



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms K Collins

**v Dr Sylvester, Dr Hobbs and Dr Ford
T/A Liphook Village Surgery**

JUDGMENT ON PRELIMINARY ISSUE AND DIRECTIONS

Heard at: Southampton

On: 21 April 2017

Before: Employment Judge Jones QC

Appearances

For the Claimant:

Mr J Emmerson

For the Respondent:

In person

DECISION

1. At all times relevant to her claims under the Equality Act 2010, the Claimant had the protected characteristic of disability by reason of her bowel condition.

REASONS

1. The question for determination was whether, at the relevant time, the Claimant had the protected characteristic of disability within the meaning of the Equality Act 2010, s. 6.
2. The test is set out at EA 2010, s. 6(1). I have to be satisfied that:
 - (1) The Claimant had an impairment (either physical or mental);
 - (2) That the impairment had an effect on her ability to carry out normal day to day activities;
 - (3) That the effect was substantial (in the sense of being more than trivial); and
 - (4) That the effect was long term in the sense (applying Sch 1, para 2) that it had lasted for at least 12 months or that it was likely to do so.

Impairment

3. The Claimant's notice of application identifies two physical impairments as being relevant:
 - (1) A prolapsed vertebra, though she accepted that it was more accurately described as a prolapsed disc; and
 - (2) A bowel condition that had resulted in an ileostomy.

4. The Claimant had wished to amend her claim so as to rely upon two further impairments: an anxiety disorder and recurrent urinary tract infections. Mr Emmerson, acting ably on her behalf, told me that that application was no longer pursued because neither of the alleged acts of discrimination relied upon (i.e. failure to make adjustments suggested by the Claimant's GP and her ultimate dismissal for absence) related to any disability arising from either impairment.

- (1) Prolapsed Disc

5. The Respondents accepted that the Claimant had suffered from a prolapsed disc; that it was a physical impairment; that it would have an adverse effect on her ability to carry out normal day to day activities and that any such effect would be substantial. It followed that the only question was whether the effect was long term.
6. The Claimant gave evidence. She told me that she had experienced the first symptoms on 29 April 2016. During cross-examination she was shown an extract from a clinic letter dated 13 July 2016 which stated:

"I reviewed [Ms Collins] today following her nerve root injection and she has done very well. All the horrid arm pain has gone away and on testing her today she has got normal strength, where as [sic] she has been weak. I am therefore delighted that her disc does appear to be shrinking back and therefore the arm is returning to normal ... It looks like surgery is not going to be required"

The Claimant's evidence was, in effect, that so far as she believed, she no longer had a prolapsed disc – that it had indeed shrunk back – but that she had been warned that it might recur and that she consequently was cautious about lifting and stretching for fear of provoking a recurrence. That caution also reflected the impact of the ileostomy. Whilst that did not sit entirely comfortably with the account given in her impact statement which suggested that the prolapsed disc remained a problem, I preferred the evidence given on oath before me.

7. It appears that by July 2016, when the Claimant's GP made recommendations for reasonable adjustments the Claimant's impairment, if not already entirely gone, was not expected to persist for very long. There is no indication that it was thought that she was likely still to be impaired in April 2017, i.e. 12

months after the initial prolapse. Although it is the effect and not the impairment that has to be long term, there was no suggestion that the adverse effect would survive the removal of the impairment. It was suggested that the impairment might be considered a recurring condition, but I had insufficient evidence before me to allow me to conclude that a recurrence (to use the language in *SCA Packaging v Boyle* [2009] UKHL 37) was something that could well happen.

8. In the circumstances, I find that the Claimant was not disabled by reason of her prolapsed disc.

(2) Bowel Condition

9. The Claimant suffers from a bowel condition that results in slow transit of faeces. In the summer of 2016 she had an ileostomy and, in consequence, now has a bag. The Respondents accepted that the Claimant had a physical impairment; that it had the relevant adverse effect, and that that effect was substantial. Again, the question turned on whether the effect was long term.
10. The Claimant's uncontested evidence was that she had had the condition for at least 12 years. Even if the ileostomy had entirely resolved the Claimant's impairment, therefore, she would still have the necessary protected characteristic on the grounds of having had a past disability (see EA 2010, s. 6(4)). However, I do not consider that the ileostomy had that effect. Applying EA 2010, Sch 1 Para 5, I consider that the ileostomy was a "measure" taken to treat or correct the impairment. It is a medical treatment and the use of a bag is an "aid" within sub-paragraph 5(2). I find that "but for" the measures the Claimant's impairment "could well" continue to produce the necessary adverse effect. That was the position through to the point of the Claimant's dismissal.
11. In the circumstances, I find that the Claimant was a disabled person for the purposes of the EA 2010 at the relevant time.

Employment Judge Jones QC

28 April 2017

Sent to the parties on:

6 May 2017

For the Tribunal: