

Syndrome. The respondents were not in a position to concede that the claimant was disabled in terms of Section 6 of the Equality Act 2010 (the EqA).

2. The Tribunal issued an order to furnish written answers to questions on 16 January 2017 (the Tribunal Order) to which the claimant replied on 10 February 2017.
3. On 13 February 2017, the respondents advised that having received this additional information they still did not accept that the claimant was a disabled person in terms of the EqA at the material times relative to the claim. A Preliminary Hearing was arranged to determine whether at the material time the claimant was a disabled person in terms of the EqA.
4. On 12 April 2017 Miss Jane McEachan, Consultant Orthopaedic Hand Surgeon was instructed to prepare a medical report. She was provided with the claimant's medical records and additional information provided in response to the Tribunal Order. Miss McEachan also examined the claimant. The medical report was issued on 28 May 2017 (the Medical Report). Miss McEachan provided a supplementary report on 11 September 2017 (the Supplementary Report).
5. The claimant gave evidence on her own account. For the respondents, the Tribunal heard evidence from the second respondent, Jane Lawler, Deputy Practice Manager, the third respondent and Alison Harkness, Practice Nurse.
6. The parties agreed that the relevant period was June 2015 to July 2016. There was no issue that the claimant had a physical impairment and that it was long term as defined by the EqA. The issue that the Tribunal had to consider was whether or not in the relevant period there was a substantial adverse effect on the claimant.
7. The Tribunal made the following material findings in fact.

Findings in Fact

8. Around June 2011 while pregnant with her first child the claimant developed Carpal Tunnel Syndrome affecting both hands. Her symptoms of numbness and intermittent tingling in her hands settled six months after her son was born.
- 5 9. The symptoms recurred in October 2013 during the claimant's second pregnancy. Her hands were numb and she was clumsy. Following her daughter's birth in early 2014 the symptoms became worse rather than better. The claimant had problems with numbness and her grip was reduced. She had difficulty changing nappies, using her hands to open bottles and
10 manipulate fine objects.
10. The claimant lives with her husband and two children. She is right hand dominant.
11. Around 18 months after the recurrence of her symptoms the claimant was concerned that her hand function had significantly deteriorated. She noticed
15 that her grip strength had gone down and that the night time symptoms of numbness had significantly worsened. In May 2015, the claimant was referred by her general practitioner (GP) to the Orthopaedic Department and was seen by Mr Hussain, Consultant in June 2015 and was listed for decompression surgery on her left hand.
- 20 12. Between June 2015 and July 2016, the claimant was a partner in a GP practice at Queens Crescent, Glasgow. The claimant was in partnership with the second respondent and the third respondent.
13. Before surgery on the claimant's left hand her symptoms had progressed from tingling and persistent numbness of three fingers to loss of strength and
25 grip. The claimant had similar symptoms on her right hand but to a lesser extent. The claimant experienced difficulty in fine motor skills. This affected her ability to perform simple tasks including dressing her children, press stud fastenings. The claimant also struggled fastenings buttons and zips. The claimant struggled when changing her daughter's nappies. The claimant also
30 experienced difficulty in gripping cutlery in her left hand which made eating

food difficult and limited her food choices. Using cutlery required extra effort and concentration. Preparing meals was also difficult. The claimant found using scissors in her left-hand challenging due to the loss of strength. She also burnt her fingers on hot surfaces.

5 14. At work the claimant found it was becoming challenging to safely handle babies during baby checks. She would ask the parents for assistance in holding the baby and removing the baby's clothing. The claimant also had difficulty in drawing up the contents of vials for injections due to loss of strength, dexterity and sensation of her fingers. The claimant would use
10 coping strategies during consultations.

15 15. The claimant had surgery to her left hand on 11 September 2015. The claimant's initial recovery from surgery lasted approximately six weeks. During that period, she could not lift her left hand, grip or hold objects in the palm of her hand. The claimant was advised not to have her hand in water during the first three-week period when she also struggled to move and use
15 her fingers such as typing. The claimant also could not drive.

20 16. The claimant symptoms improved following surgery but did not resolve. She continued to suffer numbness in the fingers of her left hand. Her fine motor skills are affected, tasks such as getting dressed or doing up buttons, or fastening zips or clasps, using scissors and cutlery, picking up and holding
20 objects between thumb and finger and folding clothes.

25 17. The claimant continues to have problems with her right hand. She suffers from numbness and tingling in her fingers especially at night and whilst driving. Her grip strength is reduced. She drops objects and is frequently unable to remove lids from bottles and containers. She struggles with fasteners and needs to be cautious and take extra care using knives and sharp objects. The claimant finds that it takes her longer to complete simple tasks. The claimant's symptoms fluctuate. She has good and bad days with her symptoms and often has good and bad weeks.

18. The Supplementary Report states that during June 2015 to July 2016 the claimant had a physical impairment that lasted over twelve months (production 60).

Observations on Witnesses and Conflict of Evidence

- 5 19. The Tribunal considered that the claimant gave her evidence in an open helpful manner. The Tribunal's impression was that the claimant was understated. She was willing to agree certain points in cross-examination while explaining why she had taken the position that she had. The Tribunal considered that she was a credible and reliable witness.
- 10 20. The Tribunal had no doubt that the second respondent believed all that he said in evidence. However, the Tribunal's view was that he had a categorical opinion about Carpal Tunnel syndrome and its effects which seemed to be significantly influenced by his wife's experience of the condition. The Tribunal felt that he was unwilling to make any concessions and appeared to have a
15 closed mind.
21. The Tribunal considered that in contrast the third respondent gave her evidence in an open manner. The Tribunal had no doubts as to her honesty but by her own admission the third respondent was not very good at recalling when events happened. The Tribunal therefore considered that much that
20 was said by her in relation to the claimant attending her house for dinner and the claimant's daughter being brought to the surgery in a car seat took place in 2014 and was therefore not relevant to the issues the Tribunal had to consider.
22. In the Tribunal's view Ms Lawler and Ms Harkness gave evidence honestly
25 and based on their recollections of events.
23. In relation to the material findings in fact the Tribunal did not consider that there was significant conflicting evidence. The claimant's evidence primarily focused on her ability to carry out normal day to day activities. She was not particularly cross-examined in relation to this. The respondents' evidence
30 focussed on the fact that they believed the claimant's position was

incompatible with what they saw in the workplace. The second respondent made much of the fact that part of the claimant's role as a GP required her to examine patients often using medical equipment which he said required fine motor skills. Accordingly, if she was able to perform her duties the inference was that her condition could not be as bad as was suggested. None of the witnesses who gave evidence for the respondents were present when the claimant was undertaking medical examinations. The Tribunal considered that the explanation provided by the claimant about the strategies which she adopted during the baby clinic, taking blood and carrying out internal examinations appeared to be entirely plausible and reasonable.

24. The second respondent also suggested that if the claimant's condition was as bad as she suggested it would have taken her longer to do the work and there was no evidence of this as all the GPs consulted at the same rate. The second respondent also referred specifically to the clinic in which flu injections were being given. This particular example was not put to the claimant. In any event the Tribunal considered that each surgery would be variable and while each GP would be expected to offer the same number of appointments all of these would not necessarily be filled and there would be occasions when extra patients were seen and the length of a consultation could significantly vary and that while each patient would be allocated 10 minutes for an appointment on some occasions patients will not use that allocated time and others exceed it. The reason for this would not necessarily have anything to do with the GP who was consulting and was more likely to relate to the number and complexity of the patients' conditions.

25. 25. There was also evidence about the number of prescriptions that the claimant required to sign. Again, it was apparent from the evidence of the respondents witnesses that while there may be a number of repeat prescriptions these were signed in batches of usually 20 and 30 and that the GP signing had a degree of control over when and where they were signed.

30. 26. The Tribunal also heard evidence about the claimant eating sandwiches and preparing coffee. The Tribunal did not understand the claimant to have

suggested that she was unable to open packages or make herself a cup of coffee. Her evidence was that she found difficulty opening certain packaging (although her evidence in relation to this was in respect of packaging for medical equipment) and also experienced difficulty in lifting a kettle filled with water. The Tribunal considered that the evidence of the respondents' witnesses was conflicting in relation to the type of utensil in which coffee was kept and whether sandwiches were provided in a covered platter or individual packets. The Tribunal did not consider that much weight could be given to this evidence. The Tribunal considered that the claimant's position seemed more plausible: she would avoid using food which would be difficult for her to eat and therefore would be socially embarrassing and would often avoid lifting a kettle which was full of water.

27. In assessing the evidence, the Tribunal felt that the claimant's approach was to try to do a task. If that was not possible she sought alternative ways of achieving the outcome, failing which she avoided doing the task if that was possible. It therefore seemed highly likely to the Tribunal that in the work context the claimant did "get on with things"; she did not make a fuss and did not expect or request others to assist. In these circumstances, the Tribunal did not consider that it was surprising that the claimant's colleagues were not aware of any difficulties that she was having.

Submissions

The Claimant

28. The Tribunal was referred to Section 6 of EqA and reminded that the issue that was to be determined was whether during the relevant period: June 2015 to July 2016 the claimant was disabled in terms of that section.

29. The Tribunal was referred to the agreed expert evidence. There appeared to be no dispute that the claimant had Carpal Tunnel Syndrome which was a physical impairment which had lasted long term. Accordingly, the first two questions in addressing whether someone was disabled within the section had been answered in the claimant's favour.

30. The issue for the Tribunal was in relation to whether there was a substantial adverse effect; that was where most of the evidence was directed.
31. The Tribunal was referred to Section 212(1) of EqA which defines substantial: something more than minor or trivial. It has a threshold. However, this is not particularly high.
32. Reference was also made to the case of *Ginn v Tesco Stores Ltd UK/EAT/0197/05* in that the Tribunal required to look at the overall effect and to this extent was reminded that the claimant's condition was in both hands.
33. The Tribunal was also referred to Guidance on matters to be taken into account in determining questions related to the definition of disability (2011) (the Guidance).
34. Section B4 states: "an impairment might not have a substantial adverse effect on a person's ability to undertake a particular day to day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together could result in an overall substantial adverse effect."
35. The Tribunal was also referred to the appendix setting out an illustrative and non-exhaustive list of factors which if experienced by a person would be reasonable to be regarded as having a substantial adverse effect on day to day activities. It includes difficulties in getting dressed; difficulties preparing a meal; difficulties in eating. The Tribunal was invited to find that there was more than sufficient evidence to support the fact that the claimant was disabled.

The Respondents

36. The respondents accepted that there was no issue regarding the claimant having a physical impairment.
37. It was suggested that the respondents' witnesses were open and helpful. Their view of the claimant while at work was not compatible with the substantial effect that the claimant maintained that she was having. There

was nothing to cause them to have any concern nor were they aware that she was not able to do activities or could only do them with difficulty. In the second respondent's view this was not the person he was working alongside. The claimant was just getting on with things.

5 38. The respondents' witnesses saw the claimant every day. Nothing caused them concern because they did not see her having any difficulty. This was incompatible with how the claimant described her situation. It was more likely than not that the claimant was not disabled.

10 39. The Tribunal to B7 of the Guidance on the definition of disability: "Account should be taken of how far a person can reasonably be expected to modify his or her behaviour by example by using a coping or avoidance strategy to prevent or reduce the effects of an impairment on normal day to day activities. In some instances, the coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the
15 person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategies, there is still an adverse effect in carrying out normal day to day activities."

The Law

20 40. Section 6(2) of EqA provides that the reference to a "disabled person" is a reference to a person with a disability.

41. Section 6(1) of the EqA provides that a person has a disability if he or she has a "physical or mental impairment" which has a "substantial and long-term effect on his or her ability to carry out normal day to day activities". The burden of proof is on the claimant to show that she falls within the definition.

25 42. Section 212(2) defines substantial as meaning more than minor or trivial.

43. Schedule 1 to the EqA, paragraph 12(1) provides that a tribunal must consider such guidance as it thinks is relevant.

44. The Guidance suggests several factors to be considered when considering whether the effects of an impairment is substantial.

45. Appendix 1 to the EHRC Employment Code provides guidance on the meaning of substantial: 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 be taken of where a person avoids doing somethings which for example cause pain, fatigue or substantial social embarrassment; because of loss of energy and motivation.”

Deliberations

46. The issue the Tribunal had to determine was whether the claimant had a physical or mental impairment which had a substantial and long term adverse effect on her ability to carry out normal day to day activities.
47. The period in which the Tribunal had to assess whether there was an impairment which had a substantial adverse effect on the claimant's day to day activities was the date of the alleged discriminatory act. It was agreed that this was from June 2015 to July 2016.
48. The Medical Report and Supplementary Report were agreed. The Tribunal was satisfied that the claimant had a physical impairment which was long term.
49. The Tribunal move on to consider whether the impairment had an adverse effect on the claimant's ability to carry out normal day to day activities and if so whether the adverse effect upon the claimant's ability was substantial.
50. The Tribunal noted that the fact that a person can carry out activities does not mean that their ability to carry them out has not been impaired. To constitute an adverse effect, it is not the doing of the acts that it is the focus of attention but rather the ability to do (or not do) the acts.
51. The Tribunal considered that it was appropriate to take account of the Guidance and the way in which the claimant carried out some normal day to day activities and the cumulative effect of the impairment. The Tribunal

considered its findings in the round and focussed on the activities that the claimant could not do or only do with difficulty.

52. The physical impairment affected both claimant's hands. Following surgery there was an improvement in the claimant's left hand but the symptoms did not resolve and the symptoms in the claimant's right hand were ongoing and fluctuating.
53. The claimant had difficulty dressing herself and her children because she struggled with clasps, fasteners, buttons, zips and folding clothes. She had difficulty preparing meals and eating because of restricted ability to remove lids off bottles and containers; and the need to be cautious, using scissors and cutlery, picking up and holding objects between thumb and finger.
54. On taking account of what the claimant could not do or could only do with difficulty the Tribunal concluded that there was an adverse effect on the claimant's ability to carry out normal day to day activities.
55. The Tribunal then considered if the adverse effect was substantial in that it was more than a minor or trivial effect. Throughout the material time the claimant attended work except for a four-week period shortly after her surgery. The claimant had to modify certain procedures while at work to take account of her reduced ability to grip with her left hand. The claimant takes extra care and time when using knives and sharp objects. While the claimant endeavours to use clothes without fasteners and zips, children's clothes tend to have these which causes her difficulty. The Tribunal considered that the physical impairment has a substantial effect on the claimant.

56. The Tribunal concluded that at the material time the claimant was disabled in terms of Section 6(1) of the EqA.

5 Employment Judge: Shona MacLean
Date of Judgment: 20 February 2018
Entered in Register: 27 February 2018
and copied to parties