, following **McDougall v Richmond Adult Community College** 2008 ICR 431, CA, the key question is whether, as at the time of the alleged discrimination, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at that date and so the Tribunal is not entitled to have regard to events occurring subsequently.

## Determining disability

17. In **Goodwin v Patent Office** [1999] IRLR 4, the EAT gave detailed guidance as to the approach which ought to be taken in determining the issue of disability. A purposive approach to the legislation should be taken. A Tribunal ought to remember that, just because a person can undertake day-to-day activities with difficulty, that does not mean that there was not a substantial impairment. The focus ought to be on what the claimant cannot do or could only do with difficulty and the effect of medication ought to be ignored for the purposes of the assessment.
18. The EAT said that the words used to define disability in what is now S.6(1) EqA require a Tribunal to look at the evidence by reference to four different questions (or 'conditions', as the EAT termed them):
  - 18.1. did the claimant have a mental and/or physical impairment? (the 'impairment condition'),
  - 18.2. did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition'),
  - 18.3. was the adverse condition substantial? (the 'substantial condition'), and
  - 18.4. was the adverse condition long term? (the 'long-term condition')?
19. These four questions should be posed sequentially and not together (**Wigginton v Cowie and ors t/a Baxter International (A Partnership)** EAT 0322/09).
20. The approach in **Goodwin** was approved in **J v DLA Piper UK LLP** [2010] ICR 1052 (paragraph 40). It was said at paragraph 38 of that judgment:

*"There are indeed sometimes cases where identifying the nature of the impairment from which a Claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will*

*be easier – and is entirely legitimate – for the Tribunal to park that issue and to ask first whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected – one might indeed say “impaired” – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from a condition which has produced that adverse effect — in other words, an “impairment”. If that inference can be drawn, it will be unnecessary for the Tribunal to try to resolve difficult medical issues of the kind to which we have referred.”*

## **Substantial adverse effect**

21. To amount to a disability the impairment must have a ‘substantial adverse effect’ on the person’s ability to carry out normal day-to-day activities — S.6(1)(b) EqA. If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities but that effect is likely to recur, it is to be treated as continuing to have that effect — para 2(2), Sch 1.
22. In **Goodwin** (above) the EAT said that of the four component parts to the definition of a disability in S.1 DDA (now S.6 EqA), judging whether the effects of a condition are substantial is the most difficult. The EAT went on to set out its explanation of the requirement as follows:

*‘What the Act is concerned with is an impairment on the person’s ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be “yes”, yet their ability to lead a “normal” life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be “no”. Those might be regarded as day-to-day activities contemplated by the legislation, and that person’s ability to carry them out would clearly be regarded as adversely affected.’*

23. This approach reflects the advice in Appendix 1 to the EHRC Employment Code that account should be taken not only of evidence that a person is performing a particular activity less well but also of evidence that ‘a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation’ — para 9.

24. There must be a causal link between the impairment and the substantial adverse effect, but it need not be a direct link.
25. In determining whether an adverse effect is substantial, the Tribunal must compare the claimant's ability to carry out normal day-to-day activities with the ability he or she would have if not impaired. It is important to stress this because the Guidance and the EHRC Employment Code both appear to imply that the comparison should be with what is considered to be a 'normal' range of ability in the population at large. Appendix 1 to the EHRC Employment Code states: '*The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people*' — para 8.
26. In cases where it is not clear whether the effect of an impairment is substantial, the Guidance suggests a number of factors to be considered (see paras B1–B17). These include the time taken by the person to carry out an activity (para B2) and the way in which he or she carries it out (para B3). A comparison is to be made with the time or manner that might be expected if the person did not have the impairment.
27. Paragraph 5(1) of Schedule 1 to the EqA provides that 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 measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, likely means '*could well happen*' (**Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening)** 2009 ICR 1056, HL).
28. When determining whether a person meets the definition of disability under the EqA the Guidance emphasises that it is important to focus on what an individual *cannot* do, or *can only do with difficulty*, rather than on the things that he or she can do (see para B9).
29. In **Aderemi v London and South Eastern Railway Limited** [2013] ICR 591, the EAT held that the Tribunal:

*“has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading “trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.”*

### **Normal day to day activities**

30. Appendix 1 to the EHRC Employment Code states that 'normal day-to-day activities' are activities that are carried out by most men or women on a fairly regular and frequent basis. The Code says:

*'The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition'*

paras 14 and 15.

31. The Guidance thus emphasises that the term 'normal day-to-day activities' is not intended to include activities that are normal only for a particular person or a small group of people. Account should be taken of how far the activity is carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning (see para D4).
32. The EAT in **Paterson v Commissioner of Police of the Metropolis** 2007 ICR 1522, EAT, concluded that 'normal day-to-day activities' must be interpreted as including activities relevant to professional life.
33. The Guidance states that it is not possible to provide an exhaustive list of day-to-day activities. However, in general, day-to-day activities are things people do on a regular or daily basis. The examples given are 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. Normal day-to-day activities can also include general work-related activities and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern (see para D3).

## Findings of fact

34. I make the following findings of fact (references are to pages in the bundle).
35. The claimant was diagnosed with Aspergers Syndrome on 18 May 2006. At the time he was nine years old. The claimant does not recall who undertook the assessment, the basis of the assessment nor indeed any other relevant information.
36. The diagnosis is noted on the only medical information provided by the claimant which is the document at [41]. That document is headed "patient summary: visits" and other than the claimant's name, date of birth and other similar personal information, has no further detail.
37. The claimant confirmed that he provided no other medical documents because, as he said, he has never needed medical intervention because of, or for any reason related to his Asperger's Syndrome.
38. Turning to his written statement, the claimant says that he experiences difficulties with social cues, that he needs routine and predictability and has a tendency to interpret language literally.

39. He also says that ambiguities in communication can lead to confusion, errors and “team efficiency” (by which I suspect he meant ‘inefficiency’). He says that sudden changes in rota, protocols or procedures without clear communication can cause significant stress and hinder performance and finally that misinterpretation of social cues from colleagues can affect team dynamics and relations.
40. The claimant's preference is for unambiguous instructions, consistent routines, written guidelines and a supportive environment.
41. The symptoms of those diagnosed with Asperger’s Syndrome can vary considerably in severity.
42. The claimant accepted that his statement did not assist the Tribunal in understanding which of his issues, if any, related to his diagnosis. The claimant also accepted that he provided no details of impaired day-to-day activities.
43. Although there is a learning agreement, the claimant accepted that essentially it was based upon what the claimant told his university. In that sense it takes us no further forward.
44. The claimant confirmed that where there is any ambiguity, or for example where protocols change, clear communication solves the problem, and he always asked for clarification.

## **Discussion and conclusions**

45. I turn now to my conclusions.
46. I reiterate that the burden of proof rests with the claimant.
47. In the learning agreement [51] it states that the claimant had presented his university with a letter dated 26 February 2018 in which his GP confirmed the diagnosis. When asked about this the claimant said that the reference was to the same document he had provided at [41]. But that is not a letter, and it does not confirm a diagnosis, it merely sets out the diagnosis as an active major problem.
48. The diagnosis itself is not the issue but the lack of any documents from the GP practise and the lack of any medical evidence in relation to the Asperger’s Syndrome suggests, as the claimant in fact confirmed, that notwithstanding the diagnosis, the claimant has never been so impacted that he has required medical intervention or indeed any other intervention. For example, although he states that “sudden changes... can cause stress...”, he does not state that that has ever been the case or, if it has, it has ever caused him to seek medical help for that stress. In his submissions (but not when giving evidence) the claimant said he had in fact taken a few days off with stress, but he did not say when nor what the cause of the stress was. No documentary evidence of this had been provided.
49. There is a further difficulty, which Ms Greening referred to in her submissions, and which I have alluded to above, that notwithstanding the claimant’s diagnosis, there is no evidence provided by the claimant of any relationship between his perceived



difficulties and the Asperger's Syndrome. Of course, in such cases it is often a matter of drawing inferences which I shall return to below.

50. To take some examples we discussed during the hearing, the claimant says he has a preference for clear structures and routines. But who does not have a clear preference for clear structures and routines in the workplace? That preference is not evidence of impaired day to day activities.
51. The claimant also says that sudden changes in rota, protocols or procedures without clear communication can cause significant stress and hinder performance. But again, who could say that they would be unaffected by sudden changes of the type described by the claimant? And even if the claimant could be affected by such changes,
  - 51.1. there is no evidence that this was ever the case,
  - 51.2. if it was the case, there is no evidence to show or from which it could be inferred that any effect was so significant that he required intervention, whether medical or otherwise (including any unreasonable coping or avoidance strategies – see further below), and
  - 51.3. there was no evidence to show or from which it could be inferred that, for example, any sudden changes adversely affected the claimant's attendance or the performance of his work.
52. The reason these questions are relevant is because the claimant gave no specific examples nor provided any evidence of, or from which it could be inferred that there was any time in which he has in fact been substantially disadvantaged by his Asperger's Syndrome. I stress that he was ordered to provide clear examples of substantially impaired day-to-day activities, and the order provided examples of day-to-day activities.
53. Ms Greening referred to Paragraph B7 of the Guidance on the definition of disability. This states that account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities.
54. The Guidance essentially means that where it is reasonable for someone to use a coping or avoidance strategy, they would not meet the definition of disability because they would not be substantially impaired. This is of course a matter of degree. In this case, given the dearth of evidence presented by the claimant of any actual substantially impaired day-to-day activities, the proper inference to draw is that he has successfully and reasonably coped with or avoided situations or circumstances in which he might otherwise have been impaired.
55. In short, the way he lives his life enables the claimant to participate fully in professional life, which is what he has focused upon in his evidence.
56. Finally, I refer to the issue of social interactions because of course impaired social interactions might well amount to an impaired day-to-day activity. However, there are several things to say about this.

57. The first is that in his learning agreement it was stated that although he finds small talk and interaction with new people very stressful, he can manage group work and social activity that he feels is purposeful without difficulties. In the context of university life, the agreement states that the claimant “does not feel that this difficulty affects his performance on the course”. There is no contrary evidence about the claimant’s life at or outside of work.
58. The second point is that the claimant gave no examples in his statement drafted for the purpose of this hearing of any actual impaired social interaction. He does say that there are challenges in interpreting non-verbal communication and understanding social nuances, but the mere fact that there are challenges does not equate to substantially impaired day-to-day activities. The claimant also says that one of the challenges he faces in the workplace is misinterpretation of social cues from colleagues affecting team dynamics and relations but again he gives no examples of that and there is no basis to infer substantially impaired day to day activities.
59. The Third Point is that the claimant said that he was often seen as blunt in his communications largely because he needs to be direct, but of course, many people are blunt and direct in their communications and in the absence of any further information there is no basis to presume or infer that this is any way related to the claimant’s diagnosis.
60. I also take account of the requirement that, where it is not clear whether the effect of an impairment is substantial, a number of factors should be considered (see paras B1– B17 of the Guidance). These include the time taken by the person to carry out an activity (para B2) and the way in which he or she carries it out (para B3). But again, the claimant made no suggestion and provided no evidence from which I could conclude, or from which an inference could be drawn, that any of these factors were impaired at all, let alone substantially impaired.
61. I accept that Asperger’s Syndrome is a lifelong condition, and the respondent has accepted that the claimant has been diagnosed with the syndrome and therefore the only **Goodwin** questions in play in this case are,
- 61.1. did the impairment affect the claimant’s ability to carry out normal day-to-day activities? (the ‘adverse effect condition’),
- 61.2. was the adverse condition substantial? (the ‘substantial condition’).
62. Given all of the above my conclusions are that,
- 62.1. there is no evidence that the impairment affected the claimant’s ability to carry out normal day-to-day activities,
- 62.2. but even if that is not correct, such adverse effect condition as there was, was not substantial and therefore the claimant is not disabled within the meaning of section 6 of the Equality Act 2010.

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Employment Judge Brewer

Date: 21 November 2024

JUDGMENT SENT TO THE PARTIES ON

.....21 November 2024.....

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FOR THE TRIBUNAL OFFICE

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