



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113334/2018

Held in Edinburgh on 26 March and 13 May 2019

Employment Judge: Iain F. Atack

Ms Jessica Ann Skinner

Claimant
Represented by:
Ms L Neil
Solicitor

David Adamson & Partners Ltd.

Respondents
Represented by:
Mr A Wallace
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the employment tribunal is that the claimant is a disabled person within the meaning of section 6 (1) of the Equality Act 2010.

Reasons

Introduction

1. This was a preliminary hearing to decide the question of disability status.

2. The claimant has brought claims of discrimination arising in consequence of disability, under section 15 of the Equality Act 2010, and a failure to make reasonable adjustments under section 20 of that Act. The purpose of this preliminary hearing was purely to decide the question of whether the claimant satisfied the definition of a disabled person in terms of section 6(1) of that Act. The claimant had initially also made a complaint of unfair dismissal but it was noted at the closed preliminary hearing held on 11 October 2018 that she did not have sufficient length of service to pursue that complaint and accordingly it is no longer being pursued.
3. The claimant was represented at this hearing by Ms. L Neil and the respondent by Mr. A Wallace.
4. Evidence was led for the claimant by herself and Mr Imran Liaquat, consultant neurosurgeon. For the respondent evidence was given by Mr. G Miller a director of the respondent's valuation division.
5. The respondent produced a joint bundle of documents extending to 100 pages and reference to the documents will be by reference to the page numbers in the bundle.
6. During the course of the hearing Mr. Wallace for the respondent accepted that the claimant suffered from a physical impairment and the effect of that impairment was long-standing. The respondent's position, following that concession, was that the impairment did not have a substantial adverse effect on the claimant's normal day to day activities.
7. From the evidence given and the documents to which I was referred I made the following material findings in fact.

Facts

8. The claimant commenced her employment with the respondent on 12 September 2016. That employment terminated on 5 April 2018.
9. The respondent is a firm of chartered surveyors.
10. The claimant was employed by the respondent as a trainee valuation surveyor.
11. The claimant reported to Mr Greg Miller, a director of the respondent, who was head of their valuation department where the claimant was employed.
12. At the age of 14 the claimant had suffered from back pain which was associated with the development of pain shooting down her left leg. Following attempts to settle her symptoms she had a left sided lumbar microdiscectomy at the L5/S1 level at Aberdeen Royal infirmary.
13. Following that operation she had complete relief of the pain.
14. In about October 2016 the claimant developed back pain which was similar to that which she had experienced when she was a teenager.
15. The physical impairment for which she suffered was a left sided S1 nerve root pain (sciatica) from a left sided recurrent L5/S1 disc prolapse causing S1 nerve root compression.
16. She suffered from a sharp burning pain in her left buttock, posterior thigh and left calf associated with paraesthesia and back pain.
17. The nerve pain was aggravated by bending forward, standing and getting into and out of cars.
18. That impairment has lasted since November 2016.

19. The claimant was initially treated by the use of the drugs Gabapentin, Amitriptyline, Codeine, Co-codamol and Diclofenac, page 79-80.
20. She also received a left sided perineural injection which failed to result in any improvement in her symptoms. She was then referred to Mr. Imran Liaquat, consultant neurosurgeon at Edinburgh Western infirmary.
21. Following that referral Mr. Liaquat concluded that the claimant's symptoms were due to a recurrent disc prolapse at the left L5/S1 level, page 81.
22. The claimant was scheduled for surgery. That surgery was a lumbar spinal microdiscectomy procedure.
23. The surgery was initially the scheduled to take place in September 2018 but in fact took place on 18 February 2019.
24. The claimant was advised to avoid activities that might exaggerate her pain such as leaning forward; standing and leaning back. That was because such activities could set off another bout of pain.
25. The pain from which the claimant was suffering prior to her operation was debilitating.
26. The claimant was advised to exercise to help her core back strength.
27. The claimant was required to go to survey properties in the course of her employment. When attending such surveys she would be required to bend down to carry out testing for damp in properties.
28. She found standing for a time to be a problem as she could not stand for more than 15 minutes without suffering pain.

29. Standing on a ladder also caused her pain. She was required on occasion to carry a letter whilst on a survey.
30. The claimant attended concerts and cinema where she could sit down.
31. She socialised at work, but went to bars where she could sit down.
32. The claimant enjoys cooking but requires to sit down after a few minutes of such activity. She received help in cooking from her flatmate.
33. She tries to do some cleaning but her flatmate helps in that task.
34. The claimant requires to sit down to get dressed.
35. She experiences pain when washing and dressing whilst bending down.
36. The claimant experienced trouble sleeping because of the pain from which she was suffering.
37. She goes to the gym and has a personal trainer. The purpose of going to the gym was to strengthen her core back muscles in order to be fit for the operation she was due to have. That was done on medical advice.
38. The personal trainer devised a plan for the claimant to exercise whilst taking into account her limitations.
39. She finds it difficult to get into and out of cars. She experiences pain in getting into and out of cars.
40. She was required to go in a car with her employers to carry out surveys.

41. She required to take the bus to work. If she was not able to obtain a seat in the bus she suffered pain as a result of having to stand. That pain was debilitating.
42. The claimant can and does go for walks. She limits the length of the walk to avoid aggravating her pain. She goes walking to places where she is able to sit down and rest.
43. The claimant's neurosurgeon was not surprised to hear that the claimant had difficulty in washing, dressing cleaning and shopping.
44. He was not surprised to learn that she cooked on a regular basis as such activity would depend on the level of pain she suffered at any given time.
45. He was not surprised that the claimant went walking. It was his opinion that patients should walk to avoid atrophy. Walking would help her core strengths.
46. He was not surprised that the claimant had attended a gym and carried out various tasks whilst there.

Submissions

Claimant

47. Ms Neil submitted that there were four issues which the employment tribunal had to decide. These were –
 1. Did the claimant have a physical impairment ?
 2. Did that impairment adversely effect her ability to carry out normal day-to-day activities ?
 3. Is the effect substantial ? and
 4. Is the effect long-term?

48. Her position was that the claimant had a physical impairment and that the impairment adversely effected her ability to carry out day-to-day activities. She referred to the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011), issued by the Secretary of State.
49. She referred to the evidence of the claimant being debilitated if she had to stand on public transport. The claimant's mobility was affected and in respect of work related activities she had difficulty on site visits and in getting into a car to go on those site visits. Standing was a problem for the claimant and bending to test for damp caused pain. These were normal day-to-day activities for the claimant. She also required to carry ladders.
50. Ms. Neil submitted that the focus of the tribunal should be upon the effect of the disability. The claimant's social life was framed around what she could manage. Her surgeon had seen her as a person who tried to cope.
51. She referred to Mr. Liaquat's evidence that it was unusual for someone to have to have surgery for sciatica.
52. It was also her submission that the effect of the impairment upon the claimant's day to day activities was long-term. The impairment had lasted since October 2016 as a sciaticic pain and had lasted for more than 12 months. She referred to Mr. Liaquat's evidence that without surgical intervention there would be no improvement in the claimant's condition.
53. It was her submission that the claimant satisfied all of the requirements in section 6 of the Equality Act 2010 and that the claimant was disabled.
54. She referred to the following cases:-

College of Ripon & York St. John v Hobbs [2002] IRLR 185

McNicol v Balfour Beatty Rail Maintenance Ltd [2002] IRLR 711

Law Hospital NHS Trust v Rush [2001] IRLR 611

Adorani v London and South East Railway EAT 0316/12

Banaszczyk v Booker Ltd [2016] IRLR 273

Respondent

55. Mr. Wallace submitted that the onus was on the claimant to prove that she was a disabled person within the meaning of the Equality Act. The respondent accepted that the claimant suffered from a physical impairment and that it was long-term. Their position was that it did not substantially adversely effect her normal day-to-day activities.
56. It was his position the claimant could carry out a number of day-to-day activities and he referred to her posts on social media regarding her attending the gym and other social activities.
57. He submitted that the claimant was not a credible witness and that there were inconsistencies in her evidence. She was able to participate in a variety of social activities and attend sessions at her gym. It was the respondent's position that the claimant was tired because of how much time she had spent exercising and working in the gym and that was consistent with her evidence.
58. He highlighted what he submitted were inconsistencies in the claimant's evidence such as her attendance at various concerts when she had claimed that she was unable to book things in advance as she did not know how she would feel or be fit to attend.
59. It was his submission that the claimant's media posts, which had been referred to in evidence, showed that she was able to carry out an active social life.
60. The claimant had not raised with the respondent that she was in pain even whilst out on survey with Mr. Miller.

61. He submitted that there was a motive for the claimant to exaggerate her claims in that she lacked sufficient length of service to be able to bring a claim of unfair dismissal. It was his submission that little weight should be paid to the claimant's evidence.
62. Mr. Wallace submitted that Mr. Liaquat's evidence was not sufficient to prove that the claimant's condition had more than a minor effect upon her normal day to day activities. Mr. Liaquat had to rely upon what the claimant had told him and the effect of that was that his evidence relating to the effects of the impairment was little more than hearsay. Mr. Wallace referred to the fact that the claimant had not called as a witness her flatmate who could have corroborated her evidence regarding her abilities to cook and clean.
63. The respondent's evidence, he submitted, should be preferred. Mr. Miller had given evidence that he was unaware that the claimant was suffering from pain and did not notice her struggling. She did not tell him she could not do anything and he had specifically said that the claimant should let the respondents know if she would not be able go out on site. She had only taken that opportunity on a few occasions.
64. The claimant had managed all that was asked of her and was progressing as any trainee would. It was his submission that she was not suffering as much as she had described and the impairment did not substantially adversely effect her day-to-day activities. There was, he said, no evidence that she was effected by the majority of factors in appendix 1 to the Equality and Human Rights Commission Code of Practice on Employment (2011).
65. It was the respondent's position that the claimant was not disabled within the meaning of the Equality Act 2016.
66. Mr. Wallace referred to the following cases:-

Condappa v Newham Health Care Trust EAT/452/00

Goodwin v Patent Office 1999 ICR 302

Decision

The Law

67. Section 6 of the Equality Act 2010 provides, insofar as is relevant, as follows:-

“(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.”

“**Substantial**” is defined in section 212 (1) of the Equality Act as meaning “more than minor or trivial”.

68. Further assistance in ascertaining if a physical impairment has a substantial adverse effect upon a person is provided by the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) issued by the Secretary of State, (the Guidance) and from the Equality and Human Rights Commission Code of Practice on Employment (2011).

Issues

69. In this case it was accepted by the respondent that the claimant had a physical impairment and that the physical impairment was long-term.

70. The issues therefore for the tribunal to consider were-

1. Is the claimant’s ability to carry out normal day-to-day activities adversely effected ? and ,if so,
2. Is that adverse effect substantial?

71. The claimant alleged that her physical impairment impacted upon her ability to carry out normal day to day activities.

72. The Guidance provides that day to day activities are things people do on a regular or daily basis and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and traveling by various forms of transport and taking part in social activities. The Guidance also states that “normal day-to-day activities” is not intended to include activities which are normal only for a particular person, or a small group of people.
73. In ***Law Hospitals NHS Trust v Rush*** (above) the Court of Session accepted that it was right for a tribunal to have regarded how an applicant could carry out duties at work in deciding whether she was a disabled person within the meaning of the Disability Discrimination Act 1995.
74. I accepted the claimant as a credible witness. She had been advised by her medical advisors to exercise to build up core strength in her back muscles. She attended the gym and Mr. Liaquat was not surprised by that and said he would encourage activities such as squats which would help the claimant’s thigh muscles.
75. The claimant gave evidence about difficulties she experienced in cooking when she required to sit down after a few minutes. Although she did not produce, as a witness, her flatmate, as commented upon by Mr. Wallace, Mr. Liaquat stated he was not surprised to learn the claimant cooked on a regular basis and stated it would all depend on the degree of pain. In his opinion pain should act as a measure of curtailing an activity. I accepted the claimant’s evidence that she experienced difficulties in cooking.
76. Similarly Mr. Liaquat was not surprised at learning the claimant walked at weekends and stated that patients should walk to avoid atrophy as again this would help with their core strengths. It was Mr. Liaquat’s evidence that any activity could be done provided it does not aggravate pain. I accepted that what Mr. Liaquat had stated in evidence provided some corroboration to the claimant’s assertions of what she could do.

77. I also accepted the claimant's evidence that if she could not obtain a seat upon the bus into work she found standing caused her pain which was debilitating.
78. I was satisfied that the claimant had produced evidence of the activities which she claimed she was less able to carry out. I accepted that she would socialise by going to bars, concerts or the cinema where she could sit down.
79. The claimant also gave evidence that she experienced pain in bending at work to carry out tests for damp in properties. She also stated that she experienced pain if she required to stand for any period of time whilst on surveys. I considered that such tasks although carried out at work were, following *Rush*, in effect the same things as would be done in the home. Simply because the claimant was required to bend or to stand whilst at work did not make them any less normal day to day activities.
80. I accepted that the claimant's normal day-to-day activities of walking, washing, dressing, traveling, cooking and getting into and out of cars were impaired. Those are normal day to day activities and her ability to carry out such activities was effected by her physical impairment.
81. I was therefore satisfied that the claimant's ability to carry out normal day to day activities was adversely effected.
82. The next question to be considered is whether that adverse effect is substantial.
83. In *Goodwin v Patent Office* (above) it was emphasized that in deciding how substantial an adverse effect is, examination should be made of what someone cannot do, rather than what they can. In this case whilst the claimant can walk, dress, cook, get into and out of cars, bend down and attend social events she can only do so by adopting tactics which avoid her suffering from pain. From the evidence led I was satisfied that the claimant mitigated the effect of her physical

impairment by adopting coping procedures to enable her to carry out her various activities and tasks.

84. In ***Condappa v Newham*** (above) it was pointed out that the Act is concerned not with *any* adverse effect but rather with a *substantial adverse* effect. Whether or not the pain or difficulty is sufficient in any particular case is a matter for the tribunal to decide on the facts before it.
85. I did not consider the effects of the impairment upon the claimant's ability to carry out normal day-to-day activities was minor or trivial. The correct approach for deciding on the severity of a disabling condition involves an enquiry as to how the individual carries out the activity compared with how she would do it if not suffering the impairment- ***Paterson v Commissioner of Police of the Metropolis*** [2007] IRLR 763. The claimant gave evidence, which I accepted, about the way in which she coped with dressing, cooking, cleaning and walking. She is able to carry out those activities by adopting coping strategies. The Guidance suggests, at B3, that the way in which activities are carried out is a factor to be considered when assessing whether the effect of an impairment is substantial in the way in which a person with that impairment carries out normal day-to-day activities.
86. In ***Goodwin*** the EAT set out its explanation of the requirements to be considered in judging whether the effects of a condition are substantial as follows:

“What the Act is concerned with is an impairment on the person’s ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that

disabled persons often adjust their lives and circumstances to enable them to cope for themselves”.

87. The Guidance also suggests, at B9, **“ Account should also be taken of where a person avoids doing things which, for example, cause pain fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would not be reasonable to conclude that the person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that the person cannot do, or can only do with difficulty.”**
88. I accepted the claimant’s evidence that she only goes to concerts or cinemas where she can sit down and that she attends social functions involving her employment where those are held in bars when she can sit down. I accepted the claimant’s evidence about the difficulty she experienced in dressing and cooking, her ability to walk and to stand and to bend. When compared with how she would be able to carry out those activities if she had not suffered from the impairment I considered that the effect was substantial.
89. I rejected Mr. Wallace’s submission that the claimant’s evidence was exaggerated. Whilst she was able to carry out a social life, I accepted that she could only do that with a certain amount of difficulty.
90. I also rejected Mr. Wallace’s submission that Mr. Liaquat’s evidence about the claimant’s ability to carry out certain activities as being merely hearsay. Mr. Liaquat is a very experienced neurosurgeon and has clearly set out his qualifications and experience in his report contained pages 70 to 87. He based his opinions upon his clinical observation of the claimant and gave clear answers to the questions put to him in cross examination about the claimant’s ability to carry out certain activities. I accepted his evidence and his comments about the effect of her physical impairment upon the claimant’s activities.

91. I concluded that the physical impairment from which the claimant suffered had a substantial adverse effect upon her ability to carry out normal day to day activities. The claimant is a disabled person within the meaning of section 6(1) the Equality Act 2010.
92. The case should now be listed for a final hearing before a full tribunal in terms of the note following the preliminary hearing on 11 October 2018.

Employment Judge: Iain Atack
Date of Judgment: 31 May 2019
Entered into the Register: 04 June 2019
And Copied to Parties