EMPLOYMENT TRIBUNALS

Claimant: Mr T Whittaker

Respondent: Tropical Marine Centre Limited

HELD AT: Manchester **ON:** 24 June 2016

BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: Mr P Norman, counsel
Respondent: Mr K Ali, counsel

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The parties having agreed that the claimant met all of the elements of the test for disability set out in s6 Equality Act 2010 save for whether his physical impairment was "long term", the Tribunal finds that the claimant was a disabled person within the meaning of s6 Equality Act 2010 from 13 August 2015 onwards.

2. As of the claimant's hospital assessment of 13 August 2015 it was apparent that the claimant's condition was not straightforward and that there were several complicating factors that could well delay his recovery. According to the evidence before me it was apparent of that date that it was likely, in the sense that it could well happen, that the claimant's condition would last for 12 months or more.

REASONS

1. The claimant brings claims against the respondent of unfair dismissal and disability discrimination. The purpose of this preliminary hearing was, by agreement between the parties' representatives, to determine only one issue: whether according to section 6 of the Equality Act 2010 the claimant's condition was "long-term" at the material time. The material time was agreed by the parties to be the period between the claimant's accident at work, 31 March 2015, and the date of communication of the outcome of the grievance appeal, which was 17 November 2015.

2. According to section 6 of the Equality Act 2010 a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities. It is settled law that "long-term" in relation to section 6 means that it has lasted for 12 months, is likely to last for 12 months or more or is a permanent condition.

3. At the material time the claimant's condition, that of an injury to his right knee causing a left meniscal and cartilage tear, had not lasted for 12 months. The Tribunal must therefore consider whether at the material time, the period for which it lasted was likely to be at least 12 months.

4. "Likely" in this context means "could well happen". This is a wider test than whether or not something was probable. The question for the Tribunal was therefore, look at during the material time, could it well happen that the claimant would be so affected 12 months after the accident?

5. Most of the material facts are not in dispute. The claimant was signed off work immediately after an accident at work on 31 March 2015 and did not return to work. He was dismissed on 20 October 2015 for gross misconduct.

6. The claimant was signed off as unfit for work by his GP. The respondent carried out an Occupational Health assessment in June 2015. Dr Gidlow produced a report which stated that the claimant has a history of osteoarthritis and that this was an underlying medical condition. The report went on to say that the accident caused cartilage and cruciate ligament damage, that Mr Whittaker would need surgery, likely to be arthroscopy, and would have a one month recovery period but that thereafter he would make a full return to work.

7. At the end of July Mr Whittaker had a fall at home and was prescribed morphine to deal with the consequences of the fall. Mr Whittaker attended hospital for an appointment on 13 August, and shortly thereafter in mid-August 2015 he emailed Mrs Potter, the respondent's HR Manager, to say that following his hospital appointment it had been determined that muscle had wasted since his fall at home and he was not able to have an operation on his knee until the muscle was built back up with physiotherapy.

8. Mr Whittaker also told the respondent that if the damage to his cartilage is as bad as was suspected, that it could take several months for him to recover. At that stage he had no date for his operation or even for when he might begin physiotherapy. He had been given no indication of how long physiotherapy might take to enable his knee to then be operated on. The hospital appointment said that he was to have a physio review after three months. This was confirmed to the respondent by the claimant's wife in an email that she sent on 6 September 2015, in which she indicated that Mr Whittaker may have to wait 3-4 months for an operation.

9. It was therefore apparent by 13 August, the date of the hospital appointment, that it "could well happen" that the claimant's condition would last 12 months or more.

10. The factors I have taken into account in reaching this decision are:

- The claimant's underlying condition of osteoarthritis which was confirmed in the Occupational Health report of June 2015;

- The claimant fell twice on his knee: once in March and once in July which exacerbated the original injury;

- The claimant's muscles had wasted as a result of the second fall and the operation needed to be delayed for at least three months to allow a course of physio and a review thereafter; and

- The claimant had been told that there was a possibility that the cartilage might not be able to be repaired, in which case his bone would have to be removed and replacement bone grown separately in a laboratory, which would take some months further.

11. Taking all of this into account it was apparent, as at mid August 2015, that it could well happen that the claimant's condition would last 12 months or more. Contrary to the respondent's assertions, these factors show Mr Whittaker's condition was not straightforward. It was not a simple case of damage to the knee repaired by surgery and recovery. There were, I find from the facts before me, several complicating factors present.

12. I note that it is the respondent's view that there is evidence before me of apparently contradictory evidence from Mr Whittaker as to the speed of his likely recovery. On occasion, Mr Whittaker expressed optimism regarding his recovery and indicated that a return to work was imminent. The matter of what the respondent knew or ought reasonably to have known, or what Mr Whittaker told them at the time, does not come into an assessment of whether he has crossed the threshold to be covered by section 6. Issues of knowledge and information exchanged between the parties is for the main hearing and the Tribunal's assessment of Mr Whittaker's complaints under sections 15, 19 and 20 of the Equality Act 2010. The threshold for an employee to be considered disabled according to section 6 is relatively low, and as at the claimant's appointment at the clinic on 13 August he crossed it and was disabled according to section 6 from that time onwards when it became apparent that it could well happen that his condition would last for 12 months.

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Employment Judge Barker

20 July 2016

JUDGMENT AND REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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