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## EMPLOYMENT TRIBUNALS

*Claimant*

*Respondent*

Ms D A Boland

AND

1. Coleen Andrews  
2. Crown Commercial Services

### PRELIMINARY HEARING

**HELD AT:** London Central                      **ON:** 26-27 April 2019

**BEFORE:** Employment Judge Brown (Sitting alone)

***Representation:***

**For Claimant:** In person  
**For Respondents:** Mr M Sethi QC

### JUDGMENT

1. The Judgment of the Tribunal is that the Claimant was a disabled person by reason of osteoarthritis arthritis and inflammatory arthritis in the period January 2017 to 3 May 2017.

### REASONS

2. This hearing was listed to determine whether the Claimant was a disabled person by reason of her osteoarthritis arthritis and inflammatory arthritis conditions in the period January 2017 to 3 May 2017.

3. The Respondents conceded that the Claimant had impairments, but contended that the effects of these on the Claimant's ability to carry out normal day to day activities were neither substantial, nor long term in the relevant period.

4. I heard evidence from the Claimant and her partner, Ms Mandy Barker. For the Respondents, I heard evidence from Colleen Andrews, the First Respondent and a senior colleague of the Claimant and Laura Dunn, who was

an HR professional providing services to the Cabinet Office at the relevant time.

5. I read the report of Mr Michael Beverley, Consultant Trauma and Orthopaedic Surgeon, dated 25 October 2018. Mr Beverley had seen the Claimant in consultation on that date. The Claimant sought to exclude Mr Beverley's report from evidence and made an application in this regard on 26 February 2019. She said, in her application and in evidence to the Tribunal, that his report contained a large number of factual mistakes; that the report that he had produced was not sent by Mr Beverley to the Claimant, but only to the Respondents, despite Mr Beverley being joint instructed; and that Mr Beverley failed to copy the Claimant into correspondence. She said, therefore, that he was not impartial. The Claimant also said Mr Beverley had not answered questions which the Claimant had put to him about the report and that, eventually, he had declined to act any further.

6. The Respondents contended that the report was admissible; it was from a jointly instructed expert who was, in fact, the Claimant's first choice of expert, this being evidenced by an e-mail from the Claimant on 25 April 2018, page 308 of the bundle.

7. I decided that I should take into account Mr Beverley's report. He was the joint instructed expert and he had examined the Claimant. I would nevertheless bear in mind the Claimant's criticisms of his approach and the fact that he had not provided answers to the Claimant's clarificatory questions. Where the Claimant pointed out factual errors in the medical history recorded in Mr Beverley's report, I accepted the Claimant's chronology of her injuries and of her medical treatment including surgical interventions.

8. I considered that, while Mr Beverley had given his opinion on whether adverse effects of the Claimant's injuries and conditions were "substantial", it was for me to decide whether the Claimant's impairments came within the legal definition of disability, including whether the effects of those were substantial in the sense of being more than minor or trivial. I bore in mind that Mr Beverley was a medical, rather than legal, expert for these purposes.

#### Relevant Law

9. In coming to my decision, I took account of the following relevant law.

10. By *s6 Equality Act 2010*, 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.

11. The burden of proof is on the Claimant to show that he or she satisfies this definition.

12. *Sch 1 para 12 EqA 2010* provides that, in determining whether a person has a disability, an adjudicating body (which includes an Employment Tribunal) must take into account such Guidance as it thinks is relevant. The relevant Guidance to be taken into account in this case is Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011), brought into effect on 1 May 2011.

13. Whether there is an impairment which has a substantial effect on normal day to day activities is to be assessed at the date of the alleged discriminatory act, *Cruickshanks v VAW Motorcrest Limited* [2002] ICR 729, EAT.

14. *Goodwin v Post Office* [1999] ICR 302 established that the words of the s1 DDA 1995, which reflect the words of s6 EqA, require the ET to look at the evidence regarding disability by reference to 4 different conditions:

- a. Did the Claimant have a mental or physical impairment (the impairment condition)?
- b. Did the impairment affect the Claimant's ability to carry out normal day to day activities? (the adverse effect condition) Was the adverse effect substantial?
- c. (the substantial condition)
- d. Was the adverse effect long term? (the long term condition).

#### *Adverse Effect on Normal Day to Day Activities*

15. Section D of the 2011 Guidance gives guidance on adverse effects on normal day to day activities.

16. D3 states that day-to-day activities are things people do on a regular basis, examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food., travelling by various forms of transport.

17. Normal day to day activities encompass activities both at home and activities relevant to participation in work, *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706; *Paterson v Metropolitan Police Commissioner* [2007] IRLR 763.

18. D22 states that an impairment may not directly **prevent** someone from carrying out one or more normal day to day activities, but it may still have a substantial adverse long term effect on how he carries out those activities, for example because of the pain or fatigue suffered.

19. The Tribunal should focus on what an individual *cannot do, or can only do with difficulty*, rather than on the things that he or she is able to do – Guidance para B9. *Goodwin v Patent Office* 1999 ICR 302, EAT stated that, even though the Claimant may be able to perform many activities, the impairment may still have a substantial adverse effect on other activities, so that the Claimant is properly to be regarded as a disabled person.

20. If an impairment would be likely to have a substantial adverse effect but for the fact that measures are being taken to treat or correct it, it is to be treated as having that effect - *para 5(1), Sch 1 EqA*. This is so even where the measures taken result in the effects of the impairment being completely under control or not at all apparent - *para B13 Guidance*.

#### *Substantial*

21. A substantial effect is one which is more than minor or trivial, *s 212(1) EqA 2010*. Section B of the Guidance addresses “substantial” adverse effect.

22. Guidance *para B2* states, “The time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial. It should be compared with the time it might take a person who did not have the impairment to complete the activity.” The Guidance gives an example of a 10 year old but with cerebral palsy who is able to carry out everyday activities for himself but gets tired very easily and it is harder for him to accomplish task such as eating, drinking, washing and getting dressed and the tasks take much longer to complete compared to a child of 10 without cerebral palsy. The Guidance states that this amounts to a substantial adverse effect.

23. Account should be taken of how far a person can **reasonably** be expected to modify their behaviour, for example by use of a coping or avoidance strategy, to reduce the effects of the impairment on normal day to day activities. Such a strategy might alter the effects of the impairment so that the person does not meet the definition of disability, *Guidance para B7*.

24. However, it would not be reasonable to expect a disabled person to give up normal day to day activities which exacerbate their symptoms, *Guidance B8*.

#### *Progressive Conditions*

25. Where P has a progressive condition and the condition has (or has had) an effect on P’s ability to carry out normal day-to-day activities, but the effect is (or was) not substantial, “P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment,” *Para 8, Sch 1, EqA*.

26. “Likely” means, “could well happen”, *Guidance para C3*.

#### *Long Term*

27. The effect of an impairment is long term if, *inter alia*, it has lasted for at least 12 months, or at the relevant time, is likely to last for at least 12 months.

28. Where an impairment ceases to have an effect but that effect is likely to recur, it is to be treated as continuing, *Sch 1 para 2, EqA 2010*. “Likely” again means, “could well happen”.

29. In assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything occurring after that time is not relevant in assessing likelihood, Guidance para C4 and *Richmond Adult Community College v McDougall* [2008] ICR 431, CA.

#### Findings of Fact

30. On all the evidence I found the following facts. At the relevant time, the Claimant had weakness and stiffness around her right shoulder, mid back, both hips and her left knee, Mr Beverley's report page 118.

31. The Claimant had been diagnosed with osteoarthritis arthritis in 2012, bundle page 380.

32. Both of the Claimant's hips were arthritic during the relevant time. The Claimant had undergone a right hip arthroscopy in about October 2012 and two left arthroscopies in about early 2013 and 2015-2016, Mr Beverley's report page 111. The arthroscopies did not provide much benefit or relief to the Claimant.

33. The Claimant had a fall in 2016 and suffered increasing symptoms in her right hip as a result. On 13 February 2017, the Claimant visited her GP complaining of five month long right sided hip pain with constant dull ache which was not improving despite hip exercises and analgesia. She said that she was unable to ride her motor bike and had worse pain in the evening and that her hip function was reducing. The Claimant was prescribed naproxen for pain and advised to continue with her exercises. She was also referred to a consultant orthopaedic surgeon, page 247.

34. The Claimant eventually underwent a total right hip replacement in December 2017, page 111.

35. At the time of Mr Beverley's report on 25 October 2018 Mr Beverley said that the Claimant's left hip was, "quite severely arthritic... the left hip would almost certainly require similar replacement within the next few years".

36. Mr Beverley described the Claimant's limitations as follows, "She is able to wash, dress and use a toilet independently though slowly, her sleep is disturbed and she cannot lie on the left shoulder. She is uncomfortable when sitting still for long ... She can stand and walk for ten to fifteen minutes. She does no heavy lifting or carrying. Her partner does all the heavier shopping and domestic chores. She can manage stairs slowly particularly ascending. She is able to drive an automatic car over shorter journeys. Her social activities are restricted". Page 112.

37. He also said, "She found it difficult to get around town and keep up with colleagues walking and was not as mobile as she would wish and that this

made her work increasingly difficult during the relevant period of January to May 2017. The duties that she describes do not appear to have been particularly onerous but I accept her account that more prolonged standing and walking would have been difficult”, page 118.

38. Mr Beverley’s stated opinion was that, during the relevant period, from the Claimant’s description, his examination of the Claimant and from medical records, there was not a substantial and long term negative effect on the Claimant’s ability to manage normal day to day activities.

39. However, he also said, “She has bilateral hip problems requiring previous arthroscopies and ultimately hip replacement, the effects of those on her daily living activities during the relevant time were in my view modest or moderate”. Page 118. He said, “The hip arthroscopies were of limited benefit and it is evident that she would at some point have required bilateral hip replacements”. Page 119. He further said, “Her various physical difficulties have an accumulative effect during the relevant period they do not appear to have prevented her from managing activities of daily living to a significant or substantial degree. It was inevitable that she would require hip replacement in any event in due course”. Page 119.

40. Mr Beverley said the Claimant’s arthritis was due to the normal aging process.

41. The Claimant told me in evidence that, since 2012, she has been unable to carry shopping bags and that all shopping has been carried out by her partner, or online. She said that she avoided going for walks and did not undertake household chores. The Claimant told me that she walked with a limp from September 2016.

42. The Claimant’s evidence was, at times, unreliable - for example, her recollection of whether she chose Mr Beverley as an independent expert. On occasion, the Claimant exaggerated; for example, at times she said she could not carry anything, or any bags, when at other points in her evidence she said she could carry books and a bag with shoes.

43. I did accept, nevertheless, that the Claimant could not carry lifting tasks of more than the lightest shopping bags and that she did not undertake household chores from 2012. Mr Beverley’s report accepted that she did not carry heavy shopping bags, or undertake such household chores. He clearly accepted that the Claimant’s ability to undertake household tasks was limited. I found that the Claimant was truthful when she told the Tribunal that she could not undertake most household tasks because of pain.

44. Miss Andrews, witness for the Respondents, told the Tribunal that she had seen the Claimant walking with a limp when she worked with her.

45. I accepted the Claimant’s evidence, supported by Mr Beverley, that she walked, climbed stairs and dressed only slowly. I accepted the Claimant’s evidence that, at the relevant time, she could not tie her own shoe laces. I

considered that it was clear that, since 2012 the Claimant had had osteoarthritis arthritis in both hips and, on Mr Beverley's account, she had had only limited relief, if any, from the arthroscopies.

46. Doing household chores is a normal day to day activity. I accepted that, from 2012, the Claimant was unable to do these. I also accepted that, from 2012 she walked, climbed stairs and dressed only slowly and with pain.

### Decision

47. Applying the Guidance, as I am required to do, I concluded that being able to undertake all those normal day to day activities only slowly and with pain did amount to a substantial adverse effect on the Claimant's ability to carry out normal day to day activities at the relevant time.

48. I concluded that the substantial adverse effect had lasted from 2012. Mr Beverley's report made clear that the Claimant had undergone three arthroscopies since 2012, with little or no benefit; the implication of that is that the Claimant was experiencing pain and restricted movement in her hips from 2012, which was not relieved by the relevant arthroscopies.

49. Even if I was wrong in that, it was clear, on Mr Beverley's report, that the Claimant's hip conditions were progressive so that it was inevitable that both hips would need to be completely replaced. I accepted the Claimant's contention that the NICE Guidelines indicate that joint replacement surgery is to be considered where patients have ongoing pain, joint stiffness, reduced function and a poor quality of life. I considered that if it was inevitable that the Claimant would be required to undergo hip replacements, then it was also inevitable that the Claimant would have hip pain and restriction of movement which would be so severe at that point as to require major surgery. That would therefore have had a more than minor or trivial adverse effect on the Claimant's ability to carry out normal day to day activities for example walking, climbing stairs and lifting.

50. Applying *Schedule 1 paragraph 8 Equality Act 2010*, I therefore found that the Claimant's osteoarthritis arthritis in her hips, which existed at the relevant time, is to be taken as having a substantial adverse effect. The condition, being progressive, was likely to result in a substantial adverse effect.

51. I also considered that, at the relevant time, that substantial adverse effect was likely to last for twelve months or more. At the relevant time, the effect would be permanent unless the Claimant was operated upon. I accepted the Claimant's contention that her disability is to be considered without having undergone the operation. The Claimant was under no duty to undergo an operation. There was no guarantee that an operation would be available with any particular time in any event. Even if the Claimant underwent an operation, the recovery time, on Mr Beverley's evidence, would have been of six to twelve months' duration.

52. Accordingly, I found that the Claimant was a disabled person at the relevant time. She had a physical impairment which had had a substantial adverse effect, for more than twelve months, at the relevant time. If I am wrong in that, I consider that the condition was progressive and that it was inevitable that it would progress to have a substantial adverse effect lasting for more than 12 months.

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Employment Judge Brown

Dated: 24 May 2019

Judgment and Reasons sent to the parties on:

30 May 2019

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For the Tribunal Office