



EMPLOYMENT TRIBUNALS

Claimant:
Mr C Maye

v

Respondent:
Reading Borough Council

Heard at: Reading **On: 26 July 2019**

Before: Employment Judge Hawksworth

Appearances

For the Claimant: Mr M Green (counsel)

For the Respondent: Mr T Dracass (counsel)

RESERVED JUDGMENT

At the material times, the claimant was disabled within the meaning of section 6 of the Equality Act 2010 by reason of Hand-Arm Vibration Syndrome (HAVS).

REASONS

The claim and the issue of disability

1. By a claim form presented on 25 January 2018 the claimant brought complaints of disability discrimination, unfair dismissal and for arrears of pay. The respondent defends the claim and initially did not concede that the claimant is disabled within the meaning of the Equality Act 2010.
2. There was a private preliminary hearing for case management on 22 October 2018 before Employment Judge Vowles. Case management orders were made, including an order that the claimant should provide an impact statement setting out the impact of his medical conditions. The claimant was also given permission to serve a medical record or report.
3. The claimant served an impact statement on 17 December 2018. He also served medical evidence. On 11 February 2019 the respondent conceded that the claimant is disabled by virtue of six of the seven medical conditions on which the claimant relies, namely deafness, damage to his left eye, dizziness and vertigo, facial nerve palsy, epilepsy and facial disfigurement. The respondent did not concede that the claimant is disabled by reason of Hand-Arm Vibration Syndrome (HAVS).

4. A public preliminary hearing took place at Reading Employment Tribunals on 26 July 2019 on the issue whether the claimant is disabled by reason of HAVS.

The issue to be decided

5. The hearing before me was therefore to decide whether, at the material times, the claimant was disabled within the meaning of section 6 of the Equality Act 2010 by reason of Hand-Arm Vibration Syndrome (HAVS).

Evidence at the hearing

6. In addition to the impact statement served on 17 December 2018 which dealt with all of the medical conditions on which he relies, the claimant served a separate statement on 10 June 2019 and a medical report dated 22 May 2018, both dealing solely with the impact of HAVS.
7. I heard evidence from the claimant at the hearing. This included a supplemental question from the claimant's counsel to the claimant about the impact of his HAVS. The additional question related to a matter which was not included in the claimant's witness statements on disability but which had come to light during the preparation of the claimant's full witness statement for the main hearing. The respondent objected to the additional question. I decided to allow the additional question as it was on a short discrete point which was potentially relevant to the issue I have to decide.
8. The parties had prepared a bundle of 155 pages for use at the hearing. The claimant's representative prepared written submissions on disability.
9. A microphone and headphone system was set up and used at the hearing. It was found to be helpful.

Findings of fact

10. I make the following findings of fact from the evidence I heard and read.
11. The claimant worked in the Highways department from the start of his employment with the respondent on 7 January 1987. The work there was mainly digging. In the role the claimant used manual tools, he gave the example of a shovel. He also used vibrating tools and machinery such as concrete breakers, kerb cutters, and rollers.
12. On 16 January 2012 the claimant had a health assessment with Dr D'Souza. By this date the claimant had been working in the Highways department for over 25 years. Dr D'Souza is a former HSE doctor. She diagnosed the claimant with mild HAVS. She advised that the claimant had blanching of the fingertips (sometimes referred to as vibration white finger) of three fingers of the right hand.

13. There is a classification system to denote the severity of HAVS symptoms. The classification covers both sensorineural symptoms (eg numbness and tingling) and vascular symptoms (such as blanching of the fingers). The sensorineural symptoms are denoted by the letters Sn followed by a number, the vascular symptoms are denoted by the letter V followed by a number.
14. Dr D'Souza assessed the claimant's HAVS on 16 January 2012 as Sn0 V1, ie no sensorineural features but some vascular symptoms.
15. Dr D'Souza advised that the claimant was still 'fit to work with vibrating tools' subject to maximum usage times and a review in 12 months with a doctor. She advised that the claimant's HAVS was reportable to the Health and Safety Executive under RIDDOR (the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013).
16. Shortly after this assessment, in about March 2012, the respondent moved the claimant from the Highways department because of his HAVS diagnosis.
17. The claimant was moved to a role on the drainage and sewers team which did not require the use of vibrating tools . This work involved clearing gullies and sewers. For clearing sewers the team use rods and, for more serious blockages, a jet or hose pressure system. The claimant did not physically handle the jet machinery himself, instead he operated it from the lorry (pushing the buttons).
18. From when he was diagnosed with mild HAVS symptoms in 2012, the claimant sometimes experienced difficulties opening some bottles and cans. This problem is continuing. The claimant described it as mild. He did not mention this difficulty in his witness statements. He said this was because he didn't know it was related to his HAVS. I accept his evidence on this, and his explanation as to why he did not include it in his impact statements.
19. On 6 December 2012 the claimant had another health assessment with Dr D'Souza. She assessed the claimant as 'fit to work with vibrating tools'. She commented that no further review was needed as the claimant had not been working with vibrating tools since March 2012, but that if he started using vibrating tools again, he would need to re-commence health surveillance.
20. On 25 February 2016 the claimant was seen again by Dr D'Souza. She noted:

"He has no symptoms or signs of HAVS at present. He had symptoms in 2012 that have resolved with no vibration exposure since March 2012. He is at risk of recurrence therefore."
21. She advised that the claimant was fit to work with restrictions, and that he should have 6 monthly reviews if he started using vibrating tools again, as

he is at risk of recurrent vibration-related symptoms given his history of these in 2012.

22. The claimant was referred to Dr D'Souza again and seen by her on 13 September 2016. On this occasion, she advised that the claimant was not fit to work with vibrating tools. She said

"I am told definitive advice is needed and that management are uncertain about the previous fitness category I have used (No. 2) [fit with restrictions]."

23. She noted that the condition was 'resolved since 2012', that there was no work-related health problem present 'now' but the claimant 'had mild HAVS in 2012 that is fully resolved since stopping vibration exposure'.

24. Dr D'Souza concluded:

"In view of Mr Maye's previous HAVS symptoms that have now fully resolved and his belief that ELC1 no longer would cover any HAVS related hand problems in the future, I have advised he is unfit to work with vibration because [there] is a risk of recurrence if vibration exposure cannot be adequately restricted/monitored as per fitness category 2. He is aware. This may affect his fitness for this role."

25. ELC1 refers to the employer's insurance. The claimant had made a claim for compensation in respect of the diagnosis of HAVS in 2012. He was told by his solicitor that, if he continued to use vibrating tools, he would not be able to make a further claim in respect of any subsequent deterioration of HAVS. Also, the claimant had seen a colleague who was badly affected and did not want his grip getting worse like that colleague. For these reasons he was himself anxious to avoid working with vibrating equipment.

26. The claimant has not received any treatment for HAVS.

27. For the purpose of these proceedings, the claimant obtained medical reports from Dr Vivian, a Consultant Occupational Health Physician, dated 18 September 2018 and 22 May 2019. The second report deals specifically with HAVS. Dr Vivian advised that:

- 27.1. The claimant has been diagnosed with mild HAVS;
27.2. The medical advice was to avoid further exposure to vibrating tools. The key reason for this seems to be that the employer was unable to ensure that exposure was kept to a minimum, and wanted definitive advice;
27.3. Apart from avoiding use of vibrating tools, it had no further impact;
27.4. Individuals with mild HAVS can continue to use vibrating tools but this needs to be carefully monitored. The main risk is that further exposure will cause progression of the condition to more serious, disabling forms;

- 27.5. Dexterity may be affected, and employee can complain of stiffness in the hand and arm;
 - 27.6. If an individual has even mild HAVS, then touching something cold or going outside on a cold day can trigger blanching of the fingers. This can affect sensation and ability to use the fingers normally. He would view this as a substantial rather than trivial impact;
 - 27.7. The condition is typically long-term but intermittent. He is at increased risk of relapse if he is exposed to further significant levels of vibration. There has been a restriction in his fitness to work as a direct consequence of the previous symptoms.
 - 27.8. The claimant was assessed by Dr Cordell, a consultant in occupational medicine. She advised on 29 April 2017 and 4 October 2017 that the claimant should not work in a role with exposure to hand-arm vibration.
28. In response to a question from me about the impact of the cold, the claimant said (and I accept) that he would notice HAVS symptoms more in cold temperatures when working; he gave the example of noticing it more when picking up a shovel in cold weather. This is not really a problem for him now that he is no longer working, as in cold weather he puts his hands in his pockets.
29. Since he stopped using vibrating tools, the claimant's symptoms have resolved, other than the difficulty he has opening some bottles and tins which he describes as a grip problem.
30. I find that, based on the medical evidence I have seen, and in particular Dr D'Souza's report of 13 September 2016 and Dr Vivian's report of 22 May 2019, if the claimant were to use vibrating tools, recurrence of HAVS symptoms would be likely (in the sense that it could well happen) and that these symptoms could well be more serious and disabling, as advised by Dr Vivian.
31. The claimant uses an electric lawn mower at home. The claimant does not do any tasks requiring an electric drill at home, he leaves these to his brother because his brother has the tools; the claimant could use a drill but would be concerned about using one consistently. However, other than this the claimant could not identify any day to day or household activities which he is prevented from doing by HAVS.
32. The claimant's only skills are in manual work. Typically that work involves tools and machinery that vibrate to some extent.
33. A Hand-Arm Vibration Test Report was produced for the respondent in September 2016. The report stated:
- 33.1. HAVS is a widespread recognised industrial disease affecting tens of thousands of workers.
 - 33.2. Tools and processes likely to be hazardous include power tools such as concrete breakers, demolition hammers, hand-held/fed circular

saws, hedge trimmers, chain saws, mowers, blowers, power hammers and chisels.

33.3. Attacks of HAVS can result in the loss of manual dexterity and the ability to grip properly.

33.4. Symptoms are likely to get worse with continued exposure to vibration and may become permanent.

34. On the basis of the information provided in the reports of Dr Vivian and the respondent's Test Report, I find that the claimant's difficulties opening bottles and tins are more likely than not to be symptoms of the claimant's HAVS condition.

The law

35. The definition of disability is contained in section 6 of the Equality Act 2010 which provides:

“(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.”*

36. Schedule 1 to the Equality Act sets out additional detail concerning the determination of disability. In relation to long-term effects, paragraph 2 of schedule 1 provides:

“(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.*

(2) If an impairment ceases to have a substantial adverse 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 the effect is likely to recur.”

37. Paragraph 8 of schedule 1 deals with progressive conditions. It provides:

“(1) This paragraph applies to a person (P) if –

- a) P has a progressive condition,*
- b) as a result of that condition P has an impairment which has (or had) an effect on P's ability to carry out normal day-to-day activities, but*
- c) the effect is not (or was not) a substantial adverse effect.*

(2) P is taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment.”

38. Section 6 (5) of the Equality Act provides that a minister may issue guidance about matters to be taken into account in deciding any question for the purposes of section 6(1). Guidance on matters to be taken into account in determining questions relating to the definition of disability was issued in 2011 (the 'Guidance'). Paragraph 12 of schedule 1 of the Equality Act requires employment tribunals to take account of any aspect of the Guidance which it thinks is relevant.
39. Section A of the Guidance deals with the 'impairment' element of the definition. It includes at A5 a non-exhaustive list of different types of impairment. The list includes impairments with fluctuating or recurring effects.
40. Section B of the Guidance deals with what is a substantial adverse effect. The threshold is relatively low: a substantial effect is one that is more than a minor or trivial effect (paragraph B1).
41. Section B7 deals with the effects of behaviour and 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. In some instances a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.”*
42. An example given in the Guidance concerns a person with acrophobia (extreme fear of heights which can induce panic attacks). The Guidance provides that such a person 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. Similarly, a person with chronic back pain might be expected to avoid 'extreme activities' such as skiing, but it would not be reasonable to expect them to give up or modify more normal activities that might exacerbate
43. Paragraph C3 of the Guidance explains that the meaning of 'likely' is relevant to a number of different elements of the definition of disability, including when used in paragraph 2(1) of schedule 1 (whether an impairment is 'likely to recur'), paragraph 8 of schedule 1 (whether a the adverse effects of a progressive condition will become substantial) and in paragraph 5(1) (how an impairment should be treated when the effects are controlled or corrected by treatment or behaviour). The Guidance provides that in these contexts, 'likely' should be interpreted as meaning that 'it could well happen'. This is a lower hurdle than the test of whether something is 'more likely than not'.

44. Section D of the Guidance deals with the meaning of normal day-to-day activities. Section D3 provides:

“Normal day to day activities can include general work-related activities, and study and education-related 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.”

45. Section D8 relates to specialised activities. It provides that

“Where activities are themselves highly specialised or involve highly specialised levels of attainment, they would not be regarded as normal day-to-day activities for most people. In some instances work-related activities are so highly specialised that they would not be regarded as normal day-to-day activities.”

46. The examples given are a watch repairer carrying out delicate work with highly specialised tools, and a pianist who performs to a high standard and often takes part in public performances.

47. The extent to which work-related activities amount to normal day-to-day activities was considered by the EAT in *Chief Constable of Lothian and Borders Police v Cumming* [2010] IRLR 109. In that case the claimant, a special constable, had failed the eyesight standard for recruitment as a regular police constable. She insisted however that she was not impaired in her ability to carry out the duties of a regular constable. At first instance, the employment tribunal held that the force’s refusal to allow the claimant to join the regular force constituted an adverse effect in itself. The EAT held that this amounted to an error of law, as a refusal to allow a claimant to progress in her professional life could not constitute an adverse effect on normal day-to-day activities.

48. In *Banaszczyk v Booker Ltd* [2016] IRLR 273, the EAT (HH Judge David Richardson) held that lifting and moving goods that weighed up to 25kg, in part manually and in part by the use of a pallet truck, was, in the context of work, a normal day-to-day activity. It was said that the speed or ‘pick rate’ at which the claimant was required to lift goods took the activity outside the scope of normal day-to-day activities. Judge Richardson did not accept this analysis and held;

“47...It is to my mind essential, if disability law is to be applied correctly, to define the relevant activity of working or professional life broadly: care should be taken before including in the definition the very feature which constitutes a barrier to the disabled individual’s participation in that activity...”

...

50. Put shortly, the day-to-day activity was the lifting and moving of cases up to 25kg; the substantial adverse effect was that the

claimant was by reason of his back condition significantly slower in carrying out this activity; the 'pick rate' imposed by the respondent was not the activity; but it was potentially a barrier which interacted with the claimant's disability to hinder his full participation in working life."

49. The reference to full participation in working life being hindered derives from the definition of disability in EU law. The Equality Act implements the EU Equal Treatment Framework Directive (No.2000/78) into domestic law, and so the definition of disability under section 6(1) of the Act must be interpreted consistently with the concept of disability in the Directive. No definition is included in the Directive itself, but the meaning of disability in this context has been considered in two decisions of the ECJ.
50. In *Chacón Navas v Eurest Colectividades SA* [2007] ICR 1, ECJ, the Court held that the concept of disability must be understood as 'referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'.
51. The definition of disability was considered again by the ECJ in *HK Danmark acting on behalf of Ring v Dansk Almennyttigt Boligselskab* [2013] ICR 851 ECJ. In *Ring*, the Court took account of the fact that on 26 November 2009 (after the decision in *Chacón Navas*), the EU had ratified the UN Convention on the Rights of Persons with Disabilities and concluded:

"Having regard to the considerations set out in paragraphs 28-32 above, the concept of disability must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers."

52. The definition of disability was recently considered by the Court of Appeal in the case of *Chief Constable of Norfolk v Coffey* [2019] EWCA Civ 1061. This was in the context of perceived disability, as it was agreed by the parties in *Coffey* that the claimant's hearing loss did not constitute a disability within the meaning of the Equality Act. However, it was also common ground that in a claim of perceived disability discrimination, all the alleged discriminator must believe that all of the elements of the statutory definition are present. Lord Justice Underhill therefore considered all of the elements of the definition of disability, including the meaning of normal day-to-day activities and substantial adverse effect.
53. As to normal day-to-day activities, Underhill LJ cited a proposition by HH Judge Richardson in the EAT in Coffey:

"[the phrase 'normal day-to-day activities'] should be given an interpretation which encompasses the activities which are relevant to participation in professional life"

54. Underhill LJ commented on this proposition:

“That seems to me wholly unexceptionable, save that ‘working life’ might be more appropriate than ‘professional life’.”

55. He went on to consider whether the particular activities required in the work involved in that case (of a front-line police officer) could be said to be not ‘normal’, but rather highly specialised, like the watchmaker or concert pianist mentioned in the Guidance. He concluded that the need to be able to listen carefully or hear particular sounds is ‘characteristic of many situations both at work and outside it’ and that the activities of a police officer for which good hearing is relevant are ‘normal day-to-day activities’ for the purpose of the Equality Act.

56. Underhill LJ then considered the meaning of ‘adverse effect’ on the ability to carry out normal day to day activities. In *Coffey* the relevant adverse effect was the effect on the abilities of the claimant police officer to perform the duties of a front-line police officer. LJ Underhill held at paragraph 44 that the belief:

“that the Claimant’s hearing loss would, currently or in the future, render her unable to perform the duties of a front-line officer was a perception that it would have an effect on her ability to carry out normal day-to-day activities. It also in my view follows that any such effect would be substantial and adverse, at least if... it would lead to her being taken off front-line duties.”

57. The question of substantial adverse effect also arises at paragraphs 55 and 56 of the judgment, in the context of the provision on progressive conditions. Underhill LJ held the finding that the putative discriminator believed that the result of the deterioration in the Claimant’s hearing, if it occurred, would be that she would be unable to go on working as a front-line officer. :

“...is a finding that her hearing loss would have a serious adverse impact on her ability to perform normal day-to-day duties.”

58. In a footnote, Underhill LJ commented on the scope of the protection of the legislation for progressive conditions:

“Take a case where – say as the result of routine testing – P has a definite diagnosis of a progressive condition which is currently wholly asymptomatic, but where symptoms having a minor impact on her abilities will develop in about a year, and disabling symptoms will appear after two years, and where her employer, who learns of the results and is frightened by the spectre of problems in future, dismisses her. It seems arbitrary and contrary to the policy of the Act that the employer should not be liable provided he acts in year 1

and will only be liable if he acts after the first symptoms have emerged in year 2.”

59. Section D of the Guidance also deals with the meaning of adverse effects on the ability to carry out normal day to day activities. The Guidance explains that environmental or indirect effects may have an impact on how an impairment affects a person’s ability to carry out normal day-to-day activities. Under the hearing ‘Indirect effects’, paragraph D22 states:

*“An impairment may not directly **prevent** someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse effect on how the person carries out those activities.”* (emphasis included in original)

60. One of the examples of indirect effects which may impact on how day-to-day activities are affected is medical advice. The Guidance states:

“where a person has been advised by a medical practitioner or other professional, as part of a treatment plan, change, limit or refraining from a normal day-to-day activity on account of an impairment will only do it in a certain way or under certain conditions.

A woman who works as a teacher develops sciatic pain which is attributed to a prolapsed intervertebral disc. Despite physiotherapy and traction her pain becomes worse. As part of a treatment plan her doctor prescribed daily pain relief medication and advises her to avoid carrying moderately heavy items or standing for more than a few minutes at a time.

This has a substantial adverse effect on her carrying out a range of normal day-to-day activities such as shopping or standing to address her pupils for a whole lesson.”

Conclusions

61. I have applied these legal principles to the facts as I have found them and reached the following conclusions.

Impairment

62. The claimant has a physical impairment, namely HAVS. He was first diagnosed with this on 16 January 2012.
63. The claimant’s symptoms settled by 6 December 2012 and he had no symptoms or signs of HAVS at that point. Dr D’Souza said the claimant’s condition in September 2016 was ‘fully resolved since stopping vibration exposure’.

64. Dr Vivian describes HAVS as 'long-term and intermittent', with a risk of relapse which is increased with exposure to further significant levels of vibration. Dr D'Souza also advises about the risk of recurrence.
65. I conclude that HAVS falls within the definition of an impairment of the kind that has fluctuating or recurring effects and that the claimant has an impairment within the meaning of section 6 by virtue of his HAVS condition.

Adverse effect on normal day-to-day activities

66. I next need to consider any adverse effect of the impairment on the claimant's ability to carry out normal day-to-day activities.
67. I have found that since 2012 the claimant has experienced some difficulties opening some bottles and tins. I conclude that opening bottles and tins is a normal day-to-day activity. I have also found that this difficulty is more likely than not to have been an adverse effect of the claimant's HAVS condition. The difficulty opening bottles and tins therefore constitutes an adverse effect of the claimant's HAVS on his ability to carry out a normal day-to-day activity.
68. Whether there was an adverse effect on normal day-to-day activities in the context of the claimant's work activities is more complex. I first need to consider how to define the work activity, and then I need to consider whether that activity is a normal day-to-day activity. If it is, I then need to consider whether the claimant's HAVS had an adverse effect on his ability to carry out that activity.
69. Both parties focused on the use of vibrating equipment as the activity to be considered. The claimant's counsel's written submission said that the question was 'whether the use of vibrating equipment constitutes a normal day-to-day activity'. The respondent's counsel submitted that using heavy duty vibration equipment would not fall within the type of activity that would be a normal day-to-day activity.
70. In *Banaszczyk v Booker Ltd* the EAT cautioned against including in the definition of the relevant activity the very feature which constitutes a barrier to the disabled individual's participation in the activity. To afford the appropriate protection, the activity should be defined broadly.
71. In the claimant's case, if the activity which is affected is defined as 'using vibrating equipment,' the definition includes the feature (the vibrating equipment) which constitutes a barrier to the claimant, like using the pick rate in *Banaszczyk v Booker Ltd* to define the activity.
72. The activity carried out by the claimant at work needs to be considered in a broad sense to avoid building into the definition the barrier which hinders his participation in work.

73. It is necessary therefore to step back and consider what the claimant actually did at work. The claimant described his work in the Highways department as 'mainly digging'. Like the lifting activity of the employee in *Banaszczyk v Booker Ltd* which was carried out in part manually and in part by using a pallet truck, the digging performed by the claimant at work was sometimes carried out manually, using manual tools such as a shovel, and sometimes with heavy equipment such as a concrete breaker.
74. I conclude that the relevant activity in the claimant's case was not 'using vibrating equipment'. Instead, it should be defined more broadly as 'digging'.
75. I next need to consider whether digging is a normal day-to-day activity. As the respondent's counsel accepted and as the Guidance makes clear at paragraph D3, general work-related activities can fall within the concept of normal day-to-day activities. The definition encompasses the activities which are relevant to participation in working life.
76. Turning to the specific work-related activity of digging, large numbers of people are employed in work which involves digging, across a range of industries and occupations. Examples of people who are engaged in digging at work are those like the claimant who work for local authorities on highways or in parks, and also large numbers of people who work in the construction industry and in agriculture. I have concluded that digging is clearly a normal day-to-day activity in the context of work.
77. Lastly on this point, I need to consider whether there was an adverse effect on the claimant's ability to carry out the normal day-to-day activity of digging at work, arising from his HAVS condition.
78. The claimant's impairment, ie his HAVS condition, and the medical advice about it, led to the respondent's decision, taken in around March 2012, that the claimant could not use vibrating tools at work. This had an adverse effect on the claimant's ability to carry out the normal day-to-day work activity of digging. He could not continue to carry out digging as part of his work on the Highways team without being able to use vibrating tools.
79. Counsel for the respondent submitted that any adverse effect on the claimant's work activities was not directly because of his HAVS symptoms but was rather by reason of the medical advice of Dr D'Souza and the employer's decision that the claimant should not use vibrating tools. It was suggested that this would not amount to an adverse effect of the impairment within the meaning of section 6. Counsel for the respondent submitted that the situation in *Banaszczyk v Booker Ltd* could be distinguished because there the employee was *physically* unable to lift items, and there was therefore a direct connection between his impairment and the affected activity.
80. I do not accept this submission. Dr Vivian's report states that there has been a restriction in the claimant's fitness to work 'as a direct consequence' of the previous symptoms [of HAVS]'.

81. In any event, the Guidance makes clear at paragraph D22 that an indirect effect of an impairment may still amount to an adverse effect of that impairment. A direct connection between the impairment and the affected activity is not required.
82. This has been confirmed by the EAT in *Sussex Partnership NHS Foundation Trust v Norris* EAT 0031/12. It was held that in many cases the causal link between the impairment and the substantial adverse effect will be direct, but the Equality Act does not require a direct link. If, on the evidence, the impairment causes the substantial adverse effect, it is immaterial that there is an intermediate step (or steps) between the two.
83. The adverse effect on the claimant's ability to carry out the normal day-to-day work activity of digging arose from the respondent's decision that he should not use vibrating tools, which was based on the medical advice. The medical advice given to the respondent about the claimant was:
 - 83.1. (from 2012 to 2016) that because of his HAVS diagnosis the claimant should only use vibrating tools under certain conditions (such as maximum usage time, regular reviews, health surveillance); and
 - 83.2. (from 13 September 2016) that because of the claimant's previous HAVS symptoms and the risk of recurrence, the claimant should refrain from using vibrating tools.
84. The medical advice was therefore on account of the claimant's HAVS. There is a causal link between the claimant's HAVS and the adverse effect. It does not matter if the effect was not a direct effect. The claimant's HAVS condition therefore had an adverse effect on his ability to carry out digging.
85. The claimant's situation is analogous to that of the teacher described in the paragraph D22 of the Guidance who is unable to stand to address her pupils for a whole lesson because of medical advice to avoid standing for more than a few minutes at a time. She was not prevented from standing for long periods by her condition, but because she was advised not to do so because of her condition.
86. Similarly, the claimant was not physically prevented from carrying out digging, either manually or with vibrating tools, by the physical symptoms of his HAVS condition. There was medical advice that he should only use vibrating tools under certain conditions (and, later that he should refrain from using them) on account of his HAVS which formed the basis for the respondent's decision that the claimant should not use vibrating tools. The claimant's inability to use vibrating tools was an effect caused by his HAVS and this amounted to an adverse effect on the claimant's ability to carry out his day-to-day work activity of digging.

87. Counsel for the respondent relied on the decision of the EAT in *Chief Constable of Lothian and Borders Police v Cumming* [2010] IRLR 109. However, I agree with the submission of counsel for the claimant that this case is not on all fours with *Chief Constable of Lothian and Borders Police v Cumming*. In that case, the EAT held that the employment tribunal had erred in law in accepting that being afforded general participation or access to professional life amounted to a day-to-day activity. Lady Smith said:

“Making an application to enter a profession, or indeed, for any job does not imply any particular physical activity. Further, the potential employer’s refusal to progress the application is not a physical effect.”

88. In this case, the relevant activity (digging) and the adverse effect (the inability to use vibrating tools) are a physical activity and a physical effect. Further, it is clear from the decision of the Court of Appeal in *Coffey* that an inability by a person to carry out the main duties of their role at work can amount to an adverse effect.

Substantial

89. Next, I need to consider whether the adverse effect on the claimant’s ability to carry out normal day-to-day activities was substantial.
90. First, I have considered the adverse effect of HAVS on the claimant of opening bottles and tins. As described by the claimant, this only affected him when opening some bottles and tins. The claimant described it as mild. Overall I assess the effect as minor. I do not consider it to be substantial.
91. However, HAVS is described by Dr Vivian as a progressive condition. He says that further exposure to vibration risks causing progression of the condition to more serious, disabling forms. In *Coffey* a progressive condition is said to be, in substance, ‘a condition that might get worse’.
92. It is clear from the medical evidence that the claimant’s HAVS condition might get worse: he has a progressive condition. There is an adverse effect on the claimant of difficulties opening some bottles and tins, but this effect is not substantial.
93. I need to consider whether the claimant’s HAVS is likely to result in a substantial adverse effect. I have found that, if the claimant was exposed to significant vibration, his condition could well become more serious and disabling. I do not consider that it is reasonable to assess this for the purposes of the definition of disability by expecting that the claimant will never be exposed to further significant vibration. I conclude that the claimant’s HAVS condition could well progress or deteriorate to the extent where it has a substantial adverse effect on him. This means that the claimant is treated by paragraph 8(2) of Schedule 1 as having an impairment with a substantial adverse effect.

94. I have gone on to consider whether the adverse effect of HAVS on the claimant's ability to engage in digging in a work context was a substantial effect. I conclude that the effect was substantial. The claimant was moved from a role that required him to carry out digging activities with vibrating tools and was unable to seek redeployment to any other role within the respondent which required the use of vibrating tools. If the claimant had not had a HAVS diagnosis, he would have been able to continuing using vibrating tools.
95. The claimant's only skills are in manual work. Typically that work involves tools and machinery that vibrate to some extent. The adverse effect (the inability to use vibrating tools) substantially hinders his ability to participate in working life.
96. The respondent's counsel submitted that paragraph B7 of the Guidance, which deals with the effects of behaviour and coping or avoidance strategies, is relevant here. He said that the fact that the claimant avoids the use of vibrating tools since his diagnosis with HAVS means that the effects of the impairment are no longer substantial.
97. I do not agree. In the claimant's case, I have concluded that the substantial adverse effect at work is the inability to use vibrating tools. Avoiding vibrating tools does not reduce that effect, it is the effect itself. Although avoiding vibrating tools may reduce or remove the claimant's physical symptoms (blanching of the fingers), these symptoms are not the adverse effect.
98. Lastly on this point, in reaching the conclusion that the claimant's inability to use vibrating tools had a substantial adverse effect on his ability to carry out the normal day-to-day work-related activity of digging, I have applied the definition of disability under section 6(1) of the Act consistently with the concept of disability in the Directive.
99. The claimant has a limitation (the inability to use vibrating tools) which results in particular from a physical impairment (HAVS) which in interaction with various barriers (the use of vibrating tools in work-related digging activities such as those performed by the claimant) hinders the full and effective participation of the claimant in his working life on an equal basis with other workers (because he was unable to continue in his role and was unable to seek redeployment to any other role within the respondent which required the use of vibrating tools).

Long-term

100. The remaining limb of the section 6 definition is that the substantial adverse effect must also be 'long-term'.
101. The medical evidence is that the claimant has not had symptoms associated with his HAVS since he has stopped using vibrating tools. The

claimant says the only physical effect of HAVS is the problem opening some bottles and cans.

102. I have considered whether paragraph 2(2) of Schedule 1 (effects likely to recur) is relevant here. The risk of recurrence of the symptoms of HAVS from further use of vibrating tools is a key feature in the medical advice. However, section 6 requires consideration of the duration of the substantial adverse effect caused by the impairment, not of the duration of the symptoms of the impairment.
103. In the claimant's case, I have concluded that the inability to use vibrating tools was a substantial adverse effect of his HAVS. That effect began in March 2012 and was continuing on 4 October 2017 when Dr Cordell advised that the claimant should not work in a role with exposure to hand arm vibration. I have concluded therefore that the substantial adverse effect on the claimant lasted for over 12 months and meets the definition of long-term for this purpose.
104. In relation to the claimant's inability to open bottles and cans, I have found that although this was not a substantial adverse effect in 2012, there could well be a substantial adverse effect in the future and therefore the claimant is taken to have an impairment which has a substantial adverse effect since 2012. This also meets the definition of long-term for the purpose of section 6.

Summary

105. In summary, I have concluded that:
 - 105.1. the claimant has a physical impairment, namely HAVS, which was diagnosed on 16 January 2012;
106. There are two adverse effects. In relation to opening bottles and tins:
 - 106.1. the claimant's normal day-to-day activity of opening bottles and tins is adversely affected by HAVS;
 - 106.2. the adverse effect is not substantial but is treated as being substantial because HAVS is a progressive condition and because there could well be a substantial adverse effect in the future;
 - 106.3. the adverse effect is long term as it began in 2012 and is treated as continuing since then.
107. In addition, in relation to the work-related activity of digging:
 - 107.1. the claimant's normal day-to-day activity of digging was adversely affected by HAVS in that by reason of his HAVS and on the basis of medical advice, a decision was taken by the respondent that he should no longer use vibrating tools;
 - 107.2. the adverse effect was substantial; and
 - 107.3. the adverse effect was long term as it began on March 2012 and was continuing on 4 October 2017.

108. I therefore conclude that the claimant was disabled for the purpose of section 6 by virtue of HAVS at the material times.
109. The full hearing is listed for 9-18 September 2019. The parties did not consider that any further case management orders were needed. All directions previously made have been complied with other than exchange of witness statements. The parties have agreed that exchange of witness statements will take place 7 days after receipt of this judgment.

Employment Judge Hawksworth

Date: 3 September 2019

Sent to the parties on: 3 September 2019

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