



EMPLOYMENT TRIBUNALS

Claimant: Mr D Astle

Respondent: JSM Engineering Limited

Heard at: Nottingham

On: 1 March 2018

Before: Employment Judge Vernon (Sitting Alone)

Representation

Claimant: Mr I Ahmed (Counsel)

Respondent: Mrs L Hatch (Counsel)

RESERVED JUDGMENT

1. At all times material to the Claimant's claims the Claimant was a disabled person within the meaning of the Equality Act 2010 by reason of a) back pain and b) a knee injury suffered in 2015.
2. The Claimant was not a disabled person within the meaning of the Equality Act 2010 by reason of suffering from gout at any time material to his claims.

REASONS

Introduction

1. The Claimant presented an ET1 claim form on 10 July 2017. In it, he presented claims of disability discrimination, breach of contract and a claim for unpaid holiday pay. The ET1 was accompanied by detailed particulars. Those particulars provide further clarification of the claims of disability discrimination. The particulars state that the Claimant complains of:
 - 1.1 Direct discrimination;
 - 1.2 Discrimination arising from disability;
 - 1.3 Harassment; and
 - 1.4 A failure to make reasonable adjustments.

2. The Respondent's ET3 was presented on 2 August 2017. The Respondent denies liability for all of the Claimant's claims. Amongst other things, the Respondent did not concede that the Claimant is a disabled person within the meaning of the Equality Act 2010.
3. The matter came before Employment Judge Britton at a telephone Preliminary Hearing on 5 September 2017. Amongst other things, EJ Britton noted that there was dispute as to whether the Claimant is a disabled person. He directed that the issue of disability be resolved at a further Preliminary Hearing. He also made case management orders for disclosure of the Claimant's medical records, following which the Respondent was to confirm whether the issue of disability was conceded or not.
4. The Claimant's medical records were disclosed. Having considered them, the Respondent wrote to the Tribunal on 6 November 2017. The Respondent does not concede that the Claimant is a disabled person.
5. The hearing before me is the hearing to determine whether or not the Claimant is a disabled person.
6. The claim has already been listed for a full merits hearing. It is scheduled to take place over three days from 30 May 2018 to 1 June 2018.

Evidence and the hearing

7. I was provided with written witness statements from the Claimant (including a statement and a supplementary statement), the Claimant's wife (Mrs Amanda Astle) and Mr Andrew Brazener, an Estimator employed by the Respondent. All of those witnesses were present at the hearing and gave oral evidence. They were each cross-examined.
8. In addition, I was provided with a bundle of documents which ran from page 1 to page 355.
9. At the start of the hearing, I was also provided with a series of 17 colour photographs of the Respondent's premises. There was no objection from the Claimant to me considering those photographs. Only 6 of the 17 photographs were referred to during the hearing. The photographs to which reference was made were numbered.
10. Mrs Hatch provided written skeleton submissions.

Timetabling

11. The hearing did not commence until 10:40am. That was due, in large part, to the late arrival of the Respondent's representative. The late arrival was understandable as the weather conditions overnight prior to the hearing had been poor and travel was difficult on the morning of the hearing. Nevertheless, 40 minutes of hearing time was lost.
12. When the hearing commenced, I asked the representatives for a proposed timetable. They provided one. It was clear from the suggested timetable that, allowing sufficient time for me to read the witness statements and relevant documents before hearing the oral evidence and submissions, there would be insufficient time for Judgment to be given orally during the hearing.

13. After I had taken the necessary amount of time to read-in, I indicated to the parties that I would impose a timetable on the hearing. The timetable did not allow for oral Judgment on the day of the hearing, but it was to ensure that the evidence and submissions could be concluded within the day without fail. No objections were received from either representative and the hearing concluded in accordance with the timetable I imposed. I received oral submissions from both representatives before reserving Judgment.

Issues

14. The only issue to be determined was whether or not the Claimant is a disabled person within the meaning of the Equality Act 2010.

Applicable law

15. The Claimant has the burden of proving that he was a disabled person at the relevant time. The standard of proof is the balance of probabilities.

16. Section 6(1) EqA 2010 provides that:

“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.”

17. Where relevant, I am required to consider the contents of the Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability. The guidance makes clear that, when considering whether an impairment exists, it is not necessary to consider how an impairment is caused.

18. Substantial means more than minor or trivial (section 212 EqA 2010).

19. Schedule 1 to the Equality Act 2010 provides further clarification. Paragraph 2 of Schedule 1 sets out when the effect of an impairment is long term:

“(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.”

20. The statutory guidance states that “likely” means “could well happen”.

21. Day to day activities are not defined in the Equality Act 2010. However, the statutory guidance provides some examples. Further, in deciding whether an activity is a normal day-to-day activity, account should be taken of how far it is normal for a large number of people and carried out by people on a daily or frequent and fairly regular basis. The activity need not, however, be carried out by a majority of people.

22. When looking at the effect of an impairment, the impact on a person's professional life ought also to be considered.

23. The relevant time for assessing whether a person is a disabled person is the time of the alleged discriminatory act. If an assessment has to be made as to whether the effect of an impairment is likely to recur for the purposes of paragraph 2(2) of Schedule 1 to the Equality Act 2010, no regard may be had to events occurring after the alleged discriminatory act (McDougall v Richmond Adult Community College [2008] IRLR 227, CA).
24. The Claimant's complaints of disability discrimination cover the period between June 2016 and 24 February 2017. Therefore, that is the relevant period for considering whether the Claimant is a disabled person.

The Claimant's case on disability

25. In paragraph 5 of the Claimant's Particulars of Complaint, it is asserted that the Claimant suffers from scoliosis or curvature of the spine, gout and knee ligament damage.
26. At the Preliminary Hearing on 5 September 2017, EJ Britton noted that those conditions were relied upon by the Claimant as disabilities.
27. Approximately 3 months before the Preliminary Hearing, the Claimant served a witness statement on the Respondent. That statement again referred only to the three conditions mentioned above.
28. A further statement was then served by the Claimant. I was told that it was served approximately one week before the Preliminary Hearing. The Claimant accepted that was correct during his evidence. The new statement asserts that the Claimant suffers from gout and knee ligament damage. As to the Claimant's back condition, the statement asserts that the Claimant suffers from "a back condition which is Degenerative Disc Disease and/or Scoliosis or curvature of the spine".
29. The Claimant asserts that the conditions referred to above have a substantial effect on his day to day activities. Details of the effects are set out in the Particulars of Complaint at paragraph 7. They include difficulties with driving, difficulties getting in and out of the car, being unable to sit for long periods, being unable to walk long distances, difficulty concentrating and experiencing pain when getting up from a seated position.

Findings and analysis

30. I have considered all of the evidence placed before me and have come to the following findings.
31. The Claimant was employed by the Respondent from 7 March 2016 until late February 2017. The precise date on which his employment ended is not agreed but is not material to my decision. According to the Claimant's contract of employment (pages 76 to 85) his role was "Design Draughtsperson". The Claimant's role was an office-based role.
32. The Claimant's main place of work was the Respondent's premises in Bilborough, Nottingham. They are premises which appear to be based on an industrial estate. They include the office where the Claimant worked. The Office is shown in photograph number 5. It is an open plan office. There are a number of workstations within the office. Employees worked within the

office in groups, dependent upon their role. The Claimant sat in a group with five other draftspersons. Mr Brazener sat with the other estimators.

33. The Respondent had marked photograph 5 to show which desk the Claimant worked at and which desk Mr Brazener worked at. The position of their desks was not in dispute. The Claimant and Mr Brazener did not agree as to the distance between their desks. Mr Brazener's evidence was that they were approximately 10 feet apart. The Claimant's view was that the distance was more like 20 feet. The photographs do not really assist in resolving that dispute, but I find that what photograph 5 does show is that the office is not a large office and there is not a large distance between the workstations which were used by the Claimant and Mr Brazener.
34. It was agreed that the Claimant sat diagonally across from and with his back to Mr Brazener. Mr Brazener told me that the office was busy and that he was primarily focussed on his work when at his desk.
35. There was also no dispute that, beyond being work colleagues, the Claimant and Mr Brazener were not close. Although there was some dispute as to exactly how many times they had spoken during the Claimant's employment, it was not in dispute that they did not have a close relationship. Mr Brazener readily accepted in cross-examination that, as a result, he would not have expected the Claimant to talk to him about any personal or private matters.
36. In my judgment, all of those matters are relevant to an assessment of the evidence of Mr Brazener. His witness statement is a direct response to the Claimant's Particulars of Complaint and specifically paragraph 7 in which the Claimant sets out (in sub-paragraphs (a) to (t)) the impact which he says his alleged disabilities had on his day to day activities. Mr Brazener deals with each sub-paragraph.
37. I have carefully considered the witness statement of Mr Brazener. I note that almost all of the evidence he gives is that either a) he didn't see the Claimant having any difficulties or that b) he was not aware of any such difficulties. He also says repeatedly that the Claimant did not tell him of any difficulties the Claimant alleges he experienced.
38. I have no hesitation in accepting that Mr Brazener was doing his best to assist me in giving his evidence. I also accept that he was giving a fair assessment of his knowledge of the Claimant's difficulties. However, I am satisfied that the assessment which Mr Brazener was able to provide is very limited. It is limited by reason of the matters set out above. It is not surprising that he did not notice or was not aware of the difficulties described by the Claimant when he (i.e. Mr Brazener) was a) primarily focussed on his own work and b) sat with the Claimant's back facing him.
39. Further, given the fact that they did not have a close relationship, it is no surprise that the Claimant did not talk to Mr Brazener about any problems he

was experiencing. As set out above, Mr Brazener accepted that it is likely the Claimant would not have done so.

40. For all of those reasons, I did not find the evidence of Mr Brazener to be of much assistance in determining the issue of whether or not the Claimant is a disabled person.
41. Of course, that does not mean that it necessarily follows that the Claimant is a disabled person. I must go on to examine the evidence presented by the Claimant.

Back

42. As set out above, until the Claimant served a statement approximately one week prior to the Preliminary Hearing, his case was that he suffered with scoliosis or curvature of the spine. His Particulars of Complaint expressly assert that he has had scoliosis since birth. That assertion is repeated in paragraph 3 of his witness statement.
43. On 17 November 2017, a report was provided in relation to the Claimant's medical issues by Dr Lim of The Park Medical Practice. A copy of that report appears at pages 125 and 126 of the bundle. That letter states that "*there is no confirmed diagnosis of scoliosis that I can see in his records*".
44. In evidence, the Claimant did not dispute the fact that there is no confirmed diagnosis of scoliosis. The Claimant says, however, that scoliosis has been mentioned to him by a number of medical professionals over the years. For example, the Claimant says that, when he was aged around 7 or 8, he was told by a Dr Rossiter that he had scoliosis. The account he gives of that conversation is reasonably detailed. I also note that scoliosis is mentioned in the Claimant's medical notes at page 263. Those notes appear to be notes made at an appointment with a chiropractor in 2009.
45. The Claimant says that mention has also been made of Degenerative Disc Disease by the medical professionals he has seen. Again, there is an entry which reads "DDD" on page 263. That note is consistent with mention of Degenerative Disc Disease at that time.
46. Irrespective of any diagnosed condition, it is clear from the evidence of the Claimant and his wife that the impairment which he complains of in relation to his back is an impairment caused by pain. Back pain is clearly referred to in the Particulars of Complaint. His witness statement also talks of back pain as being the issue which causes him problems with his day to day activities.
47. In my judgment, despite the introduction of Degenerative Disc Disease in the Claimant's recent statement, the Claimant has been consistent in his assertions that the impairment affecting his back and which he says has an effect on his day to day activities is pain in his back. Whilst the precise cause of that pain is unclear on the evidence before me, as set out above, the

important issue when assessing disability is whether there is an impairment, not the cause of any impairment.

48. The Claimant's evidence is that he was very active during his childhood and teenage years. He was involved in sports including rowing and weightlifting. During his twenties, he worked as a fitness instructor. He was a keen cyclist until 2009. He has also had a number of jobs which involved manual work. For example, he worked at a power station until 2004. That job involved heavy manual work.
49. The Claimant's evidence is that during his early life and in the period up to 2009, he suffered with bouts of back pain "every so often". He also says that, when he did suffer a bout, it would cause him severe pain for around a month.
50. At paragraph 11 of his statement, the Claimant says that his back problem did not really affect his daily life until 2009 when he says his back went into spasm when he lifted something at work.
51. I find that that history is consistent with the following documents contained within the Claimant's medical records:
 - 51.1 At page 141 is a letter from Dr Hill to the Physiotherapist at the Royal Derby NHS Trust dated 17 November 2009. The letter is a referral. It refers the Claimant to the physiotherapist regarding his "chronic low back pain". The letter states that the Claimant "*reports a constant pain in his lower back for many years which then flairs [sic] up approximately twice a year*". The letter also refers to a "*further exacerbation three weeks ago when bending forward*";
 - 51.2 At pages 260 to 264 are notes made by the Highfield Chiropractic Clinic. Although the Claimant completed the checklist of conditions on page 261 and said that he had not suffered with any problems in the category "Arthritis/Orthopaedic", the notes made at page 263 show that:
 - a) The primary complaint reported by the Claimant was "LBP" which I infer means lower back pain;
 - b) The date of onset was given as 5 weeks ago;
 - c) The problem was reported to have been on and off since January but also on and off to varying degrees since 15 years old. The problem was noted to have been "a lot milder when younger";
 - d) The Claimant reported that he was unable to stay in one position for long.

52. The Claimant's evidence is that his back pain has continued throughout his life. He accepts that the pain has not always been present. For example, at paragraph 24 of his statement, the Claimant says that he worked for Collis Engineering from 2012 to 2016 and "hardly ever had any back pain" whilst he was working there. He says he suffered no spasms at work during that period which he had had since 2009.

53. However, the Claimant says that his back pain has never fully resolved. He describes it continuing to be a problem during and throughout his employment with the Respondent. It is an issue which he says has got worse over time.

54. At page 125 of the bundle is a letter/report from Dr Lim of The Park Medical Practice dated 17 November 2017. That letter contains the following, which I consider to be significant:

"He has also suffered a long history of back pain which he remembers dating back to his early years. He remembers being diagnosed with scoliosis from an early age. However there is no confirmed diagnosis of scoliosis that I can see in his records. He does have chronic back pain for which he has presented to various clinicians and practitioners over the past few years. Looking back through his records I can see that he has consulted on numerous occasions with problems with back pain and has been referred for several sessions of physiotherapy ...

The scoliosis that he was told he suffers from I suspect is from chronic soft tissue and muscular tension which creates quite severe spasms when he has a flare up of his chronic back pain. As a result of this he has been on regular pain relief, Codeine; Co-codamol in the past and more recently Tramadol and Baclofen which is a muscle relaxant. Although there is no surgical target for the Spinal Surgeons with regards his back pain, these recurrent episodes can be fairly debilitating for him".

55. I am satisfied that the evidence presented, viewed as a whole, shows that the Claimant has suffered with back pain for many years, probably since his teenage years. It is a problem which has fluctuated in terms of its frequency and severity. The Claimant's own case is that it was occasional in his early life and caused him no real problems before 2009. However, he says that it has been more of a problem since 2009, albeit there have still been times when he has suffered little with it, for example during the period 2012 to 2016 when working at Collis Engineering. However, the Claimant says that his back pain has never completely resolved and he continued to suffer with it during his time with the Respondent. The Claimant's evidence is supported, in my judgment, by the medical evidence and particularly the report of Dr Lim.

56. It is also supported by the evidence of his wife who I found to be an impressive witness. She talks of the Claimant complaining of back pain

throughout their relationship which began in 1999. She says that the Claimant can never get comfortable and will constantly move seats if they go out anywhere. She candidly says that it drives her mad. I find that the credibility of her evidence is increased by her obvious honesty which is not entirely complimentary towards her husband.

57. For all of the reasons above, I am satisfied that the Claimant suffers with a physical impairment in his back and has done for many years. The impairment is back pain. The precise cause of that back pain is unclear to me but that is not material to the question I have to consider.
58. In coming to those findings, I have taken into account the contents of a medical questionnaire completed by the Claimant when he started working for the Respondent. A copy appears at pages 115B to 115E of the bundle. Significant emphasis is placed on that questionnaire by the Respondent. The Claimant was cross-examined at length about it. That is unsurprising given its contents. At page 2 of 4 of the questionnaire (page 115C), the Claimant completed a checklist. The checklist required him to indicate whether he was suffering from any of the conditions listed or whether he had suffered from them. The checklist contained three options which could be selected for each condition. The first is entitled "Yes Currently"; the second "Yes Previously"; the third "No". One of the conditions in the list is "Back/Neck Problems". The Claimant ticked the box "Yes Previously" for that condition. He ticked the "No" box for all other conditions on the list. At the bottom of the page, he also wrote "Back problem – scoliosis". He did not give dates when he had suffered with that problem, despite the questionnaire asking him to do so.
59. In addition, on page 3 of 4, the Claimant also completed a DSE Self-Assessment. Amongst other things, he indicated that he can sit comfortably and easily change his posture.
60. In cross-examination, the Claimant said that the contents of that questionnaire did not reflect the reality. He accepted, despite that, having signed a declaration on the medical questionnaire to confirm that the information provided was full and true to the best of his knowledge. In completing that declaration, in light of the other evidence and my findings above, I am satisfied that the Claimant was not entirely truthful in completing that medical questionnaire.
61. The Claimant sought to provide an explanation for the way in which he completed the questionnaire. He suggested that he had mentioned his health issues when he was interviewed for the role. He says that the person who interviewed him said that the Respondent would not be able to afford to employ someone who is disabled. That evidence does not appear in the Claimant's witness statement. There is no mention of it in the Particulars of Complaint either. As a result, the Respondent did not have any evidence

available to rebut it, although it was clear from the cross-examination of the Claimant that the assertion is not accepted by the Respondent.

62. The absence of that evidence at the Preliminary Hearing was, in my judgment, unsurprising. It is clear from the case management summary of EJ Britton that the issue of knowledge was not to be considered at this stage of the proceedings. At paragraph 6 of the case management summary, EJ Britton records “I of course stressed to Mr McArdle that the issue of knowledge is a different matter and will go to findings of fact. All the Claimant needs to do at this stage is to satisfy the Tribunal that he is actually a disabled person for the purposes of Section 6 and Schedule 1 of the EQA” (my emphasis).
63. In the circumstances, I make no findings as to the reason why the Claimant completed the questionnaire as he did. In any event, the contents of the questionnaire are not sufficient to alter my findings set out above. I am satisfied, on the balance of probabilities, that the Claimant has suffered with an impairment by way of back pain for many years, and particularly since 2009.
64. Of course, the existence of an impairment is only one part of establishing that the Claimant is a disabled person. The impairment also has to have a substantial and long term adverse effect on the Claimant’s ability to carry out day to day activities.
65. The Respondent asserts that there is very little evidence of any effect on the Claimant’s day to day activities, particularly during the relevant period. In particular, it was submitted that the Claimant’s evidence focusses heavily on his current abilities, not those during the relevant period.
66. I have carefully considered the evidence as a whole. I do not agree with the Respondent’s assertions. I note the following:
- 66.1 The report of Dr Lim talks of the Claimant suffering with chronic back pain for many years. He mentions medical consultations “over the past few years”. He also says that the recurrent episodes of back pain which the Claimant experiences can be “fairly debilitating for him”. I am satisfied that Dr Lim’s evidence supports the Claimant’s evidence that he has had difficulties with his daily activities for many years and, when the back pain is at its worst, it can prevent him from doing a number of things;
- 66.2 The Claimant’s evidence was that he struggles to sit for long periods of time due to his back pain. That is consistent with the evidence of his wife which I accept for the reasons set out above. It is also supported by the fact that the Claimant has sought a special chair in all of his job roles since 2009. He sets out details in his witness statement starting at paragraph 11. Some of his employers have provided a special chair; some haven’t. The Claimant said that he

supplied his own seat when working for the Respondent. At page 119 of the bundle is an email from the Respondent's Finance Manager to the Claimant dated 14 March 2017. That email post-dates the termination of the Claimant's employment. The letter asks the Claimant to confirm his intentions with regards to collecting his chair. The email confirms that the Claimant supplied his own chair. A photograph of the chair was provided (photograph number 1). It has a wedge cushion on it. It was also the Claimant's evidence that he has purchased several wedge cushions over the years to help his posture, in turn to assist him with his back pain. The photograph is also consistent with that evidence. All of that evidence is also consistent with the Claimant's evidence that he struggled to sit comfortably when working for the Respondent and that he would have to take steps to alleviate his back pain as a result;

66.3 From paragraph 49 of his witness statement, the Claimant provides details of the day to day activities affected:

- a) He says he finds driving painful and getting in and out of the car. He says he cannot drive long distances or sit as a passenger for more than an hour due to pain in his back and knee. That evidence is given in the context of the period since an accident the Claimant had in 2015. He does not exclude the period of his employment with the Respondent;
- b) He says he has had a problem with travelling long distances from "when my back condition deteriorated in 2009";
- c) He says he cannot walk for longer than 100 yards without taking breaks and that he has bought a stick. He says he bought the stick whilst he was working for the Respondent. In that context, he also says that he cannot move quickly due to his upper body;
- d) He says he struggles with stairs and would avoid the steps going into the office at the Respondent's premises;
- e) He also says he suffers with sleep due to pain and with concentration as a result.

67. I am satisfied that the Claimant's evidence as to the limitations on his day to day activities caused by his back pain are more than minor or trivial. I am also satisfied that they are problems which he describes having suffered for many years, certainly since 2009. The Claimant does not exclude the period of his employment with the Respondent from that. In fact, I find that he expressly includes the period of his employment when describing some of the restrictions. I also infer from his evidence that the other restrictions which he describes are restrictions which have been ongoing since 2009, including the period of his employment with the Respondent.

68. I also find that the Claimant's evidence about the effect on his day to day activities is truthful and is supported by the evidence of his wife who, for reasons already given, I found to be an impressive witness.

69. For all of those reasons, I am satisfied that the Claimant was a disabled person at all times material to his claims by reason of the physical impairment of back pain.

Knee ligament damage

70. The Claimant also says that he suffered an injury to his knee in 2015 which resulted in damage to his knee. He says the accident occurred in the summer of 2015. His wife says it occurred in June 2015 which is consistent.

71. There seems little doubt that the Claimant suffered an accident or that it resulted in damage to his knee. At page 236 of the bundle is a letter from the Department of Trauma and Orthopaedic Services at the Royal Derby Hospital dated 27 March 2017. The letter includes the following:

“Diagnosis: Left knee medial and lateral meniscal cleavage tears with associated mechanical symptoms

... He sustained an injury to his left knee back in 2015, whilst mountain climbing. He described how he slipped down a ski slope before managing to rest himself his left leg against a rock. His left knee gave way and he had substantial pain and swelling from this point onwards. Things have improved ever so slightly but not much.

He describes symptoms of a mechanical nature with locking and giving way, particularly when cutting and changing direction, as well as both chronic and acute bouts of catching pain.

He has had an MRI performed which has confirmed the above diagnosis.

Realistically, his best chances of improving his symptoms is an arthroscopic procedure. I have discussed the pros and cons of this with him today. We have also discussed the fact that he will also have some underlying degenerative pathology by now, which a scope may not be able to do much about”.

72. I am satisfied that, from the summer of 2015, the Claimant had a physical impairment in the knee as described in that letter.

73. I am also satisfied on the basis of the evidence from the Claimant and his wife that the knee injury affected his ability to carry out day to day activities. In particular, I accept that the pain from his knee caused the Claimant to change his car in July/August 2016 because he found depressing the clutch with his left leg too painful. I also accept that the knee pain affected his ability to walk long distances. Driving and walking are both normal day to

day activities. The effect that the Claimant and his wife describe on those activities is, in my judgment, more than minor or trivial.

74. I must still consider whether the effect was long term. The Claimant's evidence is that he was in unbearable pain immediately following the accident but that that pain subsided and reduced after 2 months. He says it settled down to a constant pain limiting his movements thereafter.
75. Amongst the Claimant's medical notes is a record of an appointment on 3 November 2016. The Claimant accepted in cross-examination that that was the first occasion on which he sought medical attention for his knee. The record includes the following: "*Pain improved then returned when he went for a run 7 months ago*".
76. The evidence of the Claimant, his wife and the medical records suggest that the Claimant was in serious pain for approximately 2 months following the accident and that the pain then improved. There is little evidence of any difficulties the Claimant's knee caused him before March/April 2016. That date appears to be the time at which the Claimant told the doctor (at the appointment in November) that his knee pain returned after running. The Claimant goes on to describe that he then experienced ongoing difficulties with driving, walking and other day to day activities as a result of his knee pain.
77. On the basis of that evidence, I am not satisfied that the effect on the Claimant's day to day activities caused by his knee pain started until March/April 2016. I am therefore not satisfied that it had lasted 12 months by the time of the alleged acts of discrimination.
78. However, I also have to consider whether the effect was likely to last for 12 months or more. I am assisted in that consideration by the information supplied in the letter at page 236 referred to above. Although that letter post-dates the acts of discrimination, it indicates that the Claimant has been symptomatic since March/April 2016 and is likely to continue to be symptomatic in the absence of medical intervention. It also states that medical intervention may improve his symptoms. It does not suggest they will be resolved. In my judgment, that letter supports a conclusion that, at the time of the alleged acts of discrimination, the Claimant had a symptomatic knee injury which was likely to continue to be symptomatic. I am satisfied that it was likely to continue to be symptomatic for 12 months or more. I am also satisfied, for the reasons set out above, that the symptoms of knee pain caused a substantial adverse effect on the Claimant's ability to carry out day to day activities.
79. Accordingly, I find that the Claimant was a disabled person at all material times as a result of the injury to his knee suffered in 2015.

Gout

80. The Claimant suffers with gout. He was first diagnosed in 2013. Having considered the contents of the Claimant’s statement and that of his wife, in conjunction with the medical records, I consider that the evidence of gout causing any adverse effect on the Claimant’s ability to carry out day to day activities is very limited.

81. I am not satisfied that the evidence available discharges the Claimant’s burden of proof in relation to his gout.

82. I therefore conclude that he was not a disabled person at any material time by reason of his gout.

Conclusions

83. For the reasons set out above, I am satisfied that the Claimant was a disabled person at all times material to his claims by reason of a) back pain and b) the injury to his knee sustained in 2015.

84. In the circumstances, his claims of disability discrimination may continue.

85. The parties were agreed that, if I concluded that the Claimant is a disabled person, it would be sensible for there to be a further Preliminary Hearing for the purposes of case management. I have made case management orders set out in a separate document accordingly.

Employment Judge Vernon

Date 29 March 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

03 April 2018

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FOR EMPLOYMENT TRIBUNALS