



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

Mr J Banham

v

(1) GI Group Recruitment Limited;  
(2) Birds Eye Limited

**Heard at:** Norwich

**On:** 5 August 2019

**Before:** Employment Judge Postle

**Appearances**

**For the Claimant:** Mr Panesar, Counsel

**For the First Respondent:** Mr Ashley, Counsel

**For the Second Respondent:** Mr Chadwick, Employment Consultant

## RESERVED JUDGMENT on PRELIMINARY HEARING

1. The Claimant does not satisfy the Section 6 definition of disability and therefore his claims against both Respondents are dismissed.

## RESERVED REASONS

1. This was a Preliminary Hearing to determine the issue of whether the Claimant had a disability at the relevant time between January 2018 and March 2018. The disability being left elbow pain.
2. In this hearing we have heard evidence from the Claimant through a prepared witness statement.
3. The Tribunal also have the benefit of a bundle of documents consisting of 153 pages and a very helpful skeleton argument on behalf of the Claimant prepared by Mr Panesar.

### The Findings of Fact

4. The Claimant was employed by the first Respondent as a Factory Operative from 1 August 2014 until his dismissal on 23 March 2018 for reasons relating to his capability.
5. The disability relied upon is a left elbow pain, which the Claimant states has been with him since around late 2015.
6. The Claimant has had steroid injections on 29 July 2015, 23 November 2015, 7 December 2015, 29 July 2016 and 3 January 2017.
7. The Claimant states he has seen a physiotherapist since April 2016 and underwent key hole surgery to his elbow on 26 June 2017.
8. The Claimant was referred to Occupational Health on 15 January 2018 and seen by them on 29 January 2018. Their report is at page 73 – 76 of the bundle and concludes that the Claimant was fit for work with adjustments; gradual phased return to work and a restriction of working with light duties.
9. The Claimant had been absent from work since 5 June 2017 and in fact, never returned to work.
10. The Claimant has obtained three reports from a Consultant Orthopaedic Surgeon, all from Mr Mann, the first being on 30 January 2019 (pages 93 – 97). His opinion and prognosis at page 97 was as follows,

*“Reviewing the medical records in Mr Banham’s case is important and pre-employment medical history needs to be reviewed to rule out long standing problems prior to the summer of 2016.*

*“Of note, I am neither an upper limb surgeon nor an expert on repetitive strain injury, but the job that he does sounds as though it would provoke symptoms akin to tennis elbow.*

*“By putting him on restricted duties, it sounds his employers did what they could to help the situation, but short of ceasing the provoking event, there is not a great deal more that can be done in the circumstances other than the treatment he has had.”*

11. He further noted the Claimant’s current symptoms,

*“He is coping with his [new] job now but this is partly because this is less arduous and less repetitive than his previous employment.*

*“He is still aware of it but it does not affect his day to day life anywhere near as badly as it did prior to surgical treatment.*

*“He has also noted a significant improvement over the last year.”*

12. The Claimant then obtained a second Consultant's report from the same Consultant dated 1 March 2019 (pages 107 – 112). This time the Consultant reviewed the Claimant's medical records as he was now in possession of them. He noted an entry on 29 July 2015 that there were problems with the right elbow and not the left elbow.
13. By the following year he noted six month history of 'left tennis elbow'.
14. He noted in 2017 he had key hole surgery and that by 1 August 2017 there was an improvement in pain and tenderness but that lifting was still difficult.
15. He noted by November 2017 there was more soreness particularly if lifting weights.
16. He noted the Claimant had attended hospital on 6 November, after falling from a ladder, with left sided arm and side pain.
17. His opinion and prognosis was as follows,

*"Of note from the review of medical records that in July 2016, he was documented to have a six month problem of left tennis elbow and previous injections and treatment were not effective. Therefore, it is not correct to say that his employment caused the problem that he has.*

*"It is true, however, to say that repetitive lifting is unlikely to help his lateral epicondylitis, but I stand by my statement in paragraph 7.3 in my original report saying that really all his employers could do was put him on a less arduous role which it sounds like they did.*

*"His response from surgery is not unusual and the problems can take a very long time to settle down.*

*"If this report is not precise enough then I would suggest an opinion is sought from a Specialist Upper Limb Surgeon."*

18. So far, both the reports are either what the Claimant told the Consultant, or particularly the second one, what he had gleaned from the Claimant's medical records. There was no physical examination of the Claimant by this Consultant so far as can be ascertained.
19. The Claimant then obtained a third report, again from the same Consultant Orthopaedic Surgeon, Mr Mann, where he was asked specific questions in relation to matters that assist in determining whether an individual satisfies the definition under the Equality Act 2010. Particularly as follows,

19.1 Question: *Did Mr Banham have one or more impairments?*

Answer: *Mr Banham described a problem with his left elbow, this is the only impairment described to me.*

19.2 Question: *If so, identify the impairment.*

Answer: *He had symptoms and signs suggestive of lateral epicondylitis in his left elbow.*

19.3 Question: *Is that a physical or mental impairment?*

Answer: *This is a physical impairment.*

19.4 Question: *Please describe the usual symptoms of the diagnosed condition.*

Answer: *Lateral epicondylitis is an inflammation of the exterior carpi radialis brevis tendon around the outside of the elbow. It is called 'tennis elbow' because it is associated with repetitive movement. 'Golfer's elbow' is the same condition but on the inside rather than the outside of the elbow.*

19.5 Question: *When was the impairment first diagnosed?*

Answer: *Please see paragraph 3.1 of the CJVM-VEMS dated 30 January 2019 and paragraph 2.4 of the CJVM-VEMS dated 1 March 2019 (they are reference to the previous report) noting that he had a previous 6 month history of left tennis elbow that was dated 18 July, so he presumably had symptoms around January or February in that year.*

19.6 Question: *Has the effect of such impairment lasted or is it likely to last at least 12 months or the rest of Mr Banham's life?*

Answer: *You will note that Mr Banham has had surgical treatment of his lateral epicondylitis and I would refer you to paragraph 4.1 and 4.2 of the January previous report as far as his current symptoms were concerned, I suspect that he may have had a mild ache in his elbow indefinitely. There is no real concrete evidence either way to suggest that he will either fully recover or have symptoms forever.*

19.7 Question: *What effect does the impairment actually have now (or would have if Mr Banham was not taking medication etc.) and his capacity to carry out the following day to day activities?*

- Answer:
- a. *mobility - this would not be affected;*
  - b. *manual dexterity - this would not be affected;*
  - c. *physical co-ordination – this would not be affected;*
  - d. *ability to lift, carry or otherwise move everyday objects – it might be mildly impaired.*

19.8 Question: *If the impairment has in the past had but ceased to have a substantial (in a sense more than minor or trivial) adverse effect on Mr Banham's capability to carry out normal everyday activities, is that effect likely to recur? State whether your answer is based on your examination of Mr Banham, the progress of such an impairment or statistical likelihood.*

Answer: *In the summer of 2016 he was working in a factory doing some quite heavy lifting and repetitive movements and he did find this difficult. My answer is based on what Mr Banham told me and to a lesser extent, his physical examination findings.*

19.9 Question: *To what extent are you relying on what you were told by the Claimant? If so, is that consistent with your clinical findings?*

Answer: *What the Claimant told me and his clinical findings are in keeping with improvement in his left elbow following surgical treatment. I thought his clinical findings were relatively mild.*

19.20 Question: *Is the Claimant capable of performing the work which he was previously employed as a Factory Operative? If so, when and was he likely to remain capable of doing so?*

Answer: *It is certainly physically possible for him to work as a Factory Operative, but whether this is likely to exacerbate his left elbow, if the point and it would seem sensible for him not to return to this type of activity, not because he is incapable of doing it but because it might lead to a recurrence of his symptoms. The Claimant would be best to avoid the heavy lifting because he would be physically incapable of doing it and it would flare up the symptoms in his elbow.*

20. They were the major findings in this report.

21. It is clear, in late January the Claimant was recovering as confirmed by his GP notes at page 123.

22. The Claimant confirmed on 1 August 2017 the scar had healed nicely and there was some improvement and was now not lifting. The Claimant further accepts that by 5 September the improvement was “so far so good”. The post-operative recovery was good, although his arm was still hurting. Although no reference to that was made to his GP in September 2017 when he saw the GP.
23. Very oddly, there is no mention in the Claimant’s GP notes of a fall from a ladder on 6 November 2017 which was apparently quite a significant fall on his left side. Clearly, that might have impacted the Claimant’s recovery.
24. It appears that when the Claimant saw his GP on 5 December 2017, it is recorded as the Claimant recovering from his tennis elbow operation (page 141).
25. The Claimant attended a return to work meeting on 10 January 2018 following the Claimant obtaining a fit note from his GP accepting that he required amended duties, no heavy lifting, repetitive tasks and light duties only. His return to work meeting records (at page 63) the Claimant agreed to be referred to Occupational Health and when Occupational Health spoke to the Claimant, it appears to have reported only residential discomfort on the left elbow but still in pain with heavy lifting.
26. It would appear by the end of January, there must have been further improvement as the Claimant did not attend a listed physio appointment on 29 January (page 142) and further, he did not rebook the physio appointment, or any further physio.
27. There appears no reference in the medical records from January to March 2018 that the Claimant was being prescribed pain medication, nor has the Claimant been able to produce any receipts for pain medication, despite the Claimant asserting in January to March, that he was prescribing himself constant pain relief.
28. The Claimant now appears to be working and has done for some time, quite satisfactory as a kitchen assistant without difficulty.

### **The Law**

29. The burden of proof is on the Claimant to satisfy the Tribunal that he satisfies the tests of disability under Section 6 of the Equality Act 2010.
30. The Employment Appeal Tribunal have stated that the words used to define disability in Section 6 of the Equality Act 2010, require a Tribunal to look at the evidence by reference to four different questions:
  - a. Did the Claimant have a mental and / or physical impairment?

- b. Did the impairment affect the Claimant's ability to carry out normal day to day activity?
  - c. Was the adverse condition substantial/ and
  - d. Was the adverse condition long term?
31. These four questions should be posed sequentially and not together.
32. Although normal work related activity should be taken into account, the tests will determine whether an individual has a disability relates to the person's ability to carry out normal day to day activities and not whether they can carry out specialist work.
33. Furthermore, the impairment must have a substantial adverse effect on a person's ability to carry out normal day to day activities.
34. If it ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, but that effect is likely to reoccur, it is to be treated as continuing to have that affect.
35. Substantial means more than minor or trivial.
36. The Tribunal have had regard to the Equality Act 2010 (Disability) Regulations 2010 and the Equality and Human Rights Commission Code of Practice on Employment 2011 and the Guidance on matters to be taken into account in determining questions relating to the definition of disability.
37. The focus should be on what a person cannot do, or can only do with difficulty, rather than things he or she can do.

## Conclusions

38. The Tribunal could not help but conclude, hearing the Claimant give evidence and in cross examination, that many of his answers were not backed up by the clinical findings. In fact, the Tribunal found the Claimant an unconvincing witness and on occasions evasive.
39. If one looks at the expert's reports commissioned by the Claimant, Consultant Orthopaedic Surgeon Mr Mann, the first report simply does not help the Claimant nor the Tribunal. The second report commissioned dated 1 March 2019, is where the Consultant effectively reviews the Claimant's medical records. The third report obtained on 11 April 2019, does attempt to address the issue of disability. But it appears that the Consultant was not asked the Claimant's condition during the relevant period, namely January to March 2018, however, what the report does point to, at various points, is that the Claimant has "*mild ache in his left elbow*". Whether or not the Claimant takes medication, does it affect the Claimant's day to day activities? The answer given was, "*mobility - this would not be affected*" and "*mobility to lift – mildly impaired*".

40. The Consultant makes it clear that his examination is based on what the Claimant told him and to a lesser extent, physical examination findings. Particularly, what the Claimant told Mr Mann was in keeping with the clinical findings that there was an improvement following surgical treatment and the clinical findings show the condition was relatively mild.
41. The Claimant went so far, when questioned about medical notes and reports, to say that the professionals had misrepresented what he had told them.
42. We have the admission by the Claimant of falling off a ladder in November and one wonders why such a major event was not mentioned in the Claimant's impact statement. Furthermore, despite seeing his own GP on a number of occasions in November, for reasons best known to the Claimant, he fails to mention to his GP that he had fallen off a ladder in November and had visited the Accident and Emergency Department of the local Hospital. This could well have aggravated post-operative recovery.
43. Furthermore, by 4 October 2017 (page 139), when meeting the Claimant's GP, he recorded there is "*only pain now and then*".
44. By 20 November 2017 it is recorded he saw the physio where it was reported there was "*a good deal of recovery, some soreness, mild swelling, tender*". What the GP does not record is ongoing symptoms and his recommended exercises for the elbow.
45. It is clear, by 9 January 2018, the Claimant's GP thought any restrictions to the Claimant's work would not need to be extended beyond 6 February 2018. But if there was to be any doubt, the GP would review the Claimant at the end of that period and there does not appear to have been a further review. Furthermore, the Claimant did not attend the physio appointment in January (failed to attend) and then did not make any further appointments.
46. It is, therefore, clear that the clinical findings suggest that the condition is mild at best and what the Claimant tries to suggest is completely different from what the Clinicians have to say is true, the Claimant appears to be over egging the conditions.
47. The Tribunal conclude that the Claimant did have an impairment, but what one does not come to the conclusion on, looking at the evidence before the Tribunal, is that it was substantial or long term. We have to look at normal day to day activity, whereas the Claimant tries to focus largely on doing arduous tasks which are clearly not within the scope of normal day to day activities.
48. It is simply not the case that the impairment was substantial, adverse and long term over the relevant period January to March 2018. The focus



should be on what the Claimant could do in respect of normal day to day activities and I am entirely convinced that the Claimant was able and had recovered sufficiently in January 2018 to carry out normal day to day activities.

49. The Claimant has therefore not fully discharged the burden of proof in satisfying the Tribunal that he meets the definition of Section 6 of the Equality Act 2010, particularly the effect on the Claimant's ability to carry out normal day to day activity and adverse condition and long term.

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Employment Judge Postle

Date: ...01.11.2019.....

Sent to the parties on: .....

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For the Tribunal Office