Case Number: 1600621/2016

EMPLOYMENT TRIBUNALS

Claimant: **Mr P D Loftus**

Respondent **M & N Davies Acton MOT & Tyres**

Heard at: **Mold** **On: 12 April 2017**

Before: **Employment Judge S Davies**
Members:
Representation:
Claimant: Mr G Edwards
Respondent: Ms K Clarke

JUDGMENT
(PRELIMINARY HEARING)

The judgment of the Employment Judge sitting alone is that the Claimant has a disability within the meaning of Section 6 of the Equality Act 2010 (EqA) by reason of his back problems/pain.

REASONS

1. This Preliminary Hearing to determine whether the Claimant was a disabled person. Oral judgment with full reasons was given at the hearing and these reasons are provided at the request of the Respondent.

The hearing

2. I heard evidence from the Claimant and on behalf of the Respondent from Mr M Davies, Director and Mr George Dodds, an employee.

3. I was referred to two bundles of documents; a larger bundle from the Claimant and a smaller one from the Respondent. Page references are to the larger Claimant's bundle unless indicated otherwise.

4. The Respondent disputed the Claimant was a disabled person two ways. The Respondent's reasons are set out in an email of 8 February 2017 sent to the Employment Tribunal and can be summarised as; firstly, a dispute as to the length of time for which the Claimant was likely to suffer from his condition at the time of dismissal and secondly, a dispute as to whether the symptoms have had a substantial effect.

The law

5. The definition of disability in Section 6 EqA:
   (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. Guidance on definition of disability (2011) (the Guidance) C3 and C4. On the meaning of the word "likely" C4 states "in assessing the likelihood of an effect lasting for 12 months' account should be taken of the circumstances at the time the alleged discrimination took place, anything which occurs after that time will not be relevant in assessing its likelihood. Account should also be taken both of the typical length of such an effect on an individual and any relevant factors specific to the individual."

7. ***Aderemi –v- London South Eastern Railway*** UK EAT 316 / 12 - I was referred to paragraphs 8, 14 and 30. Paragraph 14 provides guidance as follows:

   "*it is clear first from the definition in Section 6(1)(b) Equality Act, that what a Tribunal has to consider is on adverse effect, and that it is an adverse effect not upon his carrying out normal day to day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his .. impairment. Once he has established there is an effect, that it is adverse and that it is an effect on his ability, that is to carry out normal day to day activities, a Tribunal then has to assess whether that is or is not substantial. ..it has to bear in mind the definition of substantial in Section 212(1). 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. Therefore there is little room for any form of sliding scale between one and the other."

Facts

8. The Claimant relies on an injury to his back as amounting to disability, in particular he refers to a bulge in two discs in his spine.

9. The Claimant is in his mid 40's and previously says that he had an active, sporty lifestyle.

10. In terms of treatment he says he remains under the care of the muscular skeletal team at Wrexham Maelor Hospital, in conjunction with the local University, (paragraph 10 of his Witness Statement). He takes a mix of prescription and over the counter pain killers to manage his symptoms.

11. The symptoms of his condition are set out in detail at page 50 of the large bundle: back pain, shooting pain down both legs, pins and needles in both feet, pain in the posterior groin area into the thighs, reduced sensation in the whole left leg, sleep is very poor most nights, loss of sensation of needing to pass urine or problems fully emptying leading to incontinence, one episode of bowel incontinence, loss of weight of 1.5 stone, feeling low and slightly confused with difficulty in thought processes.

12. In terms of the impact on his ability to carry out day to day activities he records in his Witness Statement difficulties encountered with sleep, walking, sitting for long periods, managing stairs describing a period of time where he had to sleep downstairs in his house, driving short distances do not appear to pose a problem but longer journeys require breaks, not being able to work at the same rate as he had done prior to his injury and difficulty dressing himself - his wife has to assist him, particularly with shoes and socks.

13. The Claimant worked as a Manager of the Respondent's garage and was the only individual authorised to carry out MOTs. He was dismissed on 19 May 2016 for what the Respondent asserts is gross misconduct and a breach of the implied duty of trust and confidence in relation to an accident the Claimant maintained happened on 6 February 2016, because of which he says he sustained the injury to his back. There is a dispute between the parties as to whether the accident on 6 February 2016 in fact occurred.

14. The Respondent accepted that it did not seek any medical evidence or input from Occupational Health or a GP prior to the Claimant's dismissal. Mr Davies acknowledged that the Claimant had injured his back in February 2016 but does not accept that this is a result of an accident. There is an inconsistency between the ET3 Response at paragraph 7 and paragraph 12 of Mr Davies' Witness Statement. Mr Davies confirmed that his Witness Statement was the accurate account and that the Claimant had told him that he had injured his back at work and that this information had been passed to him at some point after 15 February 2016.

15. From February onwards until his dismissal the Claimant had periods of sickness absence intermittently; Mr Davies describes permitting the Claimant to work when he felt able to do so and to remain away from work when he was unable to. For example, I was shown a reference to a Fit Note issued by the GP between 21 and 28 March 2016 - this period of absence is acknowledged by Mr Davies at paragraph 18 of his Witness Statement.

16. In terms of the Claimant travelling to work Mr Davies acknowledged that he gave the Claimant a lift to work on various occasions during the period from February up until dismissal. Mr Davies is a Director of the Respondent business, along with his brother, and does not usually work at the MOT garage. He explained that either the Claimant would contact him by text to arrange where to pick him up or would inform Mr Davies that he was going to walk into work. On some occasions the Claimant would inform him in person the night before. Depending on the severity of his symptoms on the day in question the Claimant would either walk to work; a distance of less than half a mile or would get a lift from Mr Davies.

17. I was shown a Google map of the distance between the Claimant's home and a shop outside which he was sometimes picked up by Mr Davies, at a normal walking speed that distance would take around 3 minutes, but the Claimant described it taking sometimes 10 to 15 minutes because of the difficulties with his back. The distance between the Claimant's home and the garage was around half a mile and on a bad day the Claimant described that might take up to 40 minutes, less if he was having a better day with his symptoms.

18. During the period in question Mr Davies acknowledged that the Claimant told him that he was tired, was struggling to get up in the morning and was affected by his medication, (paragraph 22 of his Witness Statement).

19. Turning now to the question of who carried out MOT work during the relevant period, I saw evidence from the Respondent including copies of the garage diaries (Respondent's bundle page 1) suggesting that a reasonably large number of MOTs were carried out during the period

when the Claimant had returned to work after the alleged accident. I have noted already that the Claimant was the only authorised member of staff to carry out MOTs, albeit it was accepted that he could have assistance from the two apprentices working at the garage carrying out the work, as long as the Claimant remained responsible for final sign off of the MOT.

20. Mr Davies also referred to a gentleman called Randy who provides relief MOT cover for sickness and holiday. Mr Davies did not suggest that he was present at the garage to personally witness who had carried out the work.

21. I was also referred to the VOSA records (respondent's bundle page 7 onwards) but neither of these documents, the diaries or the VOSA records, were conclusive as to who had carried out the MOTs and whether assistance had been provided to whomever was carrying them out.

22. Turning now to the evidence from Mr Dodd and Mr Davies with regard to events that took place after 19 May 2016, I have not made detailed findings as I consider I must consider the question of disability as at the date of dismissal. Whilst there may be points to be made on behalf of the Respondent, for example about knowledge of disability, those are not questions for me to determine today and the issue I am determining.

Medical evidence

23. I was referred to the records of the GP at pages 1 to 3 which record the Claimant attending A&E on 6 February 2016.

24. There is a reference on 8 February 2016 to acute back pain with sciatica; the Claimant had bent down and felt something go and now had trouble moving with pain down his leg, no pins and needles, no urinary problems.

25. On 21 March 2016 a Fit Note was issued for sickness absence for 7 days, not fit to work until 28 March with acute pain and sciatica. "*back pain without radiation NOS. Works as an MOT tech. Lower back pain now worse. c/o Pins and needles on left side. No urinary retention / incontinence, no faecal incontinence. Taking morphine and diazepam for the pain currently. Not taking any other pain killer. Have not lifted any heavy stuff at work, doing mainly just visual inspection at work, now reports constant back pain exacerbated by any movements*."

26. On 31 March 2016 there is a record of a telephone consultation which says "s*ince the scan* (which is a reference I believe to an MRI scan) *he has had bladder disturbance - wetting himself. Severe pain in the back and lack of sensation. He is having some urgent work, he was driven to work. Though the MRI hasn't shown much nerve route involvement it may*

have changed? Cord compression. Adv to attend A&E as soon as he can leave work."

27. Claimant was admitted to hospital overnight on 31 March 2016; confirming this to Mr Davies by text message of 1 April 2016 (page 308).

28. In early April 2016 the GP records show prescribed pain killers: Temgesic and Naproxen.

29. On 22 April 2016 (pages 8 and 9) a letter is sent to the Claimant's GP by Mr Jones, Clinical Specialist Physiotherapist. In it there is a description of the incident "*he informs me that the symptoms came on suddenly when he was pulling and* (sic) *instrument and felt a 'pop' in his back with almost resultant pain…. He also seems to experience some neuropathic pain in the left leg more than right with some altered sensation. He seems to be having some symptoms around incontinence (hence his admission), but this seems to have improved recently*."

30. When the Claimant was asked about the comment "*incontinence seeming to improve*" the Claimant noted that position that was correct at the time the letter was written. This appears to be reflected as an accurate description, when considering page 29, which is an urgent referral by the Claimant's GP, a couple of days later on 25 April 2016, which says "*Dear Colleague, As you know this gentleman was referred on 8 April 2016. He is still complaining of worsening loss of control of his bladder and bowel movements. I would be grateful if his appointment could be urgently expedited.*"

31. Finally, I refer to a letter at page 50, dated 19 May 2016 (which is the date of dismissal) and refers to a clinic appointment on 17 May 2016. It is a letter from the Physiotherapist to the Claimant's GP which says:

"***Clinical impression****: ? cause for symptoms as no cause found on lumbar spine on MRI.*
Plan*. I will refer him for an urgent MRI of whole spine and review him with the results.*
History*. Mr Loftus reports that whilst pulling a car jack he felt a pop in his left lower back on 6 February and attended A&E with back pain. 1 – 2 weeks later he had pain shooting down both legs and pins and needles in both feet, which is less frequent now than initially. The back pain is constant still. Today he had pain in the posterior groin area and into the upper thighs posteriorly. He also complains of constant reduced sensation in the whole left leg. Sleep is very poor most nights. He has loss of sensation of needing to pass urine or problems fully emptying then leading to incontinence. He has had one episode of bowel incontinence approximately one month ago, but he still feels a loss of sensation in*

needing to open bowels since. Bladder / bowel problems started approximately 6 weeks ago. He has lost almost 1.5 stone, which his wife thinks is over the last month. He is not feeling unwell but sometimes feels low and also slightly confused and difficulty with thought processes. He is taking Pregabalin 150mg x 2 and Tramadol 50mg x 3. He works as an MOT tester, tried to continue, but had to stop about 3 weeks ago.
Examination: *He stands very tense and slightly shaking. There is muscle wasting of the left calf and thigh. Lumbar flexion is limited to mid thigh level due to upper posterior thigh and back pain. Lumbar extension and side flexion are limited to ¾ range due to back pain. He is unable to heel raise on the left side and myotomes S1/2 are reduced on the left. He had reduced sensation in the whole left lower limb. Reflexes were normal bilaterally. Babinski normal , possible positive clonus on the left but difficulty testing due to the patient shaking and unable to relax fully….*"

32. The Respondent submitted that there were various inconsistent accounts provided by the Claimant to healthcare professionals as to the cause of his back problem. However, I accept the submission of the Claimant that the cause of the medical condition is not a question for today. Further, the way in which the cause of injury is reported by health care professionals is not a matter over which the Claimant has total control. There is the possibility of information being lost or changing in translation.

33. The Respondent referred to the fact that a recommendation to contact Walton Hall Neurosurgery was not taken up by the Claimant (page 49) however I accept the Claimant's explanation that he was advised to pursue ongoing treatment prior to taking that step. It is understandable that health care professionals would recommend the continuance of non-invasive treatment prior to surgery being considered.

Conclusion

34. As to substantial effect, I must focus on what the Claimant cannot do; there were extensive limitations on the Claimant at the time of dismissal, which I have mentioned above. These were more than minor or trivial and there is no sliding scale, so they must be considered to be substantial.

35. Mr Davies accepts he knew of the sleep issues and the issue with walking which necessitated giving the Claimant a lift to work on what was a short journey.

36. I accept the evidence of the Claimant that his symptoms have varied from day to day and depending on the medication he was taking. As I have already said the post termination matters are not relevant to my consideration.

37. As to the length of time it was likely that the condition would last, I referred myself to C3 and C4 in the Guidance and the meaning of "likely" being "could well happen". The Claimant had the condition for only a few months at the time of dismissal, but it seems from the medical evidence created by the point of dismissal that the condition was worsening, as is illustrated particularly at page 50.

38. I note that the Respondent did not seek its own medical evidence and it is usually best practice for a Respondent to do so prior to dismissal. However, this fact does not dispose of the point that I need to decide.

39. My decision making turns on the meaning of 'could well happen'. I referred myself to the case of ***S C A Packaging –v- Boyle*** and the meaning of "could well happen" is <u>not</u> 'probable' or 'more likely than not'. In light of that definition and the Claimant's significant symptoms, I conclude that at the point of dismissal, it could well have happened that the Claimant's condition would continue for a 12 month period.

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Employment Judge S Davies
Dated: 25 May 2017

JUDGMENT SENT TO THE PARTIES ON

17 May 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

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