



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Ford

**Respondent:** Royal Mail Group Limited

**Heard at:** Leeds

**On:** 16 August 2019

**Before:** Employment Judge D N Jones

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Miss Smith, Solicitor

# JUDGMENT

The claimant was a disabled person from 2 January 2019.

# REASONS

1. Disability is defined in section 6(1) of the Equality Act 2010 (“EqA”). A person has a disability if that person has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on that person’s ability to carry out normal day-to-day activities.

2. Schedule 1 Part 1 of the Equality Act 2010 provides by paragraph 2 that “long-term effects” mean:

“(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 that effect is likely to recur.

(3) For the purposes of subparagraph (2) the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.”

3. The effect of medical treatment:

“(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 or 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.”

3. By section 212(1) of the Equality Act the word “substantial” means more than minor or trivial, and the Supreme Court has held that the words “likely” within these provisions means that there is a significant risk or it ‘could well happen’.

4. In this case I have heard evidence from the claimant and had regard to the claim form and two letters submitted by her on 25 June 2019 and 2 July 2019. I have also been assisted by the helpful submissions of Miss Smith, solicitor for the respondent, and a medical report submitted by Dr Lincoln Jowett dated 1 July 2019. I have seen an Occupational Health report which addressed the condition of the back on 18 August 2018, and I have seen another Occupational Health report but that dealt with a mental health condition of 7 May 2019.

5. Dr Jowett says in his letter of 1 July 2019 that:

*“The claimant, a 42 year old lady, first presented with a back condition in October 2017. She had good posture and there was a discussion about preventative measures. A recurrence was noted on an attendance at the surgery in July 2018 and was treated with pain relief, physio and encouragement to continue palates and yoga exercises.”*

6. The claimant was noted, by a physiotherapist, to have quadratus lumborum syndrome and iliac ligament strain. With the assistance of that health worker throughout July and August there was steady improvement. The report then says as follows:

*“In January 2019 she attended following a period of knee pain and unfortunately ongoing back pain. She saw a different physio at this time. He felt it was ongoing mechanical back pain and a sprain to the left knee joint. She required some pain relief with codeine phosphate. She was then reviewed again in February when she required an alteration to her duties at work. She was given a fit note to accommodate this. At her appointment in February it was noted that much effort was being made to try and address the back pain through palates and exercise but she was struggling to perform her activities of daily living. In March it was noted that an issue at work had led to her requiring further time off. She felt she was required to do heavy lifting and*

*pushing beyond her abilities which was affecting her back pain. This was causing a significant degree of anxiety around work which was exacerbating the whole picture. She was given some time away from work related to this stress."*

7. The report stated that in April 2019 the claimant was referred for further physiotherapy and she had reported that things were not settled when she was at work which was aggravating her condition, both anxiety and physically. She was referred again to the Physiotherapy Department on 8 May 2019.

8. The claimant said that she had first noticed a back condition after the birth of her first child. It was not constant but came on from time to time. However, up until July 2018 she had not regarded it as significant or more than trivial. She had managed the condition, but in July 2018 the condition was severe. I have referred to it in paragraph 2.2 of my earlier Order. The claimant was off work for four weeks and had to have bed rest for two weeks. When she returned to work she was able to accommodate working with the vehicle with the stiff clutch which she was provided with from some time in the autumn up until 19 March 2019, save for the period in early January when there had been the exacerbation referred to by Dr Jowett. In January 2019 the claimant was taken off duties which would exacerbate her back, and although she was off work for two days she remained on alternative duties for four weeks. Upon her return to normal duties she continued to use the vehicle with the stiff clutch.

9. The respondent submits that the claimant's condition, albeit an impairment, was not substantial or long-term. Miss Smith submits that although there were significant impacts on the claimant's ability to undertake normal day-to-day activities in the summer of 2018 and at the beginning of 2019, these were isolated and there is no evidence to suggest they were connected and therefore at risk of lasting more than 12 months or having any more than trivial effects for other periods likely to last more than 12 months.

10. I accepted the evidence of the claimant which I regarded as a fair reflection of the onset of her condition. She did not exaggerate it; in reality, she minimised the way in which her life had been affected by her longstanding back condition. It severely curtailed her day-to-day activities in the summer of 2018 leading her to be off work for a period of four weeks and bedridden for two. It recurred in January 2019. The claimant took measures to alleviate the problems by way of physiotherapy and other lifestyle changes, including undertaking pilates and yoga. This allowed her to return to driving in February but the condition continued to present problems requiring medical intervention as late as 8 May 2019. She had problems with sleep and problems associated with heavy lifting and pushing when she was suffering from back pain. In summary, there were two lengthy episodes of back pain having a substantial adverse impact on the claimant's ability to undertake normal day-to-day activities within a year.

11. With regard to the question of whether it was long term, the Tribunal must have regard to the Equality Act 2010 guidance, insofar as it is relevant to any issue. At paragraph B12 the guidance refers to the fact that the effects of treatment must be disregarded. It says:

*“Where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect.”*

12. At B13 it states:

*“The provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined or if it is known that removal of the medical treatment will result in either a relapse or a worsened condition it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.”*

13. At C5 under “recurring or fluctuating effects” the guidance provides that:

*“If an impairment has had a substantial adverse effect on a person’s ability to undertake normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur.”*

14. Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purpose of the Act. In the examples given Miss Smith draws my attention to one in which a woman has two discrete periods of depression: one which is a consequence of losing her job which lasts six weeks, and the second lasting eight weeks some nine months later, which was because of a bereavement. In that example neither episode had lasted more than 12 months and there was no evidence that the episodes were part of an underlying condition which were likely to recur beyond 12 months. Commentary within the example is given that if there was any evidence to show that the two episodes arose from an underlying condition of depression, the effects of which were likely to occur beyond the 12 month period, she would satisfy the criteria.

15. In this case nobody has asked Dr Jowett or any other medical practitioner if the condition was likely to last more than 12 months or recur. I must assess the question of disability at the time of the alleged unlawful conduct. That would be in September 2018 when the claimant says there was a failure to make adjustments when she was given a trolley rather than a vehicle to do her duties immediately after she returned from her ill health absence because of the back problem, on 19 March 2019 when the claimant says there was a failure to make reasonable adjustments and subsequently when she says she was harassed.

16. I bear in mind in this case that the claimant had, over a period of time, been undergoing what would be regarded as treatment which had ameliorated and in some instances cured the symptoms, by which I mean physiotherapy. My interpretation of the medical report is that had the claimant not been undertaking those efforts to improve the condition it would have continued throughout. It is also apparent from the fact that she had to be re-referred several times for physiotherapy, the latest period being in May 2019, that this treatment was creating an improvement in the condition.

17. This was a continuing back problem which is described in the medical report as mechanical back pain. To that extent it is distinguishable from the example relied upon by Miss Smith. It is an underlying, longstanding condition. Taking account of the significant episode of pain in the summer of 2018 and then a significant recurrence in January 2019 which lasted several months with some improvement with treatment, had a question been posed, at the beginning of January 2019, "Could it well be the case that the symptoms will last more than a year, or recur after a year", the answer would have been "yes". In contrast, I think the answer would have been "no" if asked before January 2019, prior to that recurrence.

18. The respondent did not refer the claimant for an Occupational Health referral at that time so I must make a judgment based upon all of the evidence which I have before me. I bear in mind the burden of establishing the issue is on the claimant. Having regard to the impact of treatment, I find that by the time of the second recurrence, substantial adverse effects on the claimant's ability to undertake day to day activities could well have been expected to last beyond a year or expected to recur after a year. That would have been even more likely by 19 March 2019.

19. In those circumstances I make a finding that the claimant was a disabled person but not until January 2019.

Employment Judge D N Jones

Date: 16 August 2019

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