



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

**Respondent**

Mrs C Denham

and

Mulberry's of Beaconsfield Limited

**Preliminary Hearing  
held at Reading on:**

6 April 2017

**Before:**

Employment Judge Vowles (sitting alone)

**Appearances**

**For the Claimant:** Ms B Zeitler, counsel

**For the Respondent:** Ms J Smeaton, counsel

## RESERVED PRELIMINARY HEARING JUDGMENT

**Evidence**

1. The Tribunal heard evidence on oath and read documents in a bundle provided by the parties.

**Disability - section 6 Equality Act 2010**

2. The Claimant was not a disabled person within the meaning of the Equality Act 2010 by reason of a physical impairment in her right arm. The complaints of disability discrimination relating to the impairment fail and are dismissed.

**Reasons**

3. This judgment was reserved and written reasons are attached.

## REASONS

**Issues**

1. The issue to be determined was set out in a Case Management Order made at an earlier Preliminary Hearing on 29 November 2016. It was to consider the issue of whether the Claimant was a disabled person within the meaning of the Equality Act 2010.

2. The Claimant claimed that she was a disabled person at the material time, February–April 2016, by reason of a physical impairment, namely tennis/golfer’s elbow in her right arm, a form of repetitive strain injury.
3. The Respondent accepted that the Claimant suffered from the physical impairment but did not accept that it amounted to a disability within the meaning of section 6 Equality Act 2010.

### **Evidence**

4. The Tribunal heard evidence on oath from the Claimant, Mrs Carol Denham. It also heard and read submissions from Ms Zeitler on behalf of the Claimant and from Ms Smeaton on behalf of the Respondent. It also read documents in a bundle provided by the parties.

### **Relevant law**

5. Section 6 of the Equality Act 2010 contains the statutory definition of disability for the purposes of the Act:

*(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.*

6. The Tribunal also took account of Schedule 1 of the Act, the Secretary of State’s Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) and the Equality and Human Rights Commission Code of Practice on Employment (2011) in particular, appendix 1 entitled: ‘The Meaning of Disability’.

### **Findings of fact**

7. The Claimant was employed as a facial therapist by the Respondent from 27 October 2004 until her resignation on 26 April 2016, a period of 11 years. She was aged 57 years at the effective date of termination of employment.
8. Her duties involved work of various types as a beauty therapist. She provided facial therapies in the main but also on occasions performed reflexology and massage type treatments. All involved the use of her hands and arms and required a degree of manual dexterity.
9. The Claimant relied upon her disability impact statement dated 19 December 2016 and a further, more general, witness statement dated 19 March 2017. In the later statement, she said:

*“4. Throughout my employment with the Respondent, I suffered with ‘tennis’ and ‘golfer’s elbow’ and the Respondent was aware of this. I had been signed off work on numerous occasions between 2010 and 2015, which cumulated with my final period of sickness, commencing on 28 August 2016.*

*5. Further, the Respondent had removed reflexology and massage type treatments from my work list which helped ease the pain and discomfort that I was suffering from on several occasions. However, the Respondent started adding more and more reflexology and massage type treatments to my work list, which increased the pain in my elbow and precipitated me suffering incredible pain and being signed off work as unfit to work sick once again. I would reiterate that I was employed as a facial therapist and undertook reflexology treatments to assist the Respondent when other employees left the Respondent’s employment.*

*6. I was repeatedly signed off work by my GP due to the pain I was experiencing, between 13 August 2015 to 2 December 2015, with these notes being exhibited at pages 138 to 145 and relates to my most recent period of being off work whilst employed by the Respondent. As is clear, my GP has stated that the conditions that I am suffering from is “repetitive strain injury”, “elbow pain” and “repetitive strain injury causing painful elbow”. The Respondent was aware of the disability that I was suffering from.”*

10. The Claimant was absent on sick leave because of her elbow problem from 28 August 2015 until her return to work on 13 February 2016.
11. On 29 February 2016 she was dismissed by reason of medical capability. She appealed and on 7 April 2016 her appeal was successful and she was reinstated. However, on 26 April 2016 she resigned.
12. On 19 August 2016 the Claimant presented her complaints of unfair dismissal, disability discrimination, age discrimination, unpaid wages, breach of contract and unpaid holiday pay to the Tribunal.
13. Those are the background facts.

## **Submissions**

14. In her second statement, the Claimant said as follows:

*“9. My repetitive strain injury of golfer’s and/or tennis elbow (as they are known) has substantially effected my ability to undertake normal day to day activities over a long period during my employment with the Respondent in the following ways, and more particularly 2010 and up to the termination of my employment.*

- a. *I have driven for many years and prior to 2010 my husband and I would equally share any driving that needed to be done. However, whilst I have been signed off work by my GP I suffered pain in my arm whilst holding the steering wheel. It was and is particularly painful when I am in traffic and also when I have to drive for longer periods e.g. more than 10 minutes, although the pain is there all the time no matter how long I am driving. ...*
- b. *I had previously been able to fully fill a kettle. However, between 2010 in particular and during the period that I was signed off work by my GP I have been unable to lift a kettle full of water with my right hand and either did not do it or had to do so with the support of my left hand. ... ..I am unable to lift a big mug of tea with my right hand as it is too painful for me to either grip or lift it.*
- c. *... I am unable to lift a saucepan while cooking food. ...*
- d. *... Since 2010 I have not been able to do carry out fine movements required for tasks, such as peel vegetables with a normal peeler because it causes pain in my forearm and elbow. ...*
- e. *I cannot open jars easily and sometimes at all....*
- f. *... since 2010, I have been unable to undertake diurnal tasks such as using the vacuum cleaner. ...*
- g. *Prior to 2010, I was able to push a shopping trolley around the supermarket and carry my shopping, however since about 2010 I have found it very difficult to do so. ... .. I could not lift a shopping bag.*
- h. *... I cannot hold properly my second granddaughter. ... I cannot cradle my second granddaughter who was born in September 2015, for longer than maybe as much as 5 to 10 minutes in my right arm because of the pain in my elbow. I could not carry her as she got older. ...*
- i. *... since about 2010, I have not been able to use a keyboard for a substantial period of time ...*
- j. *... since about 2010, I have struggled to hold a regular pen. ...*
- k. *... Since 2010, and particularly whilst I was signed off from work by my GP, I was unable to hold my usual make up brushes. ...*
- l. *... I have subsequently found that it look me longer to do the buttons up on a shirt or blouse. ...*
- m. *... I struggled and continue to struggle to sleep. ...*

- n. *Prior to 2010, I regularly attended classes at my local gym attending up to 6 hour-long classes per week. Due to the pain my condition causes in my arm, I had to reduce these to 3 classes a week. ...*
- o. *... from 2010, and particularly during the period that I had been signed off work by my GP from August 2015, I was unable to use many of my gardening tools. ...*
- p. *Prior to 2010, I would undertake sewing and making curtain. Since 2010, I have been unable to do this without difficulty and pain. ...”*
15. Also included in the bundle were extracts from the Claimant’s GP medical records although it was accepted that these were incomplete and out of order.
16. The most recent and relevant medical reports which the Tribunal took account of were as follows:
- 20-31 July 2015: Report of Mr Gus Morrison, Chartered Physiotherapist. (Although based on examinations in July 2015, this report was not produced until 16 December 2016 at the request of the Claimant's representative.)
  - 4 August 2015: Letter from Mr Morrison to the Claimant’s GP.
  - 21 August 2015: GP referral to physiotherapist.
  - 25 November 2015: Report by Ms Sujata Deshmukh, physiotherapist.
  - 2 February 2016: Report by Ms Meryl Glover, specialist hand therapist.

## Decision

17. In considering substantial adverse effect, the Tribunal paid regard to paragraph 8 of the EHRC appendix which states as follows:

*What is a substantial adverse effect?*

*A substantial adverse effect is something which is more than a minor or trivial effect. 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. Account should also be taken of where a person avoids doing things which for example cause pain, fatigue or substantial social embarrassment or because of a loss of energy and motivation. An impairment may not directly prevent someone*

*from carrying out one or more normal day-to-day activities but it may still have a substantial adverse long term effect on how they carry out those activities. For example, where an impairment causes pain or fatigue in performing normal day-to-day activities, the person may have the capacity to do something but suffer pain in doing so or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time.*

18. The case law is clear that in determining whether a Claimant has a disability the Tribunal must focus on what she cannot do, or can do only with difficulty, rather than what she can do. It should also consider all matters in the round.
19. So far as day-to-day activities were concerned the Tribunal considered carefully the list of activities set out in paragraph 16 of the Claimant's witness statement. Paragraph 14 of the EHRC appendix reads as follows:

*What are normal day-to-day activities?*

*They are activities which are carried out by most men or women on a fairly regular and frequent basis. 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. Day-to-day activities thus include, but are not limited to, activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing, and taking exams, going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for oneself. Normal day-to-day activities also encompass the activities which are relevant to working life.*

20. The Tribunal found that the medical evidence listed in paragraph 16 above cast considerable doubt upon the contents of the Claimant's disability impact statement.
21. It was clear from the Claimant's GP records and the referral made on 21 August 2015 that the Claimant had not consulted her GP about her elbow impairment from 7 May 2010 (when it is first mentioned in her GP records) until 21 August 2015. It was conceded by the Claimant's representative that the impairment may not have been substantial in 2010 so as to amount to a disability.
22. All the medical evidence suggested that the impairment worsened in July/August 2015. Mr Morrison, having assessed the Claimant in July 2015, said that he made a diagnosis of lateral and medial epicondylitis which had been causing her significant discomfort and affecting her

activities of daily living for approximately one month. That was consistent with the Claimant's medical history in her GP records.

23. Additionally, it seems the Claimant had been carrying out duties at work, including reflexology/massage treatments up until August 2015 when she went absent on sick leave.
24. In Ms Deshmukh's report (although dated 25 November 2015 it appears to relate to an examination in September 2015) and it is noted "*she denied of having any radiating pain or paresthesia in her upper limbs.*" The report seems to focus upon pain and stiffness in the Claimant's neck but not in her arms.
25. This evidence was inconsistent with, and undermined, the Claimant's account that the substantial adverse effects were present from 2010 up until April 2016.
26. So far as the question of whether the adverse effects were "substantial", Mr Morrison, having been specifically requested to consider whether the Claimant had a disability under the Equality Act 2010 said:

*"Mrs Denham reported to me that she struggled with numerous activities of daily living. In particular she described specific aggravating factors such as lifting the kettle and housework. This is likely to have had an effect on the time taken to complete these activities, however I am unable to determine, to what extent this will have been the case."*

27. The medical evidence which casts the most doubt upon the Claimant's disability impact statement was Ms Glover's report which included the following:

*"Mrs Denham was assessed on February 2<sup>nd</sup> 2016 at her work place in Mulberry's in Beaconsfield at 15.00 hours.*

*Mrs Denham brought with her some of her medical records regarding her right hand and upper limb. From this information I was able to establish that she had been diagnosed with right tennis and golfers elbow.*

*These are conditions that cause pain around the elbow. They often occur after strenuous overuse of the muscles and tendons of the forearm, near the elbow joint.*

*If symptoms are not eliminated it is still possible to continue to function in activities of daily living and work.*

*The assessment found that she had reduced grip strength for a female of 57 years however her grip strength was comparable in both her dominant and non-dominant hands. Her pinch strength was within the norms for a female of 57 years. She had normal sensation in her hands.*

*A quick Disability of the Arm, Shoulder and Hand (Quick DASH) questionnaire was completed. This asks about symptoms and the ability to perform tasks of daily living. It is widely used in the assessment of those with arm, shoulder and hand problems and universally recognised.*

*The responses indicated that Mrs Denham has no difficulty or mild difficulty with such tasks.*

*She has moderate pain but is able to carry out tasks.*

*Mrs Denham stated that she was initially unable to carry out tasks when she went off work but is now able to carry these out. She stated that she has been making curtains and doing some painting. She has also been attending her fitness classes.*

*In view of the assessment findings and the fact that Mrs Denham has been using her right upper limb and continuing her other activities I feel that Mrs Denham is able to return to work.*

*I would recommend that this is a staged return to work as her work is very 'hands on'....".*

28. The medical evidence indicated that the adverse effects of her elbow impairment were not substantial between May 2010 and August 2015. There appears to have been a flare up of the adverse effects but by November 2015 at the latest, Ms Deshmukh reported that the Claimant denied having pain in her upper limbs. By February 2016 the Claimant reported to Mrs Glover through the DASH questionnaire, which was about symptoms and the ability to perform tasks of daily living, that the Claimant had *"no difficulty or mild difficulty with such tasks – she has moderate pain but is able to carry out tasks"*. By February 2016 she was assessed as fit to return to work, albeit on a staged basis.
29. Additionally, the medical evidence supports the Respondent's contention that even if there was a substantial adverse effect, that was limited to the period between August and February 2016.
30. The Respondent relied upon the Employment Appeal Tribunal case Condappa v Newham Healthcare Trust [2001] EAT/452/00 paragraph 47 in which it was said that:

*"As Mr Morton pointed out, the Act is not concerned with any adverse effect but rather with a substantial adverse effect. As appears from paragraph 31 of the decision, this is the question which the Tribunal addressed. Mr Morton accepted that where a person carries out normal day-to-day activities in pain or with difficulty, this may amount to a substantial adverse effect; however it will not necessarily do so. This is a matter for the Tribunal."*



31. The Claimant relied upon the Employment Appeal Tribunal case of Aderemi v London and South Eastern Railway Ltd [2013] ICR 591 paragraphs 24 and 28 in which it was said:

*“Where a broad definition such as that of disability is adopted, that requires that a broad approach should be taken to what lies within it. Thirdly, we consider that there is a need to be careful here that the purpose of the statute is not defeated by an overemphasis upon the specificity of the label to be attached to a particular situation.”*

32. The Tribunal accepted the propositions set out in both the above cases but was not able to conclude that the Claimant’s disability impact statement was accurate or that adverse effects of the physical impairment were substantial or long term because the statement was directly contradicted by the medical evidence.
33. Taking the list of activities in the Claimant’s statement which are properly described as normal day-to-day activities, there is nothing in that list that the Claimant cannot do. So far as doing an activity with her right arm causes difficulty and pain, it is reasonable to expect her to use her unimpaired left arm to carry out, or assist in carrying out, that activity. That may cause some awkwardness or inconvenience, and may take longer to carry out the activity, particularly at first, especially as the left arm is the non-dominant arm. But for most people it would not cause any difficulty in for example holding a kettle or a saucepan or carrying a shopping bag in the other hand.
34. Paragraph B.7 of the Secretary of State’s Guidance deals with coping strategies:

*Effects of Behaviour*

*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. 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.*

35. The Tribunal found that the Claimant had a physical impairment in the form of right tennis/golfer’s elbow but it did not, before July 2015 or after February 2016, have a substantial adverse effect on her ability to carry out normal day-to-day activities. The residual ability to use the right arm, the availability of the unimpaired left arm to compensate for the limited loss of right arm function, and the available medical evidence all led to the

conclusion that the adverse effects were not more than minor or trivial. Any substantial adverse effects lasted at most from July 2015 to February 2016. There was no evidence to suggest that any substantial adverse effect had lasted, or was likely to last, for at least 12 months.

36. It was not therefore a disability within the meaning of section 6 of the Equality Act 2010.
37. The Claimant's claims of disability discrimination insofar as they rely upon the elbow impairment (and it appears no other impairment is relied upon) therefore fail and they are hereby dismissed.

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Employment Judge Vowles

Date: 24 April 2017

Sent to the parties on:

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For the Tribunal Office