



EMPLOYMENT TRIBUNALS

Claimant: Miss L Reynolds

Respondent: Shisedio Group UK Ltd

Heard at: Manchester

On: 18 June 2019

Before: Employment Judge Humble
(sitting alone)

REPRESENTATION:

Claimant: Mr S Pinder, Solicitor

Respondent: Miss C Souter, Counsel

JUDGMENT ON PRELIMINARY HEARING

The Judgment of the Employment Tribunal is that the claimant had a disability within the meaning of section 6 Equality Act 2010 at all material times; that is for the period from 1 September 2017 to 18 October 2018.

REASONS

The Hearing

1. The claimant was represented by Mr S Pinder, a Solicitor, and the respondent was represented by Miss C Souter of Counsel. The claimant gave evidence at the hearing by way of a written statement which had been prepared on her behalf and she was cross examined by Counsel. There was an agreed bundle of documents extending to 174 pages.

2. The case was listed for three hours on the morning of 18 June. The tribunal was able to read the documentation and to take the evidence and submissions, but there was insufficient time to deliberate and give judgment due to another matter which was to be determined that afternoon. The decision was therefore reserved.

The Issues

3. The hearing was convened principally to determine the preliminary issue of whether the claimant was disabled for the purposes of section 6 Equality Act 2010. The nature of the claimant's condition was not articulated with any precision beyond a "knee condition".

4. The tribunal identified the following issues for determination:

4.1 Whether, between 1 September 2017 and 18 October 2018, the claimant met the statutory definition of disability by reason of a physical impairment to her right knee. In particular the tribunal would determine:

4.1.1 whether the claimant had a physical impairment;

4.1.2 whether the impairment adversely affected the claimant's ability to carry out normal day-to-day activities;

4.1.3 whether any such adverse effect was substantial; and

4.1.4 whether any adverse effect was long-term.

The Law

5. The Tribunal had reference to section 6 Equality Act 2010, which states:

"(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."

6. The tribunal had reference to whether the claimant had a recurring impairment and to section 2(2) of Schedule 1 Part 1 of the Equality Act 2010 which states:

"If an impairment ceases to have a substantial 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."

In addition, the tribunal had reference to Appendix 1 of the Code of Practice on Employment at Part 4, section 13:

"If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur; that is, if it might well recur."

7. The tribunal reminded itself of the principles in Kapadia v London Borough of Lambeth [2000] IRLR 699, CA which confirms that the burden of proof rests with the claimant to show that he or she suffers from a disability, and had reference to Goodwin v Patent Office [1999] IRLR 4 EAT which is authority for the proposition that, when assessing disability, the tribunal should examine the things which a claimant either cannot do or can only do with difficulty, rather than on the things that the person can do.

Findings of Fact

The Employment Tribunal made the following findings of fact on the balance of probabilities (the tribunal did not make findings upon all the evidence presented but made material findings of fact only upon those matters relevant to the issues to be determined):

8. The claimant has a condition in her right knee for which she has had a series of operations. There was no precise description before the tribunal as to what that condition was. The claimant said in her oral evidence that she believed she suffered from osteoporosis of the knee but that was not confirmed in any medical diagnosis put before the tribunal. There was an indication in a medical report from April 2015 that the claimant would develop osteoarthritis “*within ten years*” but there was no confirmation that she suffered from osteoarthritis at the material time. There was, however, documentary evidence of a series of operations over a lengthy period of time and the medical evidence confirmed that there was damage to the cruciate ligament in the claimant's right knee.

9. The problems with the claimant's right knee go back to 2003 when she suffered a netball injury which resulted in damage to the anterior cruciate ligament. The damage was serious enough that she had to undergo an operation in which ligaments were removed from the claimant's hamstring and grafted to the knee in an effort to repair the damage to the knee ligaments. Unfortunately, there were complications during the course of that surgery caused by a drill bit being shattered in the claimant's knee joint; this left metal fragments lodged in the cavity of her knee which could not be easily removed. There followed a series of operations during which various attempts were made to remove the metal fragments and to repair the damage to the cruciate ligament. The documentary evidence suggested that the claimant had undergone at least seven operations and the tribunal accepted the claimant's evidence that she had in fact undergone nine operations in total. Essentially, the claimant's case was that the damage to the cruciate ligament, complicated by the remnants of metal fragments in the knee cavity, led to severe pain in her right knee and caused her ongoing discomfort and impaired mobility.

10. The evidence in the medical records was that, following at least some of the nine operations there was an improvement in the claimant's condition and there was, at least a temporary alleviation of her symptoms. This was the focus of the respondent's case: in essence, it was argued that the claimant had overstated her symptoms and that following surgeries she was not sufficiently impaired such that it could be said that her condition had any substantial adverse effect on her day-to-day activities. In particular, the respondent's case was that during the relevant period, from September 2017 to October 2018, the claimant had not made out that her condition had a substantial adverse effect. It was said that the “section 6 witness statement” produced on the claimant's behalf did not focus on that period but rather gave generic descriptions of her condition over a protracted, largely unspecified period, and there was little in the way of General Practitioner notes during the relevant period to support the claimant's case. There was a significant gap in those notes between September 2015 and February 2017 when it appeared the claimant did not attend her GP at all, and after February 2017 there was nothing further in her notes until January 2018. Further, during the period from the late part of 2017

through to the end of 2018 there was no evidence at all that the claimant had been prescribed any painkillers or any other medication by her General Practitioner.

11. While Counsel presented the respondent's case in a skilful manner, focussing upon gaps in the medical evidence which appeared to undermine the claimant's case, the tribunal did not share the respondent's interpretation of the evidence for three main reasons.

12. Firstly, it was not disputed that the claimant had undergone nine operations on her right knee since 2003. Most recently, an operation had taken place in 2015 and further surgery was carried out in August 2017 when some metal debris was removed from the claimant's knee and a further attempt was made to repair the cartilage ligament. It is correct that there were only limited references to attendances at the claimant's GP during the material period, but this was in large part because the claimant was under the care of consultants during this period and her GP could do little to assist. There were in any event some medical documents which supported the claimant's case that she was continuing to receive treatment. By way of example, in February 2018 there is a reference in GP notes to "*orthop[aedic] consultant*" and the use of a "*knee support*", and to Naproxen being prescribed; and in June 2018 there is a GP's reference to an ongoing knee problem with "*mild swelling and redness to the anterior knee*". There are also references to the claimant being seen by Orthopaedics in January and March 2018. In February 2017, there is a reference to the claimant "*currently walking on crutches*" and being referred to an orthopaedic specialist, albeit this pre-dates the material period by about six months.

13. Secondly, there was a report from a Mr T Spalding (described as a Consultant Orthopaedic Surgeon Specialist in Knee Surgery) of 11 July 2018 following an examination of 10 July, in which he states that the claimant has had seven episodes of surgery since 2003 and further states, "*the last time was August 2017 when we removed some metal debris within her knee. She had some degeneration change in both the medial and lateral compartments of the knee and the patellofemoral joint...She tells me she benefitted from this surgery but still thinks that there may be some metalwork inside which is causing the mechanical symptoms. She has noticed a locking around the anterior lateral Hoffa's fat pad and there was some thickening here which we trimmed on the last occasion*". The letter also stated, "*she tells me that she has needed to take dihydrocodeine and naproxen (covered with omeprazole) to try to manage her knee pain. She feels as if the knee moves out of joint in addition to her symptoms*". This was a fairly detailed description of a severe knee injury during the period which the claimant was seeking to rely upon.

14. Thirdly, aside from the medical evidence, the tribunal found that the claimant was a credible witness when describing her condition and the effect that it had upon her on a day-to-day basis. In brief, the claimant said that she had suffered from ongoing pain in her knee for many years which was from time to time alleviated by surgery but even after surgery she remained in discomfort and required to manage the pain with painkillers. Among other things she took naproxen, co-codamol and codeine. Some of the drugs, notably naproxen, required prescriptions and the claimant was challenged about the lack of evidence of any prescriptions from her GP for much of the material period. The claimant explained that, when she was not attending her GP, she would use her mother's prescription since the cost of a prescription to the claimant was £9 which she often found difficult to pay. The claimant was living on her own and often struggled to cover her living costs and to

pay her mortgage and bills so £9 represented a significant sum. The tribunal accepted that the claimant's mother suffered from osteoporosis of the spine and was regularly prescribed naproxen, among other painkillers and that the claimant made use of her mother's medication, taking Naproxen on a regular basis throughout the material period.

15. In her oral evidence, the claimant gave some details of her medical care during the course of 2017-2018. During the mid to later part of 2018 she was under the care of a consultant based in the North West, Mr Robb, who referred her to another consultant based in Coventry who was carrying out a form of surgery not available to patients in the North West. The claimant travelled to Coventry in November 2018 and had MRI scans but was later informed that she was not "*an ideal candidate*" because her knee was "*too far gone*". She was therefore referred back to Mr Robb who sought to obtain some further treatment which involved injections directly into the knee. Unfortunately, it transpired that the Trust in which Mr Robb operated was not prepared to fund that treatment and the claimant was thereafter referred back to Coventry. These events took place shortly after the period upon which the claimant was seeking to rely, but they provided an insight in to the nature of the difficulties that the claimant was experiencing and supported her case that she struggling with her ongoing symptoms in 2018.

16. The tribunal accepted the claimant's oral evidence that she had, throughout the period from 2017 to 2018 suffered impaired mobility which she continued to suffer and which had an adverse effect on her day-to-day activities. Her oral evidence was credible, graphic and compelling. She described how, because of the lack of cruciate ligament left in the knee, there was a constant "*clicking*" in the knee joint and there were occasions when "*bone was grinding on bone*" and it did not feel as if her knee "*fitted*" into the joint. She had difficulty in lifting heavy items and in doing domestic duties such as hoovering or lawnmowing. She struggled to stand for long periods and, while she could take her dog on short walks of a few hundred yards, she had difficulty walking any longer distances. The claimant had been unable to play netball since her injury in 2003 and, because of her condition, she had difficulty managing her weight and fitness since could not carry out any weight bearing exercises at a gymnasium. Among other things which she had to give up, she expressed regret that she could not wear high heels when she occasionally had "*a night out with the girls*". The condition also affected her sleep since it caused discomfort during the night and at times the knee joint would "*lock in to place*" causing severe pain; she attempted to alleviate this by sleeping with a pillow beneath her knee.

17. Although the symptoms were alleviated from time to time following various surgeries, the tribunal was satisfied that the claimant had a physical impairment to her knee and that impairment had an adverse effect on her day-to-day activities. Further, the tribunal held that the effect was substantial, i.e. more than minor or trivial, and that it had a substantial adverse effect throughout the period from 1 September 2017 to 18 October 2018. Even if there were occasions when those symptoms were reduced or alleviated, they were still sufficiently adverse to meet the definition. It follows that the claimant had a disability within the meaning of the Act throughout the relevant time. The tribunal were not required to do so but would, on the balance of probabilities, have held that even if there were periods when it did not have a substantial effect, it would have met the definition of a recurring disability within section 2(2) of Schedule 1 Part 1 of the Act.

18. The case will proceed to a full hearing and further directions will follow.

Employment Judge Humble

Date 28th June 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

4 July 2019

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