



**EMPLOYMENT TRIBUNALS**

**Claimant**

**Respondent**

**Mr N. Gough**

**v Board of Governors of Mount Grace School**

**RECORD OF A PRELIMINARY HEARING IN PUBLIC**

**Heard at:** Watford Employment Tribunal (by CVP)

**On:** 20 July 2023

**Before:** Employment Judge Coll

**Appearances**

for claimant: Mr. Harris, counsel

for respondent: Mr. MacMillan, counsel

**PRELIMINARY HEARING RESERVED JUDGMENT**

The claimant is a disabled person within the definition in section 6(2) of the Equality Act 2010.

The claimant has proctitis which is part of inflammatory bowel disease (“IBD”). This satisfies the definition of disability within the definition in section 6(1) of the Equality Act 2010.

**REASONS**

**Introduction**

1. A preliminary hearing has been held in order to determine whether the claimant is a disabled person within the definition of section 6(2) of the Equality Act 2010.
2. The hearing was remote (by CVP) and attended by the claimant, both representatives and both instructing solicitors. I had the benefit of reading 107 (electronic) pages contained in a bundle of documents. This included:
  - 2.1 the claimant’s disability impact statement [42 – 45].
  - 2.2 medical evidence [59 – 95].
  - 2.3 the respondent’s response to the disability impact statement [46 – 51].

- 2.4 a response from the claimant to the respondent's response in the form of a supplementary disability impact statement [52 – 59].
3. I heard oral evidence from the claimant after he had adopted his disability impact statement and his supplementary disability impact statement. In addition, I had the benefit of very helpful oral closing submissions on behalf of both parties.

### **Background**

4. The respondent is Board of Governors responsible for the governance of Mount Grace School ("the School").
5. The claimant is a former professional footballer who became a PE and geography teacher.

### **Chronology of key events relating to the claim**

6. On 13 May 2022, the claimant applied for a job at the School in May 2022 as a PE teacher [job advertisement at 96 – 97]. He completed a job application form [98 - 105] and was interviewed. He received an offer letter on 26 May 2022. In response, the claimant accepted the job offer on 26 May 2022 and resigned from his job with Christ College, Finchley on 27 May 2022. The offer was conditional on a number of requirements.
7. The claimant attended an induction day on 6 July 2022. He had completed a health questionnaire and attended a review with Occupational Health on 11 July 2022.
8. In a letter dated 21 July 2022, the respondent withdrew its job offer, giving reasons.
9. On 21 November 2022, the claimant presented his claim form, a summary of which is that his job offer was withdrawn because of his being disabled. His complaint of disability discrimination therefore relates to the withdrawal of this offer of employment on 21 July 2022.
10. On 26 May 2023, in a telephone case management preliminary hearing, EJ Warren listed preliminary hearing in public to determine whether the claimant is a disabled person within the definition of section 6(2) Equality Act 2010.

### **The Law**

11. The tribunal must determine whether or not the claimant had a disability falling within s.6 of the Equality Act 2010, which provides:
- “(1) A person (P) has a disability if— (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.”*
12. The burden of proof lies with the claimant to prove that he is a disabled person in accordance with that definition.

13. The expression 'substantial' is defined at s.212 as 'more than minor or trivial'.
14. Further assistance is provided at Schedule 1 to the Equality Act 2010, which explains at 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 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”.*
15. The word, “likely” in the context of the definition of disability in the Equality Act 2010, means, “could well happen”, or something that is a real possibility (*SCA Packaging Ltd v Boyle [2009] ICR 1056 HL*).
16. The question of how long a condition is likely to last should be assessed as at the date of the alleged discrimination, (not the date of the hearing) (*Richmond Adult Community College v McDougall [2008] ICR 431 CA*).
17. As to the effect of medical treatment, Schedule 1 paragraph 5 provides:

*17.1.1 “(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.”*
18. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government’s office for disability issues entitled, “Guidance on Matters to be Taken into Account in”. Case Number: 1402146/2021 Determining Questions Relating to the Definition of Disability’ (“the Guidance”).
19. Section A.3 of the Guidance deals with the meaning of impairment. It provides that the definition requires the effects which the person may experience must arise from a physical or mental impairment. It is not necessary for the cause of the impairment to be established nor does the impairment have to be the result of an illness.
20. Section A.5 provides that a disability can arise from a wide range of impairments which can be sensory impairments, impairments with fluctuating or recurring effects and auto-immune conditions.
21. The Act and the Guidance make it clear that a substantial effect is one that is “more than minor or trivial”.
22. The Guidance states at section B.7: *“Account should be taken of how far a person can reasonably be expected to modify his or his 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. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the*

*extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day to day activities”.*

23. The Guidance at Section D.3 states: *“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.”*

### **Issues to be determined**

24. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about (21 July 2022)?

25. The issues to decide are:

25.1 Whether the claimant had a physical impairment?

25.2 Did it have a substantial adverse effect on the claimant’s ability to carry out day-to-day activities?

25.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

25.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

25.5 Were the effects of the impairment long-term? The Tribunal will decide:

25.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

25.5.2 if not, were they likely to recur?

### **Findings of Fact and Analysis**

#### **Physical impairment?**

26. The material time is the date at which the offer was withdrawn, that is 21 July 2022.

27. On 19 August 2019 and 22 August 2019, investigations were undertaken and reports produced (colonoscopy [B1 – B3] and histopathology [B4 – B5]). The claimant was diagnosed with *“a mild to moderate degree of chronic non-specific active proctitis”*. He was also diagnosed with haemorrhoids, sigmoid diverticuli, and a hyperplastic polyp (which was removed). [Letter from consultant gastroenterologist, Dr Mazhar dated 13 May 2020 at B8].

28. The claimant described proctitis as being under the umbrella term of IBD (which Dr. Mazhar confirmed at [B8]). The claimant continued to experience this condition as at 21 July 2022 (and to the present date). In the course of his closing submission, Mr Macmillan accepted that the claimant has a physical impairment.

Did it have a substantial adverse effect on the claimant's ability to carry out day to day activities?

29. When not having a flare-up, the claimant felt well, emptied his bowels 1-2 times per day, suffered no abdominal pain and no rectal bleeding or mucus [see letter from Dr. Mazhar dated 12 May 2021 B36]. His application form [98 – 107], disability impact statement, supplementary impact statement and answers in cross examination showed that he was able to do the following activities:

29.1 coaching children aged about six in football lasting an hour without the need to leave the football pitch to go to the toilet.

29.2 Coaching students at Mount Grace School in cricket, lasting 2-4 hours, again without the need to leave the cricket pitch to go to the toilet.

29.3 Staying in a tent at a campsite during the bronze and silver Duke of Edinburgh practice and qualifier events for respectively one and two nights, thus a total of six nights per year. There were toilet facilities at the campsite.

29.4 Visiting the gym 2-3 times a week for 30-40 minutes, frequency limited by the need to provide childcare to his children. Participation in primarily the treadmill and some machines/weights. The claimant had ceased to go to the gym, due to depression.

30. I note that the claimant expressed some concern that engaging in machines and weights would trigger a flare-up or exacerbate his condition. But I also note that his specialist advised him to attend the gym to benefit his condition.

31. Given the nature of these activities compared to day to day activities, I have concluded that there was no substantial adverse effect on the claimant's ability to carry out day to day activities, when not having a flare-up.

32. During flare-ups, the claimant stated that he could not go out on those days and had to go to the toilet 15 – 20 times per day, for durations of 15 to 20 minutes [paragraphs 13 – 14 A42]. This was supported by Dr. Mazhar in the letter dated 13 May 2021 [B8]. This was not challenged in cross-examination.

If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

33. The claimant first experienced symptoms of proctitis in March 2019, which were continuous until he had benefitted from medication prescribed in August 2019. He was required to take Prednisolone (Predfoam) for two weeks, followed by a month of suppositories (Pentasa 1g). His symptoms were

relieved after this short-term course of medication. In addition to the medication, the claimant was advised to change his lifestyle permanently through diet, exercise at the gym and reduction of stress.

34. In or about March 2020, he experienced a flare-up. From a letter dated 13 May 2020, it is clear that claimant was on nightly suppositories (Pentasa) from mid-May 2020 (after Prednisolone for a month calmed the flare-up [B8]). Dr. Mazhar stated that it would be necessary to have routine reviews in his clinic [B8]. The claimant has continued with this regime of Pentasa once a day [see IBD nurses at B10 on 15 June 2020 and at B9 on 26 July 2022]. This was to act as a preventative measure [B10]. From 26 July 2022, he was to add in a Predfoam enema on a daily basis [B9]. Mr. MacMillan accepted that the claimant was taking medication daily from a certain date, but did not concede the period.

35. I therefore find that the claimant had daily medical treatment from May 2020 to treat or correct the impairment.

Were the effects of the impairment long-term? Did they last at least 12 months, or were they likely to last at least 12 months?

36. In his closing submissions, Mr. MacMillan accepted that the physical impairment was long term, having lasted 12 months.

37. I have to consider whether the effects of the impairment were long term. This is a complex question in the circumstances of this case, requiring me to consider both:

37.1 The likelihood of flare-ups recurring, which caused effects on the claimant's day to day activities.

37.2 The deduced effects of any medication

Likelihood of recurrence of flare-ups

38. Despite ongoing medical treatment (through daily medication), the claimant has experienced flare-ups in 2020, 2021 and in March, July and November 2022. On average, he experiences between 2 and 3 flare-ups in a year. Mr Macmillan in his closing submission accepted that the claimant experienced 2-3 flare-ups per year lasting 5-10 days each.

39. The key difference between Mr MacMillan and Mr Harris was whether the flare-ups were likely to recur. Mr. MacMillan stated that, with actual maximum incidence of 3 times per year, recurrence was not likely, especially since in late 2019 to 2020, he had 7 months of no flare-ups and had not been on medication. Mr. MacMillan's submission was that objectively flare-ups were unlikely to occur. I therefore need to consider schedule 1, paragraph 2 (2).

40. I find that the flare-ups are likely to recur even when the claimant is on medication because they are and have been recurring from March 2020. The past is a reliable predictor of the future pattern. This is supported by the GP letter dated 10 July 2023 which states: *"his proctitis can flare up at any time. It*

*has been ongoing with intermittent flare since 2019 and exacerbated by stress in his daily life. I expect this will continue going forward and being managed as flares arise” [B35]. She also states “the proctitis causes Mr Gough to have increased bowel motions, abdominal pain and PR blood loss. This can be very debilitating and flare-ups would be difficult to predict”. In sum, flare-ups “could well happen”.*

41. For those reasons, I conclude that the impairment experienced by the claimant during flare-ups is to be treated as continuing to have that effect as that effect is likely to recur.

Deduced effect of medication

42. The specialist confirms that without treatment, the claimant would experience flare-ups. They do not indicate the frequency of such flare-ups in the event of the claimant not taking any medication but this is not necessary. It remains the position that but for the measures (medication in particular and life-style changes), it “could well happen” that the impairment has a substantial adverse effect on the claimant’s ability to carry out day to day activities.

**Conclusions**

43. The claimant meets the definition of a disabled person within s6(2) Equality Act 2010.
44. No findings are made as regards the respondent’s knowledge (or lack of knowledge) of the claimant’s disability, which is to be considered at the final hearing.

**I confirm that this is my written Judgment with reasons in Gough v The Board of Governors of Mount Grace School No: 3313679/2022 and that I have approved the Judgment for promulgation.**

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Employment Judge Coll

Date: 29 July 2023

Sent to the parties on: .31 July 2023.....

For the Tribunal Office