



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104574/2018 & 4104576/2018

5

Held in Glasgow on 3, 4 and 5 June 2019

Employment Judge Laura Doherty

10 **Mr A Morton**

**Claimant
In Person**

Royal Mail Group Limited

**First Respondent
Represented by:
Ms A Hunter -
Solicitor**

15

Blue Arrow Limited

**Second Respondent
Represented by:
Ms J Wright -
Solicitor**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that at December 2017 the claimant
25 was a disabled person in terms of section 6 of the Equality Act 2010.

REASONS

1. The claimant presented two claims against the respondents of disability discrimination in terms of the Equality Act 2010 (EqA).
2. The claims were conjoined, and this Preliminary Hearing (PH) was fixed to
30 determine as a preliminary issue, whether the claimant was a disabled person in terms of section 6 of the EqA as at December 2017, when the alleged act of discrimination is said to have taken place.
3. The claimant appeared in person at the PH; the first respondents were represented by their solicitor, Ms Hunter, and the second respondents by Ms
35 Wright, solicitor.

E.T. Z4 (WR)

4. The claimant gave evidence on his own behalf, and the parties lodged a joint bundle of documents.
5. There was a preliminary issue in relation to the documents. Ms Wright made an application to substitute one of the documents included in the bundle, which was a Blue Arrow medical questionnaire, with a more legible copy of that document.
6. Objection was taken to the inclusion of this document in the bundle by the claimant, on the basis that the original document was not produced. It was also the claimant's position that the medical questionnaire amounted to contravention of the provisions of section 60 of the EqA. It was the second respondent's position that the document did not contravene these provisions, and Ms Wright indicated that she would lead evidence in relation to this point.
7. The document appeared to the Tribunal to be relevant to the issues which it has to determine, and therefore it was satisfied that it should be included in the bundle, subject to any argument as to whether it constituted a contravention of section 60 of the EqA.
8. The claimant did not seek an adjournment of the proceedings on the basis that the document was to be included.
9. The Tribunal heard evidence from the claimant, and from Mr Hannah, an operations director at Blue Arrow.
10. Included in the bundle of documents was a medical report from a Dr Gavin Tait, which the claimant had instructed. The claimant did not seek to rely on Dr Tait's report. Both respondents confirmed that they were able to agree the report produced in the bundle was a report produced by Dr Tait, but beyond that no admission is made.

Findings in Fact

11. The claimant, whose date of birth is 9 November 1963, suffers from mild mnemonic chronic ligamentous mechanical back pain, and left drop foot.

12. The claimant had a long history of lower back pain and left sciatica. On 16 November 2001, he required emergency admission for sciatic pain and on 27 November he had back surgery. Following the surgery, he has suffered intermittent back pain. The weakness in his left lower leg did not improve and the claimant has permanent left foot drop. This has been a chronic condition which the claimant has experienced for 17 years.
13. There is marked muscle weakness which is seen on the claimant's lower left leg. The claimant does not have active flexion of his left foot, ankle or big toe, but he has full power in his plantar flexion. The effect of left foot drop is that the claimant's left foot drops, which means that he cannot lift his left foot. The claimant wears a left ankle/foot orthosis which is a plastic splint, which is strapped to his calf under his left foot in order to maintain his ankle and foot at 90 degrees. Without the ankle/foot orthosis (splint), the claimant walks with a dropped foot deformity.
14. When the claimant is not wearing his splint, his left foot drags, and he has to lift his left leg higher to compensate for that; his foot is 'all floppy' when it lands on the ground. The claimant is not able to walk any significant distances without discomfort, or his balance being affected, particularly on rough or uneven ground when he is not wearing a splint. The claimant does not attempt to walk out of doors without wearing his splint because this it would be difficult.
15. When the claimant is wearing his foot splint, he can walk a reasonable distance, albeit he has to take account of the ground conditions, in particular any cobblestones, or uneven ground, and he can become fatigued after about fifteen minutes of walking.
16. The claimant can drive a manual car when he is wearing a splint. He cannot drive a manual car when he was not wearing a splint, as he does not have sufficient control of his left foot in order to operate the clutch. He could drive an automatic car without wearing his splint.
17. The claimant can carry groceries, when he is wearing his splint and he is able to shop for groceries. If the claimant did not wear his splint, he would not be

able to carry groceries as his balance would be affected by carrying weight, and he would be unable to carry any shopping home. The claimant could not shop for groceries if he was not wearing his splint.

18. The claimant suffers from intermittent back pain. He last consulted his GP about this, in 2002. The claimant takes ibuprofen from time to time to alleviate his symptoms.
19. When the claimant registered with Blue Arrow, the second respondents, he completed a medical questionnaire (document 11, page 53). This medical questionnaire was completed prior to the claimant being offered any employment. The purpose for which the questionnaire was used was set out in the preamble. The preamble stated; *In order for Blue Arrow to ensure that any assignment you are offered poses no threat to the health and safety of yourself, your colleagues or the public, or so that we can consider all reasonable adjustments may be necessary in a particular assignment, please complete the relevant parts of this questionnaire fully and accurately. It may be necessary for your consultant to request further details of any aspects of your health for these purposes.*
20. The questionnaire was completed by the claimant. In answer to the question 'do you have back trouble or another muscle or joint trouble', the claimant answered no. The questionnaire asked 'should we be aware of any matter affecting your ability to: stand, sit, walk, lift, climb stairs, use your hands'. The claimant answered no to all these questions. The claimant also answered no to the questions as to whether he had taken any time off work because of an illness or injury, or whether he was taking any prescribed medication which may affect his ability to drive, operate machinery or perform his duties.
21. The claimant instructed Dr Tait to provide a medical report for the purposes of this case. Dr Tait has experience in providing medico legal reports. The instruction asked inter alia that Dr Tait provide a 'medical report which will enable the employment tribunal in assessment of whether I, the claimant suffer from a disability within the meaning of the Equality Act 2010'.

22. The claimant provided Dr Tait with a copy of the Equality Act 2010 Guidance notes, the EHCR Employment Statutory Code of Practice, and section 6 and schedule 1 of the Equality Act 2010. The letter of instructions set out the legal tests for disability and ask a number of questions. Those questions included:

5

(1) *Do you believe that the claimant suffered and/or suffers from any physical and mental impairments? If so, what and between what dates?*

10

(2) *Do you consider that the claimant suffered and/or suffers from any impairments and/or does it have any adverse effect on the claimant's ability to carry out normal day to day activities?*

(3) *If so, what activities, and what is the adverse effect?*

15

(4) *If the claimant has and/or had an impairment which has an adverse effect on his ability to carry out his normal day to day activities, was and/or is that effect substantial?*

...

(g) *Please outline any measures which have been or are being taken to treat or correct the claimant's impairments and when? Please indicate if these measures are continuing.*

20

(h) *If measures are being undertaken, please indicate what the effects of stopping those measures would be on the claimant?*

23. Dr Tait's report (document 21) contains the following statements:

Past Medical History

25

Mr Morton states that at the age of 21 he lifted a heavy engine and suffered an injury to his back, which resulted in him developing left leg sciatica pain and numbness in his lower leg and foot.

5 *He continues to suffer intermittent exacerbations of his condition, which he managed with analgesia, but his symptoms did not progress and ultimately, he underwent a standard laminectomy operation to his lower back in Falkirk Royal Infirmary. This was to remove a lapsed disc and states did you leave him of his sciatic pain.*

10 *He states unfortunately, however, he subsequently developed a left foot drop as a consequence of a partial paralysis of the sciatic nerve. This foot drop has persisted from that time onwards and is a chronic disability.*

15 *Since 2000 he has suffered intermittent episodes of in his left leg which last 1-2 weeks, often worse in bed. He has never been prevented from working normally by any symptoms in his left leg. He does not suffer any recurrence of sciatic pain. His walking distance is not limited, although he is limited by the fact he has a left drop foot and has to wear a left below knee and ankle/foot orthosis. If he does not wear the orthosis, then he has to walk with a high stepping gait and can occasionally catches foot.*

20 *He states that since his surgery, he suffered intermittent episodes of low back pain, localised to the lumbaroscacral area, with no particular laterality. His pain is aggravated by bending and sitting driving his HGV for more than 2 hours. After a short break can return to driving without difficulty.*

25 *He has no particular sports or hobbies.*

He is not limited in his normal activities of daily living by his back or foot condition.

.....

30 *Clinical examination*

On examination Mr Morton is a generally fit looking man of middle-age who stands with a normal posture. He was able to undress and dress himself to his underwear without difficulty.

5 He was clearly wearing a well worn left ankle/foot orthosis, a plastic splint which is strapped to his calf and under his left foot to maintain his left foot and ankle at 90 degrees. With the ankle/foot orthosis removed, he clearly has significant wasting of the muscles of his left calf, which is about half the size of his right calf. When he walks without ankle/foot orthosis, he walks with a dropped foot deformity.

10 He is able to climb up on to and down from an examination couch without apparent difficulty or discomfort and appears to be comfortable supine on the couch. Straight leg raising is possible to 90 degrees at both hips with no evident discomfort.

He has no active dorsiflexion of his left foot, ankle or great toe, but has full power in plantar flexion.

15 While standing, examination of his back reveals a well healed, 6" long longitudinal laminectomy scar over his lower lumbar spine. The scar is well healed and non-tender.

He is able to flex his lumbar spine only to some 2-3cm of skin extension, indicating some resistance to active flexion.

He will not allow active or passive extension of his lumbar spine, but lateral rotation and lateral flexion appear to be normal and pain-free.

20 Conclusions

Mr Alexander Morton is a 55 year old HGV driver who underwent a 2 level laminectomy and discectomy in 2001 for a 5 year history of low back pain and left sided sciatica.

25 Unfortunately, he suffered damage to the L5 nerve root, resulting in a chronic left dropped foot deformity, associated with wasting and weakness below the knee in his left leg.

Since his surgery, Mr Morton has continued to work satisfactorily as an HGV driver, but he has suffered intermittent episodes of low back pain muscular pain and occasional shooting pains in his leg and foot.

These pains are aggravated by heavy lifting and carrying and sitting for a prolonged period, beyond 2 hours. The pains resolve after rest.

He has not been prevented from performing any of his normal activities of daily living or his household duties as a consequence of his back or leg condition.

He has not been prevented from working by his conditions.

At the present time, he clearly has a dense chronic left dropped foot deformity, which requires the use of a permanent below knee splint.

There is evidence of restriction of active movement of his lumbar spine but no evidence of any other neuromuscular abnormality in his back or left leg.

He is not presently under any investigation or treatment and is not presently limited in any of his normal activities of daily living or his work duties, which do involve the use of a pallet truck.

He has not lost any time from his work subsequent to the event in Christmas 2017.

Opinion

Clearly, Mr Morton suffers from mild to moderate chronic musculo-ligamentous mechanical backache as a consequence of his spinal surgery. This is an unfortunate but regular consequence of a surgical assault to the lower back for sciatica. However, the surgery does cure the sciatica.

His dropped foot is a consequence of damage to one of the nerve roots in his back, either at the time or prior to his operation, and is now chronic and has been for 17 years.

While Mr Morton is not unfit to carry out his present occupation as an HGV driver or to load and unload a trailer of pallets, using a pallet truck, it is evident from his medical records that he has suffered from previous episodes of back pain brought on by heavy lifting and pulling.

Thus, it would be reasonable for him to avoid any such activity which might bring on a further episode or exacerbation of his present intermittent low back pain.

24. On receipt of Dr Tait's report, the claimant wrote to him on 23 January 2019 stating that he had concerns about the contents of the report (page 124). Among other things the claimant stated that he could not recall a discussion about walking distances, and stated he was confused at how Dr Tait arrived at the conclusion that his walking distance was not limited. Dr Tait replied on 4 January (page 145) stating *inter alia*:

'May I explain my role in provision of a medical report for personal injury. I am usually instructed by a solicitor who would be your advocate to make your case. That is not my function and cannot be. I write medical reports based on the testimony given on the day of interview and cannot amend that subsequently, other than to correct facts. I cannot change my report on further subjective analysis by another party.

What you are asking is for me to subsequently rewrite my report, which I cannot do. A solicitor would be the person to make your case and argue the points you make. You make comment as to the "legal" interpretation of these matters. That is not for me or you to know and interpret and why if you wish to pursue this you must consult a solicitor.

With regards to the points you make in the first 2 paragraphs of your note I would advise that you instructed me to report on an occasion when you did not wish to pull trolleys, as that action might have aggravated your back condition. That I have done. At no time did I agree to comment on your overall long term back pain and your ability to work. That would be a different matter altogether and would require you to take advice from a solicitor.'

25. The Tribunal heard evidence from the claimant, and from Mr Hannah, an operations director with Blue Arrow, who gave evidence for the second respondent.
26. Mr Hannah gave evidence as to the second respondent's practice of requiring individuals who registered with them to complete a medical questionnaire, and for the purposes for which that is done. He also spoke to the fact that because the second respondents transferred their operating systems from a paper system to a computer-based system, the original documentation which the claimant signed, would have been destroyed, and a scanned copy retained on the second respondent's computer records. The Tribunal found Mr Hannah's evidence to be entirely credible and reliable.
27. The Tribunal formed the impression that the claimant was in the main a credible and reliable witness. The Tribunal did not form the impression that the claimant sought to embellish or exaggerate his evidence as to the consequences of the impairment of drop foot. He accepted quite readily that he was able to engage in a productive working life and carry out normal day to day activities such as shopping or driving with the benefit of a splint. Nor did the claimant seek to exaggerate the effects of his back pain; he accepted the back pain was intermittent. The fact that the claimant was able to make appropriate concessions, enhanced his credibility in the claimant's view.
28. There was an issue arising from the report from Dr Gavin Tait, which had been commissioned by the claimant. The relevant parts of the letter instructing Dr Tait, and Dr Tait's report are set out above in the findings in fact.
29. The claimant relied on Dr Tait's report to the extent that Dr Tait's narrated his medical history and reviewed his medical records. The claimant also accepted that Dr Tait was entitled to have a medical opinion. He did not accept however that Dr Tait was entitled to express all the opinions which he did, and he particularly took issue with the suggestion in the report that the claimant's walking distance was not limited, and that he was able to carry out all normal day to day activities.

30. It was the claimant's position that he had not been asked by Dr Tait about the distance which he could walk, and that Dr Tait's report did not take into account the impact of his drop foot deformity, if he was not wearing his left ankle/foot orthosis.
- 5 31. Ms Hunter for the second respondents submitted that Dr Tait's report could not be challenged. Dr Tait had not been called to give evidence, and therefore could not deal with the challenges which the claimant made to his report. It would have been open to the claimant to call Dr Tait. The claimant could not pick and choose the parts of the report which he wished to rely upon.
- 10 32. Both respondents referred to Dr Tait's expertise in providing medical reports and referred to the comprehensive nature of the instructions, and the fact that Dr Tait had been provided with the relevant guidance in the letter of instruction for the purposes of preparing a report in relation to the claimant's disability status and knew what was required of him.
- 15 33. It appeared to the Tribunal that there was a relevant dispute between the claimant and both respondents as to the extent to which Dr Tait's report dealt with the question of the effect of the claimant's impairment of drop foot, if he was not wearing his left foot ankle/foot brace.
- 20 34. The respondents' position was that Dr Tait's report dealt with this, and made clear that there was no impact, and that the claimant could carry on a full range of day to day activities. Both respondents referred in particular to the fourth paragraph of Dr Tait's report under the heading '*past medical report*' (page 134) in which he states:
- 25 *'Since 2000 he has suffered intermittent episodes of cramp in his left leg which last 1-2 weeks, often worse in bed. He has never been prevented from working normally by any symptoms in his left leg. He does not suffer any recurrence of sciatic pain. His walking distance is not limited, although he is limited by the fact that he has a left dropped foot and has to wear a left below knee ankle/foot orthosis. If he does not wear the orthosis, then he has to*
- 30 *walk with a high stepping gait and can occasionally catch his foot.'*

35. The respondents also relied on two paragraphs from the Conclusions section of Dr Tait's report in which he states:

5 *'He (the claimant) has not been prevented from performing any of his normal activities of daily living or his household duties as a consequence of his back or leg condition.*

He has not been prevented from working by his conditions.'

36. It was the respondents' position that Dr Tait's comments as to the effect of the left drop foot was consistent with the claimant's evidence. The claimant's evidence was that he walked with a high step gate, and the report made clear
10 that there was no effect on the claimant's normal day to day activities as a result of his condition.

37. It was the claimant's position that the report did not accurately reflect the impact of his left foot drop when he was not wearing a foot brace. His position was that his impairment significantly affected his walking distance, his ability
15 to drive a manual car, and his ability to balance which meant that he could not carry weight if he was not wearing his splint. This impacted on his ability to carry groceries, which meant that he could not go shopping.

38. In submitting that the Tribunal should accept Dr Tait's report as evidence in support of the fact that the claimant had no restriction in the performance of
20 his normal day to day activities as a result of his condition of left foot drop, both respondents referred to the case of *Kapadia v London Borough of Lambeth 2000 IRLR 669*. The Judgment of Lord Justice Pill in that case (paragraph 30) states;

39. *'There will be cases of which a fact finding tribunal is not obliged to accept
25 uncontested medical evidence given to it.'* For example, evidence on the basis of which his doctor has formed an opinion may be rejected by the fact-finding Tribunal. There may be cases where it is clear the medical witnesses misunderstood the evidence which he was invited to consider in expressing his opinion. No such consideration applied, however in this case. The
30 majority of the tribunal sought to substitute, for the medical opinion, their own

impression of the claimant formed in the course of the hearing which took place a year at least after the relevant date of which the claimant's medical state had to be considered'.

40. The Tribunal recognise that unless it has good reason to do so, it should not reject uncontradicted medical evidence. It appeared to the Tribunal however that it was not necessary that Dr Tait's opinion that the claimant had no restriction in his performance of normal day to day activities, including walking, should be rejected. The claimant accepted that he had no such restriction when wearing his orthosis.
41. The issue was the basis on which Dr Tate had expressed that opinion. In particular whether his opinion as to the claimant's abilities was expressed on the basis that the claimant was not wearing his orthotic aid.
42. The opinion section in Dr Tait's report does not specifically address this. The closest Dr Tait's report comes to dealing the question posed by the claimant at point (h) of his letter of instruction, is contained in the statement about the claimant walking with a high stepping gait and that he can occasionally catch his foot, under the heading *Past Medical History*.
43. Dr Tait's report makes it clear that there is an effect of the claimant having dropped foot, (*claimant has to walk with a high stepping gait and can occasionally catch his foot*). The respondents submitted this was consistent with the claimant's evidence. The claimant said he walked with a high stepping gait, and he explained that the effect of his condition is that his left foot drags, that he has to lift his left leg higher to compensate for that, and his foot is 'all floppy' when it lands. The Tribunal accepted this evidence as credible. There was nothing in the medical report which suggested that it should not do so.
44. The respondents were critical of the claimant's evidence, in maintaining that his evidence as to the distance which he said he could walk without the orthotic splint was 'vague'. The Tribunal however was satisfied that the claimant, as he said, never left the house without wearing the orthotic splint and that he only took the splint off when he was at home. The Tribunal

accepted the claimant's evidence that he would find it painful and difficult to walk any distance without a splint, and that his balance would be in jeopardy, especially on rough ground. The Tribunal also accepted the claimant's evidence that in addition, his condition affects his balance, and that without wearing the splint, he would have difficulty carrying groceries. It appeared to the Tribunal the claimant's evidence on these matters was not inconsistent with terms of Dr Tait's report, and under the heading '*Clinical Examination*', in which he states; *(the claimant) was clearly wearing a well-worn left ankle/foot orthosis, a plastic splint which is strapped to his cast on his left foot to maintain his left foot and ankle at 90 degrees. With the ankle/foot orthosis removed, he clearly had significant wasting of the muscle of his left calf, which is about half the size of his right calf. When he walks without the ankle/foot orthosis, he walks with a dropped foot deformity.*

45. The Tribunal also took into account that Dr Tait states in the Opinion section that the claimant is not unfit to carry out his present occupation as an HGV driver. The claimant gave evidence to the effect that if he did not wear his splint he could not drive a manual car, and that he would not be able to obtain an HGV licence. This evidence was not challenged in cross examination. The respondent's submission was that the claimant accepted that without his splint he could drive an automatic car, and therefore his condition did not have an impact on the activity or driving. It was further submitted that driving an HGV was not a normal day to day activity (second respondent).

46. The claimant's unchallenged position that he could not drive a manual car without wearing his foot brace, suggested that Dr Tait's opinion that the claimant could carry out all normal day to day activities, which included that the claimant could continue to work satisfactorily as an HGV driver, was reached on the basis of the claimant's abilities when he was wearing his orthotic foot brace.

47. The Tribunal therefore did not reject the evidence in Dr Tait report, but on balance, was satisfied that the Conclusion and Opinion section of the report in so far as relevant to the impact of the claimant's impairment, did not deal with the effect of the claimant's impairment when he was not wearing his foot

brace, and that the paragraph relied upon by the respondents under the *Past Medical History* heading of the report, could not be taken as a clear statement to the effect that the claimant's walking distance was not limited as a result of his condition, when he was not wearing a foot brace.

5 48. In assessing the credibility of the claimant's evidence on the impact of his drop
foot impairment the Tribunal also took into account the medical questionnaire
which he completed when registering with the second respondent. The
claimant firstly had an issue as to whether this was a questionnaire which he
had completed, the original documentation not being produced before the
10 Tribunal.

49. The Tribunal was satisfied that the claimant had signed the questionnaire
which was a standard document required of an individual registering with the
second respondent. It appears to be signed by the claimant, and he was
unable to take a clear position that the document had not been signed by him,
15 albeit he said the answers to the questions may have been ticked by someone
else in response to answers which he gave. The Tribunal found Mr Hannah's
evidence as to why the original could not be produced, and the purpose of the
questionnaire, to be credible.

50. The Tribunal took into account the answers given by the claimant in that
20 questionnaire and attached some weight to the fact that he indicated that
there was nothing the respondents should be aware of which affected his
ability to walk. However the Tribunal also took into account the activities which
the claimant could do while wearing a splint (which included walking and
driving) and therefore did not find that the claimant's answers to the medical
25 questionnaire were determinative of the issues before it, or impacted so
adversely upon the claimant's credibility, that the Tribunal was entitled to
reject his evidence as to the impact of his impairment in its entirety.

List of Authorities

51. The parties referred the Tribunal to the following authorities:

- 30 • *Mr R Banaszczyk v BUKA Limited UKEAT/1032/15/RN*

- *Kapadia v London Borough of Lambeth 2000 IRLR 699 (CA)*
- *De Keyser v Wilson 2001 IRLR 324*
- *Woodrup v London Borough of Southwark 2003 IRLR 111CA*
- *Anwar v Tower Halmets College UKEAT/0091/10*

5 **Claimant's Submissions**

52. The claimant took the Tribunal to the test of disability status under the Equality Act and the Guidance. He referred the Tribunal to the terms of Dr Tait's report in relation to the impairment in respect of his back and the history recorded in that report.
- 10 53. The claimant took the Tribunal through the history of how Dr Tait came to be instructed and took the Tribunal to his letter to Dr Tait, in which he took issue with the statements made about the content of the report, which the claimant said were factually inaccurate. He submitted that when Dr Tait used the word *normal* in the report, it was not the legal meaning of the word *normal* relevant to the Equality Act. He submitted that Dr Tait used the word in a colloquial sense. Dr Tait had no desire to alter his report even though it was perfectly clear he was in error. The claimant pointed to an error as to the claimant's employment history contained within the report, and another error in relation to the claimant's personal circumstances.
- 15
- 20 54. The claimant submitted that he did not argue with Dr Tait's medical opinion, as that was derived from his medical experience. He did argue however with his note taking skills during interview, and his attention to what the claimant has said which he submitted was clearly inadequate. The claimant submitted that the Tribunal would be entitled to reject Dr Tait's report or part of it, and he referred in that regard, to paragraph 30 of the judgment in *Kapadia*
- 25
55. The claimant went on to submit that he did have an impairment of back pain, and foot drop. He submitted the medical evidence supports the view that the foot drop occurred through damage to one of the nerve roots in his back and thereby the back injury caused the foot drop. The claimant submitted that

although the sciatica was cured, there was damage to both the nerve root and back, and there was evidence that the mechanical back pain can be a consequence of surgery.

56. The claimant submitted that he suffered intermittent back pain for many years. He explained that he self-medicates when necessary to alleviate the back pain, and that he uses rests to enable a return to a level of fitness to continue with the work environment. He submitted he only needs to visit his GP when the level of pain is lasting longer, and it is more troublesome than normally experienced. The claimant submitted there was clearly a link between the foot drop and the back ache and it could well happen that the foot drop contributes to the back ache through altering his gate and both conditions could be linked.
57. The claimant referred to section C2 of the Guidance. The claimant submitted that the use of a lower leg splint gives him the opportunity to do some normal day to day activities. He submitted the consequence of not using the leg splint would be to increase the burden on his back/hips causing onset fatigue and pain at a quicker pace and he would not be able to sustain his employment. The claimant submitted that if he could carry out normal day to day activities without his leg splint, there would be no point in wearing it at all
58. The claimant has submitted that the day to day activities which he could not perform without a splint would be driving a manual car, retaining his HGV licence, walking on uneven ground without risk of tripping, walking any distance without risk of pain, carrying shopping of any significance, going around the community, or continuous employment.
59. The claimant submitted that normal day to day activities extend to include the workplace, and he referred to the case of *Banaszyk* in connection with this.

Submissions

Submissions for the first respondent

60. Ms Hunter for the first respondent took the Tribunal to the relevant law and addressed the Tribunal on the evidence.

61. She submitted that Dr Tait produced his report after he met with the claimant, assessed him and discussed his condition, and that he formed his opinion based on the claimant's medical records.
62. Ms Hunter referred to the case of *De Keyser*, in particular paragraph 36, in which the EAT set out the guidance on the use and instruction of medical experts. The EAT referred to the '*valuable observations about expert evidence in Whitehouse v Jordan 1981 1WLR 246 House of Lords, (the expert's evidence should be seen to be the independent product of the expert and uninfluenced as the form or content by the exigencies of litigation)*'. Ms Hunter submitted that Dr Tait's report was just that.
63. Ms Hunter submitted that the claimant did not like Dr Tait's conclusions. Dr Tait was quite correct not to change his report on the claimant's request. She submitted that the Tribunal should be wary of the claimant's suggestion that the opinions were not formed on the basis of questions asked. Dr Tait's report should be accepted at face value.
64. Ms Hunter suggested that where there was a difference in evidence, between Dr Tait's opinions and the claimant's evidence, Dr Tait's report should be given greater weight.
65. Ms Hunter accepted that the claimant had an impairment of which was a drop foot, and that this was long term. The first respondents did not accept that the claimant suffered from back pain at the relevant time. The claimant's back pain was repeatedly referred to as intermittent, and from the claimant's medical records, it could be seen that he did not attend his doctor in respect of back pain since August 2014. The claimant does not reference his back pain in the questionnaire.
66. Ms Hunter then dealt with whether the impairment had an adverse effect on the claimant's ability to carry out normal day to day activities. She referred to the Guidance on matters to be taken into account when determining questions relating to the Definition of Disability (the Guidance).

67. Ms Hunter referred to Dr Tait's report, and the questions asked of him and the opinion which he provided which she also referred to the claimant's completion of a pre-employment questionnaire.
68. Ms Hunter submitted that in the event that the Tribunal was persuaded that there was an adverse effect, then that effect was not substantial, she referred to section 212 (1) of the EqA, in the case of *Anwar v Tower Hamlets College*, and section B of the guidance. Ms Hunter submitted that Dr Tait's medical report makes no mention of any difficulty in walking beyond changing gate. Dr Tait's opinion about the change of the claimant's gate was consistent with the claimant's own evidence.
69. Ms Hunter submitted that conversely, the claimant alleges he is unable to walk any distance without his splint, but his evidence in this respect was vague, and he was unable to confirm what the effect of removing his splint would be on his walking ability in terms of distance, as he does not walk without the splint. Further, Ms Hunter submitted that the claimant had not provided contemporaneous medical evidence to support his position. The claimant relied on the tests that were some twelve years old along with printouts from the internet in respect of that test. Ms Hunter referred to the case of *Woodrup v London Borough of Southwark* in which the ET held in the absence of medical evidence, there was no arguable case that the deducted effect of discontinuous of treatment would have a substantial adverse effect on the claimant's day to day activities.
70. Ms Hunter submitted that there was a similar situation in this case, the claimant has failed to prove disability in terms of the deducted effects without a splint with any particularly in respect of the impact on his day to day activities. He submitted that the Tribunal should prefer the clear opinion of Dr Tait in that the claimant was not limited to the distance that he could walk.
71. Ms Hunter submitted that the claimant spoke about but be mindful about when he was walking on uneven ground, and the risk of tripping particular if there were cobbles, but these were concerns other people would have and did not amount to a substantial effect on his ability to walk.

72. Ms Hunter sought to distinguish the case of *Banaszyk*. In that case there was clear medical evidence of the claimant's ability to carry out the work activities which were affected by his impairment, but there was no such evidence here.

5 73. Ms Hunter submitted that the claimant had given evidence that without a splint he would be unable to drive a manual car. He confirmed in cross examination that he would be able to drive an automatic car. She referred to section B of the Guidance which states that account should be taken of how far a person can reasonably be expected to modify his behaviour, for example by use of a coping or avoidance strategy to prevent or reduce the effects of impairment on normal day to day activities, she submitted that driving an automatic as opposed to a manual car would be one such coping strategy.

10 74. Ms Hunter submitted that the claimant had failed to show that the effect was substantial. The first respondents accept that the effect of the drop foot was long term but that the claimant had not led sufficient evidence to support any finding of adverse effect of the claimant's back pain would be long term. Ms Hunter submitted that the existence of the impairment itself was not sufficient, and the other aspects of the statutory tests needed to be satisfied.

Submissions for the second respondents

20 75. For the second respondents, Ms Wright confirmed that she agreed with much of the submission made by the first respondents and did not require to repeat all the points made. She did however take the Tribunal to the background, and the legal tests, which have to be considered.

25 76. Ms Wright accepted that the claimant had drop foot. She did not accept that the claimant had the impairment of back pain, as there was no evidence to demonstrate that the claimant was suffering from back pain in the material claim.

30 77. There was no issue taken with the longevity component in the statutory test for the purposes of the drop foot impairment. However, issue was taken with substantial adverse effect, and Ms Wright made reference to statements in Dr

Tait's report, which suggests that the claimant had not been prevented from performing any of his normal day to day activities. She submitted, that in making these comments, Dr Tait had been expressly asked in his letter of instruction to comment on the impact on the claimant's impairment on his ability to carry out day to day activities and to comment on the measures taken to deal with it and the effect of stopping those measures.

5

10

15

78. Ms Wright referred to Dr Tait's email of 6 January (page 123 of the bundle) which makes clear that he understands the disability requirements by reference to the instruction letter and supplementary documentation provided to him by the claimant. Ms Wright referred to the experience which Dr Tait had, and the material which he had before him, and she submitted that Dr Tait's report would tend to suggest the claimant was not suffering from a substantial adverse effect in his ability to carry out day to day activities. She submitted that the claimant's challenge of Dr Tait's report be disregarded as he had not been called as a witness to address those challenges; Dr Tait's report should be accepted in its entirety.

20

25

79. Ms Wright also referred to the medical questionnaire which the claimant had completed when commencing his employment with the second respondents, in which he failed to identify any issues when he was specifically asked about whether he experienced any difficulties in standing, sitting, walking or lifting. Ms Wright submitted the claimant had been unable to give any specific evidence as to the impact of his condition on his ability to carry out day to day activities with or without the use of a splint. He submitted that the claimant was unable to say with any degree of the specification what the impact of not wearing a splint would be on his ability to walk. He says little more that it would cause fatigue but was unable to say at what distances fatigue would affect him. There was nothing which amounted to a substantial adverse effect on his ability to carry out the normal day to day activity of walking.

30

80. The claimant said that without a splint, he would walk with a high stepping gate. This was consistent with a report from Dr Tait, and it was submitted that this was not evidence of a substantial adverse effect on his ability to carry out normal day to day activities.

81. The claimant stated that without his splint, he would not be able to drive a manual car or hold his HGV licence. It was submitted however that the claimant could drive an automatic car. Driving an HGV vehicle was not a normal day to day activity. Ms Hunter referred to the decision in *Woodrup v London Borough of Suffolk*, particularly paragraph 11 of that judgment, and paragraph 22 of that judgment it was sated; *'in her statement of particulars, repeated in substance her statement to the tribunal, that if medical treatment were to be stopped, she would 'deteriorate and full symptoms would return' was little more than speculation'*.
82. In this case, there is clear medical evidence from Dr Tait that does not support the position advanced by the claimant. The Woodrup case makes it clear that the deduced effects case such as this, clear and particular evidence is required as to the effect on day to day activities without the measure in question. Ms Wright submitted no such evidence had been submitted by the claimant, and he could not satisfy the statutory test.

Consideration

83. Section 6 of the Equality Act 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.*
- (2) *A reference to a disabled person is a reference to a person who has a disability.*
84. Schedule 1 of the EqA provides at section 2 under the heading '*long-term effects*' the following:
- (2)
- (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.*

85. Under the heading '*effect of medical treatment*', the schedule provides at section 5:

(1) *An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if –*

(a) *measures are being taken to treat and correct it, and*

(b) *but for that, it would be likely to have that effect.*

(2) *"Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.*

86. Section A of the Guidance makes provision for the meaning of impairment and provides the term *mental or physical impairment* should be given its ordinary meaning.

87. The Tribunal began by considering whether the claimant had an impairment. There was no dispute in this case that the claimant has the impairment of left foot drop.

88. There is a dispute as to whether he has any other impairments. The claimant submitted that has an impairment of back pain. The Tribunal was satisfied that the claimant did have the impairment of moderate chronic musculo mechanical back ache. This is the opinion provided by Dr Tait in his report of 13 January 2019.

89. The Tribunal then went on to consider whether those impairments had an adverse effect on the claimant's ability to carry out normal day to day activities? Dealing firstly, with the impairment of chronic musculo mechanical back ache, there was no evidence before the Tribunal upon which it could conclude that this had an effect on the claimant's ability to carry out normal day to day activities. In reaching this conclusion, the Tribunal attaches

significant weight to the conclusions in Dr Tait's report, and his opinion that the claimant has not been prevented from carrying out any of his normal activities of daily living or household duties as a consequence of his back condition. In reaching this conclusion, the Tribunal also takes into account the claimant's evidence to the effect that the condition is intermittent, and that he has not attended his doctors since 2014.

5

90. The claimant suggested that his backache and drop foot may be linked, however there was no medical evidence, beyond the fact that surgery for sciatica pain may have caused the drop foot, to link the two on an ongoing basis.

10

91. The Tribunal then went on to consider whether the claimant's left drop foot impairment had an adverse effect on his ability to carry out normal day to day activities.

92. In considering this, the Tribunal had regard to D 23, and B 12 to B 17 of the Guidance. That provides that if a person is receiving treatment or correction measures for an impairment, the effect of the impairment on day to day activities is to be taken as that which the person would experience without the treatment or measures. The Guidance provides that the practical effect of Schedule 1 paragraph 5 is that the impairment should be treated as having the effect it would have without the measures in question.

15

20

93. B13. provides that this provision applies even if the measures result the effects been completely under control or not at all apparent. The example given at B 14, is that if a person with a hearing impairment wears a hearing aid, the question as to whether his or her impairment has a substantial adverse effect is to be decided by reference to what the hearing level would be without the hearing aid.

25

94. The task for the Tribunal is therefore to assess the effect on the claimant of the impairment of drop foot when he is was not wearing his splint.

95. The Tribunal made findings in fact as to the effect of the claimant's impairment when he was not wearing a splint, as set out above. In reaching its

30

conclusions on this the Tribunal considered the respondents submissions as to the effect of the *Woodrup* case. The Tribunal takes from that case that the claimant has to produce medical evidence and give evidence with some particularity as to deduced effects.

5 96. The Tribunal was not persuaded the facts of *Woodrup* case were on all fours with this case. In the *Woodrup* case, there was no medical evidence to support the claimant's statement that she would deteriorate, '*and full symptoms would return*'. This statement was said to be speculation on the part of the claimant in that case.

10 97. In this case there is medical evidence before the Tribunal in the form of Dr Tait's report to the effect that the claimant has an impairment of left drop foot; when he walks without his ankle/foot orthosis he walks with a drop foot deformity; when the ankle/foot orthosis is removed, he clearly has significant wasting of the muscles of his left calf which is about half the size of his right
15 calf; that he has no active dorsiflexion of his left foot, ankle or great toe; that if he does not wear his left foot orthosis, then he has to walk with a high stepping gate and can occasionally catch his foot; and that his foot drop has persisted from the time he had back surgery and is a chronic disability.

20 98. In addition to this, the claimant gave evidence with some particularity about the effect on his ability to walk, to carry shopping, and to drive, without the use of the orthosis, which, in the Tribunal's view, could be distinguished, from a statement to the effect that the claimant would deteriorate, and '*full symptoms*' would return.

25 99. In considering whether the claimant's impairment had a substantial adverse effect on his day to day activities, the Tribunal took into account the Guidance which provides a number of examples, although a non-exhaustive list of day to day activities. D3 of the Guidance provides that; '*In general, day to day activities are things people do in their regular or daily basis, and examples include shopping, reading and writing, having a conversation using the
30 telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various*

forms of transport and taking part in social activities. Normal day to day activities can include general work-related activities, studying and education related to activities such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents and keeping to a timetable or shift pattern’.

5

100. D4 provides that normal day to day activities are not intended to include activities which are normal only for a particular person, or small group of people. In deciding whether activity is a normal day to day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context ‘normal’ should be given its ordinary, everyday meaning.

10

101. The Tribunal was satisfied, for the reasons given above, that if the claimant did not wear his splint, he would not be able to walk any material distance without experiencing discomfort and would be at risk of falling on rough or uneven ground. The Tribunal also accepted the claimant’s evidence that he would be unable to carry any weight, because his balance would be affected if he were not wearing a splint, which would affect his ability to go to the supermarket and carry home shopping. The Tribunal also accepted the claimant’s evidence that he would be unable to drive a manual car without wearing his splint, as he would have insufficient control of the clutch. The Tribunal was satisfied that these activities, walking, driving and shopping for groceries, were normal day to day activities.

15

20

102. The Tribunal then went on to consider whether the effect of the claimant’s impairment of those activities was a substantial adverse effect. The Tribunal considered the meaning of substantial adverse effect. The Guidance provides that the meaning given to adverse effect on normal day to day activities should be a substantial one, which reflects the general understanding of disability as limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one which is more than a minor or trivial effect. That is stated in the act at section 121 (2) of the EqA.

25

103. The Tribunal also obtained assistance from the case of *Anwar v Tower Hamlets College*, where the ET held that the effect of impairment was more than trivial but still minor, as opposed to substantial.
- 5 104. Section B3 of the Guidance provides that another factor to be considered when assessing whether the effect of an impairment is substantial is the way in which the person with impairment carries out a normal day to day activity, and the comparison is to be made with the way in which a person may be expected to carry out the activity compared with someone who does not have the impairment.
- 10 105. Ms Hunter submitted that the effects which the claimant spoke about which having to take care on cobbled pavements and uneven ground when walking, were no different than that which would be experienced by other people.
106. Ms Hunter submitted the claimant's evidence as to how far he could walk was vague, as he never walked outside of his home without the splint.
- 15 107. In this regard, however in this regard the Tribunal took into account section B9 of the guidance which provides '*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 or motivation. It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining the question as to whether the person meets the definition of disability, it is important to consider the things that a person cannot do, or commonly do without difficulties.*
- 20
- 25 108. The claimant's evidence was that he did not walk outside of the house without his splint, as to do so, would cause discomfort and difficulty in retaining his balance, particular on uneven ground, and cobbled streets, and the Tribunal accepted this. That evidence was consistent with the terms of Dr Tait's report to the extent he stated that the claimant, without his splint, walked with a high stepping gait and could occasionally catch his foot.

109. The Tribunal was satisfied that the claimant's not walking out of doors without wearing his splint was explained by the fact that he found this difficult to do; the Tribunal was satisfied that it was because the claimant did not attempt to walk outdoors without a splint that he found it hard to estimate exactly how long he could walk without difficulty. It appeared to the Tribunal that the claimant was adopting an avoidance strategy in not walking out of doors without with his splint, and therefore too much could not be taken from the fact that he was unable to accurately estimate the distance he would be able to walk out of doors without a splint. The inability to walk out of doors without experiencing difficulty is more than minor or trivial and satisfies the definition in the EqA.
110. The Tribunal also accepted the claimant's evidence that the difficulties which his left foot drop causes with his balance impacted on his ability to carry weight, and he would be unable to carry home shopping from the supermarket to his house if he was not wearing a splint. The Appendix to the Guidance provides a non-exhaustive list of factors which, if experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. That includes; 'Difficulty *picking up and carrying objects of moderate weight, such as a bag of shopping or a small piece of luggage, with one hand.*' Taking into account the Guidance, the Tribunal was satisfied that the inability to carry home groceries from the supermarket is an effect which is more than minor or trivial, and the Tribunal was satisfied that this satisfies the definition in the EqA.
111. The Tribunal was also satisfied that the claimant was unable to drive a manual car.
112. The Tribunal took into account the respondents' submissions to the effect that the claimant should reasonably expected to behave in a way which would modify the substantial adverse effect of his ability to carry out the day to day activity of driving.
113. The Guidance deals with this at B7. It provides that account should be taken of how far a person can reasonably be expected to modify his or her

behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. Examples given in the Guidance include that when considering modification of behaviour, it would be reasonable to expect a person who has chronic backache to avoid extreme activities such as skiing. It would not be reasonable to expect the person to give up, or modify, more normal activities that might exacerbate the symptoms; such shopping or using public transport.

5

10

15

114. B8 of the Guidance states that it would be reasonable to expect a person with a phobia to avoid extreme activities of situations that would aggravate their condition. It would not be reasonable to expect him or her to give up, or modify, normal activities that might exacerbate the symptoms. The example given in the Guidance is of a person with acrophobia (a fear of heights which can induce panic attacks) who might reasonably be expected to avoid the top of extremely high buildings, such as the Eiffel Tower, but not to avoid all multi-storey buildings.

20

25

115. Taking into account what is said in the Guidance, the Tribunal was satisfied that driving was a normal day to day activity, and that it would not be reasonable to expect the claimant to modify this by always having a manual car available to him. In reaching this conclusion the Tribunal also took into account that as indicated above, D3 of the Guidance provides that driving can be included as a normal work-related day-to-day activity. This lends weight to the conclusion that that driving is a normal activity of the type illustrated in the examples in the Guidance, which the claimant should not be expected to give up or modify. The Tribunal was satisfied claimant's impairment of left drop foot had a substantial adverse effect on his ability to carry out the normal day to day activity of driving.

116. There were no issues taken by the respondents as to longevity of the claimant's impairment of foot drop, which is a final limb of the test.

30

117. The Tribunal therefore concluded that the claimant was disabled, as a result of the impairment of left foot drop, in terms of section 6 of the Equality Act 2010, this case should proceed to a final hearing.

118. If any party considers that a PH to consider case management issues is necessary, they should apply to the Tribunal for such a hearing to be fixed, within **14 days** of the date of this Judgment.

5

Employment Judge

L Docherty

Date of Judgment

13 June 2019

10

Date sent to parties

17 June 2019