Case Number: 3328386/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Miss M McLean	v	Unity in Care Limited

Heard at: Watford **On**: 29 May 2018

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: In person

For the Respondents: Mr I Ahmed, of Counsel

RESERVED JUDGMENT

The claimant was not, while she was an employee of the respondent, disabled within the meaning of section 6 of the Equality Act 2010.

REASONS

Introduction; the purpose of the hearing before me of 29 May 2018

1 In these proceedings, the claimant claims that she was discriminated against by a failure to make reasonable adjustments for a claimed disability and as a result of an employee of the respondent harassing her sexually. There was a preliminary hearing on 5 April 2018 at which Employment Judge Vowles directed that there be a further preliminary hearing on 29 May 2018 to decide

whether the claimant was disabled within the meaning of section 6 of the Equality Act 2010 ("EqA 2010"). A full hearing of the claimant's claims is listed to take place on 2-4 October 2018 inclusive. As a result, Employment Judge Vowles determined that at the hearing of 29 May 2018, the judge should consider also any further applications which might be made by the parties, and whether any further directions should be made for the future conduct of the proceedings. At the hearing before me on 29 May 2018, the claimant said that she wanted permission to amend her claim to add a claim of harassment within the meaning of section 26(1) of the EqA 2010 in relation to the protected characteristic of disability. I return to that application for an amendment below, after stating my reasons for my above judgment.

The legal issue which arose for determination on 29 May 2018

2 The legal issue which I had to determine on 29 May 2018 was whether or not the claimant was disabled within the meaning of section 6 of the EqA 2010 at the time when she was employed by the respondent. In the case management orders made by Employment Judge Vowles on 5 April 2018, there were these orders relating to the claimant's claim of disability discrimination

> "Failure to make reasonable adjustments - section 20 Equality Act 2010
>
> 9. The provision, criterion or practice was the requirement to carry out pulling and lifting as part of her job as a support worker/carer.
>
> 10. The substantial disadvantage was that the Claimant was unable to carry out pulling and lifting of clients and would suffer pain if required to do so.
>
> 11. The reasonable adjustment was to adjust the Claimant's duties so as to avoid pulling or lifting of clients, if necessary by employing another carer to assist her and to allocate pulling and lifting duties to other carers.
>
> ...
>
> **Disability**
>
> 14. The Claimant makes a complaint of unlawful disability discrimination and claims that at all material times she was a disabled person by reason of an injured right shoulder and lower back following a road traffic accident on 14 March 2017. The Respondent does not accept that the Claimant is, or was, a disabled person for the purposes of section 6 Equality Act 2010

and puts her to proof of the same.

15. No later than 19 April 2018 the Claimant shall provide to the Respondent a statement signed by the Claimant setting out:–

15.1 the impairment relied on;

15.2 the precise nature and extent of the effects the impairment has or had on the ability to carry out normal day to day activities;

15.3 the periods over which those effects have lasted;

15.4 whether or not there has been treatment for the impairment and what difference, if any, such treatment has had on the effects of the impairment."

3 The question whether an employee was disabled at any material time falls to be determined by reference to sections 6 of, and Schedule 1 to, the EqA 2010. Section 6 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.
>
> (2) A reference to a disabled person is a reference to a person who has a disability.
>
> (3) In relation to the protected characteristic of disability—
> (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability".

4 Schedule 1 provides:

> "(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 at 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."

5 In *McDougall v Richmond Adult Community College* [2008] ICR 431, Pill LJ, with whose judgment Sedley LJ agreed, said this in relation to the equivalent provisions in the Disability Discrimination Act 1995:

‘**21** The statute plainly contemplates that, for a disability within the meaning of the Act to exist, an impairment having a long-term adverse effect must be established: section 1. The starting point is to ask whether the effect of the impairment has lasted at least 12 months: Schedule 1, paragraph 2(1)(a). Sub-paragraphs (b) and (c) of paragraph 2(1) introduce a predictive element. It is not necessary to establish that the effect has lasted for 12 months if it is established that it is likely to last for at least 12 months or for the rest of the life of the person affected (no doubt to deal with terminal conditions).

22 Paragraph 2(2) provides a further opportunity to establish a longterm effect. Where the effect of the impairment has ceased, it may still be treated as having a long-term effect if the effect is likely to recur. By the use of the word “likely” in each of those situations a predictive element is introduced into the test of whether the effect of an impairment is a long-term effect. The word should bear the same meaning in paragraph 2(2) as in paragraph 2(1)(b).

23 The 1995 Act makes unlawful discriminatory acts of employers when making decisions about employees. Employers must not discriminate against employees who are disabled within the meaning of the Act. If they are to avoid the sanctions which may result from such discrimination, they must not discriminate against disabled people. They must first decide whether the employee is disabled within the meaning of the Act. They do that by applying a series of tests which, in an appropriate case, includes that in paragraph 2(2) of Schedule 1. That involves a prediction on the available evidence as would, in a different situation, a decision under paragraph 2(1)(b) or (c). Other decisions which employers are required to take to avoid falling foul of the Act, for example, the duty to make adjustments under section 4A of the Act, do not arise for decision in the present case.

24 The decision, which may later form the basis for a complaint to an employment tribunal for unlawful discrimination, is inevitably taken on the basis of the evidence available at that time. In my judgment, it is on the basis of evidence as to circumstances prevailing at the time of that decision that the employment tribunal should make its judgment as to whether unlawful discrimination by the employer has been established. The central purpose of the 1995 Act is to prevent discriminatory decisions and to provide sanctions if such decisions are made. Whether an employer has committed such a wrong must, in my judgment, be judged on the basis of the evidence available at the time of the decision complained of. In reaching that conclusion, I have had regard to the Guidance. I agree with the conclusion of Lindsay and Elias JJ and with their analysis of the Guidance.

25 The situation is quite different from an assessment of damages when a wrong has been established. The tribunal assessing the extent of the victim’s loss and damage should do so on the basis of the evidence available at the time of assessment. Whether a wrong has

> been committed must be judged on the basis of the evidence available at the time of the act alleged to constitute the wrong. The predictive exercise may be a difficult one. Predictive exercises usually are.
>
> **26** Mr Petts makes the point that it is necessary to make provision for the possibility of recurring episodes of the effect of an impairment. That is so and what paragraph 2(2) does under a procedure which is, in my view, plain. Mr Ohringer accepts that, where a recurrence has occurred, paragraph 2(1) read with paragraph 2(2) has the effect of back-filling the period since the last occurrence for the purposes of paragraph 2(1) so that the entire period counts towards the relevant period. That does not, in my judgment, bear upon the date at which the likelihood of recurrence is to be assessed for the purposes of paragraph 2(2). It is fundamental that the question whether a wrong has been committed be judged by the circumstances existing at the date of the act or acts alleged to constitute the wrong.'

6 Rimer LJ gave a concurring judgment, saying this in paragraph 33 at page 440F:

> "it is fallacious to assume that the occurrence of an event in month six proves that, viewing the matter exclusively as at month one, that occurrence was likely. It does not. It merely proves that the event happened, but by itself leaves unanswered whether, looking at the matter six months earlier, it was *likely* to happen, a question which has to be answered exclusively by reference to the evidence then available." (Original emphasis.)

7 I was referred in addition to the above case to the decisions of the Employment Appeal Tribunal in *Patel v Oldham Metropolitan Borough Council* [2010] ICR 603 and *Mefful v Merton and Lambeth Citizens Advice Bureau.* There were several hearings in the latter case, and I found that in UKEAT/0290/14/DA, of 5 December 2014, of most assistance. In fact, HHJ Eady QC there applied the previous ruling of the Employment Appeal Tribunal in *Ginn v Tesco Stores Ltd* UKEAT 0197/05/MAA, but her encapsulation of the test required by the latter case (in paragraph 25 of her judgment) is helpful:

> "An ET might also need to look at the cumulative effect of different impairments (albeit if taken alone, the individual impairments might not have a substantial effect). In such cases, the ET would have to add up the component parts, to see whether that amounted to more than the individual parts taken separately, see *Ginn v Tesco Stores Ltd* UKEAT 0197/05/MAA."

8 I did not see *Patel* as adding anything material to the analysis in *McDougall*, but I saw that in paragraph 22 of her judgment in *Mefful*, HHJ Eady QC helpfully said this about paragraph 2 of Schedule 1 to the EqA 2010:

> 'Thus whether the effect of an impairment is long-term may be determined retrospectively, under (a), or prospectively, under (b) or (c), see *Patel v Oldham Metropolitan Borough Council* [2010] IRLR 280 EAT. "Likely", for the purposes of (b) or (c), has been defined as meaning something that is a real possibility, in the sense that it could well happen, *SCA Packaging Ltd v Boyle* [2009] ICR 1056 (an approach now adopted in the Guidance).'

9 The guidance to which HHJ Eady QC there referred was the "Guidance on matters to be taken into account in determining questions relating to the definition of disability" issued by the Secretary of State under section 6(5) of the EqA 2010. I was referred to that guidance as well, but it added nothing to the above analysis concerning the application of paragraph 2 of Schedule 1 to the EqA 2010. What it did do is refer helpfully (given the claimant's contentions to which I refer below) to migraine in one place only, namely in the example set out in paragraph D15 on page 38, which was in these terms:

> "A journalist has recurrent severe migraines which cause her significant pain. Owing to the pain, she has difficulty maintaining concentration on writing articles and meeting deadlines."

10 Above that example, in paragraph D13, this was said:

> "The examples of what it would, and what it would not, be reasonable to regard as substantial adverse effects on normal day-to-day activities **are indicators and not tests**. They do not mean that if a person can do an activity listed then he or she does not experience any substantial adverse effects: the person may be affected in relation to other activities, and this instead may indicate a substantial effect. Alternatively, the person may be affected in a minor way in a number of different activities, and the cumulative effect could amount to a substantial adverse effect. (**See also paragraphs B4 to B6 (cumulative effects)**.)" (Original emphasis.)

The evidence before me on the above issue

11 The claimant gave oral evidence. She also put before me a number of documents on whose contents she relied. I had already read the statement which she had made in compliance with order number 15 of those made by Employment Judge Vowles on 5 April 2018, and I noted that that referred to migraines, headaches, dizzy spells, nausea, "an episode of blackout", depression and post-traumatic stress disorder ("PTSD") as well as back and shoulder pain. The statement was also in part a statement about the manner in which the claimant was treated by her manager at work, in part a series of assertions about the result of the application of the EqA 2010 to the claimant's conditions, and in part a series of extracts from texts about those conditions,

evidently drawn from the internet.

12 At the start of the hearing, I therefore asked the parties about the scope of my inquiry, and whether I could or should take into account the claimant's ailments other than those which affected her back or her shoulder. Having had that discussion, taking into account the factors to which I refer in the following paragraph below, I came to the conclusion that I both could and should take into account all of the claimant's conditions which were relevant to the claimed reasonable adjustment, but only those conditions.

13 The following factors were relevant in that regard.

13.1 The claimant is a carer.

13.2 Her claimed reasonable adjustment was putting her on a "run" which did not involve lifting or pulling until her shoulder had healed.

13.3 Migraine is not something which exacerbates shoulder and/or back pain so that the latter prevents someone from lifting or pulling: rather, migraine incapacitates the sufferer from doing anything, or at least affects the person's ability to do their normal work. The same is true of PTSD, nausea, dizzy spells and depression.

13.4 A simple (non-migraine) headache is not likely to affect shoulder pain in such a way that the pain becomes so unbearable that the sufferer from that pain cannot lift or pull.

The evidence which I took into account in determining whether the claimant was a disabled person within the meaning of section 6 of the EqA 2010

14 In oral evidence, the claimant said that her mother and her sister suffer from Fibromyalgia and that she, the claimant, is at risk of doing the same. She also referred to what had happened since she had left the respondent's employment. In fact, one of the things that she said was that she had suffered a worsening of her shoulder pain as a result of the work which she was required to do in the job to which she went after she had resigned from her employment with the respondent.

15 The last day of the claimant's employment with the respondent was 25 June 2017.

16 The claimant in oral evidence pointed to the documents at pages 79, 137, 148 and 194 and said that it was clear that she had a "grade 2" injury as described on page 194. The document at page 79 was a general description of rotator cuff tears. The claimant relied on the underlined words (I have added the underlining) in the following extract (which is in precisely the terms on page 79 with the exception that I have replaced the odd symbols at the beginning and

end of “snapping” with inverted commas, which were what those symbols evidently replaced):

> “The rotator cuff (a mechanism composed of four tendons that blend together) arises from the shoulder blade (scapula) and helps link the upper arm to the shoulder blade. A small fluid-filled sac called a bursa helps to protect and lubricate the tendons of the rotator cuff. A partial tear of the rotator cuff is when the tendon is damaged but not completely ruptured (torn); a full thickness tear is where the tendon has torn completely through, often where it is attached to the top of the upper arm (humerus), making a hole in the tendon. Rotator cuff tears are more common in people over the age of 40. Carrying on with normal activities if you are in pain can cause further damage to your rotator cuff, in some cases making the tear more serious. What causes it? Degeneration (wear and tear) due to fraying of the tendons over time. This can be due to repetitive stress, common in weightlifting, tennis or rowing Bone spurs or osteophytes (bony lumps around the joints) which develop with age. This condition, also known as shoulder impingement, can rub against, and tear, the tendon Poor blood supply, a natural part of ageing, which can lead to a tear What are the symptoms? * If due to an injury, there is sudden pain, a sensation of a “snapping” and sudden weakness in the arm* Weakness in the shoulder, making everyday activities difficult * Pain when raising or lowering the arm and when resting, particularly at night if you lie on the affected side* Crunching or cracking of the shoulder as it moves”.

17 The documents at pages 137 and 148 were created after the claimant had ceased to be employed by the respondent (they concerned MRI scans of 15 July 2017 and 18 December 2017 respectively), so, applying the case law to which I refer above, I was obliged to ignore what those documents said, as they were evidence only of the state of the claimant’s shoulder after she had ceased to be employed by the respondent. In any event, as the claimant had herself said, her pain was increased by the work that she did after she had left the respondent’s employment. Nevertheless, if I had been able, or obliged, to take the content of those documents into account, that would not have helped the claimant’s case, since a grade 2 injury would (according to the document at page 194) typically require only 2-3 months to heal. The relevant passage on page 194 was in these terms:

> “Patients often lose some strength and range of motion with a muscle injury. The severity of the injury can be assessed by how much strength and range of motion they lose, and this can provide an idea as to how long it will take to recover. Muscle injuries can be categorized into three grades, as follows:
>
> **Grade 1**: Mild damage to individual muscle fibers (less than 5% of fibers) that causes minimal loss of strength and motion. These injuries

generally take about 2-3 weeks to improve.

Grade 2: More extensive damage with more muscle fibers involved. However, the muscle is not completely ruptured. These injuries present with significant loss of strength and motion. These injuries may require 2-3 months before a complete return to athletics."

18 The claimant relied on the fact that the medical records which she put before me were consistent with what she had been told by the medical staff whose advice she had received about the existence of a fracture, namely that she had had a hairline facture. Thus, page 98 referred to a "Fracture of clavicle", as did the document at page 157. On page 98 there was this entry in the claimant's medical history: "Had x-ray and told has fractured outer right clavicle in RTA."

19 In fact, in the document on page 137, to which I refer above, dated 24 July 2017 and made following an MRI scan of 15 July 2017, this was said: "Thought to have had a fracture of the clavicle but not confirmed". Nevertheless, on 28 March 2017, there was this text in a "UCC Discharge Letter for [the claimant's GP's medical centre]" written by the Northwick Park Urgent Care Centre (page 129):

"**Diagnosis**

there is a lucency appearance on the coronoid bone ? in keeping with a fracture area of max tenderness.
Fracture Closed [053000]".

20 On the same page, there was under a heading which was impossible to read, but looked like "vfc":

"regular analgesics paracetamol and ibruprofen etc
Sling/collar cuff/broad arm sling [36]".

21 On page 131 there was a letter from Mr Andrew Osborne, Specialist Doctor in Trauma & Orthopaedics at Northwick Park Hospital, to the claimant's GP. At the end of the letter, Mr Osborne wrote this:

"This would appear to be a soft tissue injury which I would expect to gradually settle with time. I have referred her for physiotherapy to assist in the rehabilitation. I haw given her an appointment for review in six weeks? time but if all is well she may cancel and be discharged."

22 The claimant suffered from back pain initially after the accident of 14 March 2017. She at first said to the respondent that she was too unwell to come to work because of her back pain: see page 174, where, on Friday 24 March 2017 at 4:06pm, she said this:

> "Im sorry Bev. I have injured my spine and woke up in pain unable to walk properly. I thourght i would be but im not".

23 On the same page there was this text, sent on the same day at 4:59pm:

> "I have injured the lower discs in my back which was picked up on the x-ray i had done while away.
> I acctually went back then forward into the stering wheel."

24 By 28 March 2017, however, the claimant's shoulder was the main cause of pain. I have already referred (in paragraph 19 above) to page 129 of the bundle. The next page was the second page of the same document. At the end of it, in hand, this was written:

> "Avoid pulling/lifting and carrying with right arm for – 10-14 days. Then review"

25 The claimant told me that her back had caused her pain in this way:

> "It felt like it was glass in my joints in the lower part of my back."

26 The claimant said that her medical records showed that she had degenerative arthritis in the lower discs in her spine and the upper discs in the area of her neck. The claimant said that she believed that those factors affecting her back were relevant to her shoulder pain as there is a major muscle in the back, which runs from the base of the skull to the lower discs in the back, and those muscles control the back and the shoulder muscles. The claimant said that she had studied physiology and physiotherapy for several years at Brunel university.

My conclusions

27 Having reviewed the above evidence and having considered the above case law carefully, I could see no alternative to the conclusion that during the period from the time of the accident (14 March 2017) to 25 June 2017, the claimant's shoulder injury was not likely to last either 12 months or for the rest of the claimant's life.

28 Nor could I see how the addition of the claimant's back pain to her shoulder pain meant that she had an impairment which was likely to last 12 months or for the rest of her life. It was the shoulder pain that was the major cause of the claimant's claim that the respondent should have made the reasonable adjustments for which the claimant contended, and in any event the combination of the two was going to last only as long as the shoulder condition was likely to last.

29 As for the addition of the other conditions on which the claimant relied as showing that, looking at her condition holistically, she had an impairment which was likely to last for at least 12 months or for the rest of her life and otherwise satisfied the requirements of section 6 of the EqA 2010, they too were all dependent on the shoulder condition in terms of the likelihood of them lasting for that period.

30 In all the circumstances, I came to the firm conclusion that the claimant was not disabled within the meaning of section 6 of the EqA 2010 at the time that she was employed by the respondent.

Further case management orders

31 The claimant's application to amend her claim was stated in a letter dated 3 May 2018. As I indicate in paragraph 1 above, the application was to amend the claim by adding a claim of harassment contrary to section 26(1) of the EqA 2010, the protected characteristic being disability. The letter also sought permission to add a claim of a failure to make reasonable adjustments for not only the claimant's shoulder injury but also her back injury. That was in fact already included in the claim, so there was no need for that application, as Mr Ahmed pointed out at the hearing.

32 The application to add a claim of harassment in relation to the protected characteristic of disability was in very general terms: it sought permission to claim "Disability Discrimination on the grounds of Harassment", only, and gave no further detail than that. After discussion with the parties, and after giving the claimant an opportunity to identify the precise statements and acts of the respondent that she said constituted harassment within the meaning of section 26(1), with the protected characteristic being disability, I concluded that I should require the claimant to state with particularity on what statements and/or actions of the respondent she (the claimant) relies in claiming that the respondent harassed her contrary to section 26(1). As I pointed out in my discussion with the parties, a claim of harassment in the form of conduct related to the protected characteristic of disability may well be very difficult, if not impossible, in the circumstances to advance if I concluded that the claimant was not disabled within the meaning of section 6 of the EqA 2010 while she was employed by the respondent.

33 Thus, the claimant might not seek to amend her claim in the manner proposed at the time of the hearing before me on 29 May 2018. If she does still seek to do that having read my above judgment and reasons, then she will need to comply with the directions stated below.

34 The parties and I agreed that I would determine any application of the claimant to amend her case on the papers only, i.e. without the need for a further hearing. Before the end of the hearing, I discussed with them the applicable principles and case law. The case of *Abercrombie v Aga*

Rangemaster Ltd [2014] ICR 209 was of particular relevance. The approach taken in the application of Part 17 of the Civil Procedure Rules 1998 might well be relevant: I referred the parties to what is said in paragraph 17.3.6 of the *White Book*, which is to the effect that if an amendment would not satisfy the test for summary judgment in Part 24 of those rules, then permission to make it should not be given.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

Amendment of the claimant's case

1 If the claimant wishes to press her application to amend her claim then she must, **by 4pm on the date which is 14 days after the date when this document was sent to the parties,** state to the tribunal and the respondent in detail the statements and/or actions of the respondent (i.e. any person acting as an employee or agent of the respondent) which she, the claimant, claims constituted harassment within the meaning of section 26(1) of the EqA 2010, the protected characteristic being disability, **i.e. the conduct which she says was related to the protected characteristic of disability and had the purpose or effect of (a) violating her dignity, or (b) creating an intimidating, hostile, degrading, humiliating, or offensive environment for her**. That can be stated by reference to the documents in the bundle used in the hearing of 29 May 2018. The full reasons for saying why the amendment should be granted (i.e. the submissions in support of the proposition that permission to amend should be given) should be stated at that time.

2 The respondent may, within 21 days of the statement made in compliance with order number 1 above, respond to it. Such a response should state the respondent's submissions on the issue in full and should be sent both to the tribunal and the claimant, i.e. both filed and served.

3 The claimant may, within 7 days of receipt of those submissions, file and serve a response to them.

4 The determination of the application to amend made in accordance with order number 1 above is reserved to Employment Judge Hyams.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under section 7(4) of the Employment Tribunals Act 1996.

2. The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice under rule 54 or 57 or hold a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative

_____
Employment Judge

Date: 1 / 6 / 2018

Sent to the parties on: .....

.....

For the Tribunal Office