EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106438/2019

Held at Aberdeen on 18th November 2019

Employment Judge J Hendry

Mr B Cochrane	**Claimant** **In Person**
The Moray Council	**Respondent** **Represented by:-** **Mr B Caldow, Solicitor**

JUDGMENT

The Judgment of the Employment Tribunal is that the claimant was a disabled person during the relevant period of January and February 2019 in terms of the Equality Act 2010

1. A Preliminary Hearing took place on the 18 November 2019 in order to determine whether or not the claimant's medical condition satisfied the definition of disability set out in the Equality Act 2010.

Issues

2. The issues for the Tribunal to determine were whether or not the claimant could demonstrate that his condition satisfied the various tests set out in the Equality Act during the relevant period which was agreed to be January and February 2019.

Evidence

3. The Tribunal heard evidence from the claimant on his own behalf. It also considered the documents lodged by parties in the Joint Index of Documents (ID1-18). This included a photocopy information on the claimant's Dihydrocodeine tablet box which was added on the morning of the hearing of consent.

Facts

The Tribunal found the following facts established or agreed:

4. The claimant is a 49 year old male. He keeps fit. His hobbies are cycling and snooker. The claimant has attended his General Practitioner in Ellon since 2012 in relation to longstanding back pain.

5. The claimant has described the pain in his back as having arisen from an injury that he was aware of when it first occurred. He has variously stated that it occurred following a weight lifting accident in a gym and at other times as an injury that occurred when lifting a crate of heavy parts at work. The claimant's attendances at the GP practice from 2012 onwards are recorded in his medical records (ID p64-68).

6. The claimant first attended the practice with "back pain unspecified'' on the 8 June 2012. It was narrated in the notes that he had the pain for a week and it had occurred when he "was lifting something heavy at work 3 weeks ago". He was prescribed Tramadol.

7. The claimant returned to the practice on the 13 of June complaining of continuing pain and was prescribed Naproxen, in addition, a powerful pain relief medication.

8. The claimant returned to the practice on the 6 of July and claimed that he was too drowsy from taking Tramadol and that Naproxen irritated his stomach. He was prescribed Co-Codamaol but remained on Naproxen.

9. The claimant also attended the surgery on the 19 of December complaining of insomnia.

10. The claimant remained on these medications long term. The notes suggest that he did not seek medical assistance in 2014 and returned to the practice on the 8 of December 2015 in relation to backache. It was noted that the claimant had been taking more than the recommended dosage of painkillers before bed in order to try and sleep without the need to take medication through the night or early morning. If the painkiller wore off his back would become painful and he would be unable to sleep. It was recorded: "*Injury many years ago. Overdosing on his meds – taking naproxen bd and ibuprofen during the night, and taking 10 co-Codamaol 30/500 tabs/day. Advised re all of this. Asking for sleeping tab says always wakes during the night with pain at least 1 x night often more. Doesn't stop him doing anything during the day. Cycles on static bike and walks 4 miles/day. No stretching seen physio, chiropractor, acupuncture in past*".

11. The claimant saw his GP on a number of occasions in 2018 in relation to his back pain. He received physiotherapy at the practice which did not alleviate his symptoms. He was referred for further investigation to the Specialist Spinal Unit in Aberdeen.

12. Dr Burt, a Specialist Physiotherapist, reported to the claimant's GP on the 30 of April 2018 confirming that Mr Cochrane had been referred to the Spinal Clinic from the Physiotherapy Department at Ellon Surgery and he had been having treatment for chronic thoracic spine pain. The claimant complained of

constant pain in and around his lower thoracic area on the left. An x-ray was taken and Dr Burt noted: *"x-ray today does not appear to show any vertebral collapse. There is some degenerative change in his mid-thoracic with what appears to be large osteophyte formation. This is on the opposite side to his pain, however. I think given this reported daily pain levels and issue with night pain an MRI scan might be prudent*." An MRI scan was arranged.

13. In July 2018 the claimant completed a health check form for a company ''Mealmore'' when applying for a job in one of their care homes (ID p224) He ticked "yes" to the box indicating that he suffered from "spinal/back problems". He did not tick the box "major accidents, operations or disabilities" although he had considered doing so. He wrote in relation to continuing medical treatment "dermatitis'' and ''have an existing thoracic back injury (2012) and am taking painkillers for this, and dermatitis – taking cream.

14. Dr Burt wrote to the claimant's GP in August 2018 following an MRI scan. He recorded that the scan was normal with some minor degenerative changes on a couple of levels but well within normal limits. There were no signs of any inflammatory process nor any bone or soft tissue lesion or concern. He wrote: "*He is obviously disappointed that we have found no obvious reason for his ongoing chronic pain. There is really little from an orthopedic point of view we can offer him. We did ask about injections, but this is not something that would be treatable through injection therapy. The only thing I could do was recommend some further conservative treatment. He was keen to try further physiotherapy to see if potentially seeing a different practitioner might offer him something new that he has not tried. I will refer him on for this. As far as orthopedic follow up is concerned I have discharged him from the clinic."*

15. The claimant was also at this time seen by a Specialist Occupational Health Doctor who was in correspondence with Dr Burt.

16. Dr Burt prepared a report dated 19 September 2018. Dr Burt had reviewed Mr Cochrane on the 30 of April and at the request of the Physiotherapy

Department at Ellon Health Centre. The physiotherapy had been prescribed for what was recorded as chronic left lower thoracic pain. Dr Burt wrote:

"*Given the chronicity of his symptoms there was concerns that there may be some underlying pathology*". Dr Burt also wrote *"On examination his symptoms appear to have been present for some time following a weight lifting incident. He was complaining of a dull ache in the lower part of his thoracic area, more left sided. He had some restriction to his range of movement, but not marked and he was not reporting any radiating symptoms. He was also experiencing some night pain and morning pain and stiffness on rising. The night pain when flared was sometimes bad enough to make difficulty sleeping and he was also occasionally woken up by his pain. It was difficult to know if this was a mechanical issue or symptomatic of other pathology*.

Examination of his range of movement showed this to be functional with fairly much full range of movement apart from some restriction to right side of rotation and side flexion. There was no real focal areas of tenderness found on palpitation nor any pain on percussion.

Given the chronicity of his symptoms and query over any underlying pathology we arranged x-ray which did not show any bony injury other than some age related degenerative change in his thoracic spine. To ensure that we were not missing anything I arranged an MRI scan which showed no pathology.

Given the results of this imaging we recommended further physiotherapy with the knowledge that we have no underlying pathological reason for him not to. His pain would appear to be mechanical. I have explained to him that there is no surgical way of treating mechanical axial back pain. With continued physiotherapy the hope is that he would be able to keep his pain under control and manageable. Due to the multifactorial influences that can influence mechanical back pain it is very difficult to know in the future how this will turn out, but the hope would be with him continuing with rehabilitation and a regular exercise programme. This would allow him to keep his symptoms under control."

17. As part of the assessment at the Unit the claimant was examined by a physiotherapist Jennifer McBurnie on the 6 of September 2018 (ID p91-95). She recommended various exercises to the claimant (ID 96-102). She recorded at page 93 "*Relatively pain free rom".*

18. The claimant applied for a job with Moray Council and completed a standard application form in January 2018 (ID p108-110). The form stated that work history must include all current and all previous employment. The claimant narrated his work history starting with his employment with Arnold Clark

Automobiles. He did not make any reference to short periods of work with the company Meallmore or a company Inspire where he worked as a care worker. The claimant had raised Employment Tribunal applications against both of these former employers. He later raised Employment Tribunal proceedings against Moray Council for disability discrimination.

19. In 2018 the claimant had previously enrolled in a nursing degree with RGU. He experienced pain in his back when carrying out placements which involved working in a stooped or bent position. As a consequence, he was referred to Occupational Health by RGU. He was seen by an occupational doctor, Dr Carol Close. Dr Close prepared a management referral report after assessing the claimant on the 6 March 2018 (ID p121). She noted*: "Mr Cochrane is currently absent from his placement due to an exacerbation in a longstanding underlying medical condition of a musculoskeletal nature. It was declared at the pre-placement stage. He had seen his GP and was awaiting physiotherapy input. The main current difficulty is with pain and he is maintaining a good level of function.*

Mr Cochrane's condition can be prone to exacerbations. He reports difficulties with performing tasks at floor level on community placement. It is possible this could have contributed to his exacerbation but other factors could also have contributed.

In my opinion Mr Cochrane is fit for his course but currently unfit for placement. He may be fit to return in the next 2-4 weeks. I am happy for his GP to assess his fitness to return. I would recommend adjustments on his return. I would recommend that he work short shifts and no more than 8 hours and that he does no moving and handling until the next review. He should also avoid any tasks at floor level. .."

20. The claimant obtained a medical report from his GP Dr Humes dated 22 May 2019. In this report Dr Humes writes: "*I can confirm that Barry Cochrane suffers from a very longstanding back pain problems stretching back to roughly 2012 following a lifting accident at the gym.*

During the course of July-August 2018 he was under investigation by the Spinal Unit at Woodend Hospital in Aberdeen and was requiring strong analgesia in an attempt to keep active. He was training as a nurse at the time I understand and was struggling with a lot of aspects of nursing as a result of a flare that happened in early 2018, hence the referral to secondary care. He had expert review and assessment by the Spinal Clinic in April-September 2018 and included MRI imaging. He was diagnosed with mechanical axial back pain with no surgical treatment and was given advice about physiotherapy, rehabilitation and analgesia.

He has ongoing symptoms of back pain and requires quite strong medication in an attempt to remain as active as he can. He has been on a number of medicines including dihydrocodeine, amitriptyline, co-Codamaol 30/500 and naproxen to manage his pain. Naproxen is an anti-inflammatory medication of pain relief and to settle inflammatory conditions such as joint inflammations and muscle inflammations. Co-Codamaol 30/500 and dihydrocodeine is for moderate to severe pain and amitriptyline is a medication for neuralgia known as a pain modifier. It is particularly useful for nerve related pain but can be used in any chronic pain setting. If Mr Cochrane takes his analgesia during a good phase where his back is not flared and not in spasm then he can function reasonably effectively when his back has flared as it was in 2018 hence the referral. He can be significantly impaired by his back to the extent that he is going to struggle to do any form of lifting. He has ongoing problems and has ongoing medications.

I am not in a position to comment as to whether he would be able to drive his car safely off medications. I can only speculate as to whether he would be able to do activities of daily living without his analgesia on board. Mr Cochrane's position is that without the analgesia he is not able to function. Mr Cochrane's pain and problems were such that he had to leave the course for nursing as he was not going to be able to function in that career.

I would certainly class his pain as substantial around July/August last year. He was requiring strong analgesia and was in the secondary care setting for investigations. He will likely need to retrain into another field and will have to continue taking medication in some form or other in order to facilitate continuing to work."

21. The claimant made a claim against Inspire Partnership through Life (Limited) for "whistleblowing". The claim proceeded to a hearing in June and September 2019 (Case Number 4121802/2018). The claimant's position as recorded by the Tribunal particularly at paragraphs 39 and 42 was that the claimant's evidence to them in summary was that he was so traumatised by his experience with the respondents, having worked with them in May and June 2018, that he had "*decided to give up completely on the care industry*".

22. The claimant finds sitting for even short periods painful. He had difficulty with activities that involve him bending his spine such as bending or stooping. The pain he suffers requires him to take daily strong analgesic medication.

Submissions

23. Mr Caldow reminded the Tribunal that it was up to the claimant to discharge the burden of proof that he was disabled. The relevant dates were January and February 2019. The position advanced by the claimant was that he had a chronic back injury but there was he said no evidence of an injury to be identified. There was no physical impairment. Nothing was shown on the MRI scan nor indeed on the x-ray that would give a reason for the claimant's back pain.

24. Mr Caldow accepted that the matter was principally a factual matter and indicated that the respondent's position was that the claimant was not a credible or reliable witness. There were numerous inconsistencies in his evidence. There were inconsistencies in the position presented to the Tribunal both today, namely that he had given up his nursing career because

of his back injury, and the position he took in front of another Tribunal that he had given up a career in the care industry because of the actions of a particular employer.

25. There was no credible evidence for the Tribunal to found a decision that the claimant was disabled when completing the application to Moray Council although he disclosed he had a back problem he had not answered the questionnaire that he had a disability despite claiming such. The respondent's lawyer made reference to the IDS Handbook on Discrimination at Work paragraph 628 and in particular to the case of ***Foord v J A Johnston and Sons*** whilst not binding on the Tribunal might be of assistance to the Tribunal. Mr Caldow accepted that there was no need for the claimant to establish a medically diagnosed cause for the impairment but in this case the medical evidence was by no means certain or clear and in particular the medical report from the GP that the claimant relied on was dependent on the doctor accepting the claimant's evidence that he suffered and continued to suffer pain. Mr Caldow also referred to the case of ***McKechnie Plastic Components v Mrs E Grant*** UKEAT/0284/08/NAA and the case of ***Walker v Sita Information Network and Computing Limited*** UKEAT/0097/12/KN. In that latter case the genuineness of the symptoms was not challenged. Mr Caldow also referred to the case of ***Kapadia v London Borough of Lambeth*** 2000 IRLR 699. The cases should he submitted give the Tribunal some assistance in how to approach a consideration of the medical reports/evidence.

26. In this case, he continued, the medical reports particularly that of Dr Humes was not spoken to by the authors and in consequence the Tribunal had to be careful in assessing their weight. It was interesting that Dr Humes did not go on to speculate as to whether the claimant could in fact carry out day to day activities. The Tribunal should have regard to the lack of detail in the claimant's evidence at the hearing. Mr Caldow referred me to the appointment the claimant had with his GP on the 29 March (JID p65) which read without his analgesia: *"he is in trouble with pain and stiffness and at the same time*

he is exercising without apparent difficulty and there is virtually a full range of movements".

27. In summary the claimant was not a credible and reliable witness in relation to his evidence. There was an absence of detail and candour in his testimony. There were inconsistencies such as the exact site of the pain. In the absence of a clear reason for his back pain he couched his evidence in quasi medical terms such as having difficulty in "functioning". There was no good reason put forward for these changes in factual position. There was no solid basis from which the Tribunal could then form a view that he discharged the burden on him.

28. Mr Cochrane in response made reference to the medications that he was on. These were, he pointed out, for moderate to severe pain. He took the Tribunal to the medical evidence and to the information given about the medications. He pointed to the cocktail of medication which he had been taking for some years. He made reference to Dr Burt at page 74 referring to his chronic pain. These were, he submitted, the sort of phrases repeated throughout the medical reports. The fact that his doctors are unable to identify an organic cause is not the point. Mr Cochrane took the Tribunal me through the various medical reports. He required a cocktail of strong medication in order to function properly. There was no query in any of the reports that he should not be on these drugs. The reports should be read on the basis that the doctors, physiotherapists and so forth understood that he was on these medications for backpain.

29. In relation to the site of his pain he could only point at his back and give a general indication of where it was sore. No inference should be drawn from this and any minor inconsistencies I the reports and whether the pain was in his upper or lower back. In the physical examinations he could only point behind himself as to where there was pain. One report refers to oesteophytes (page 57) and where they were. Mr Cochrane then indicated that the various reports made references to mechanical pain and not to phantom pain as one might expect if he was not believed. He urged the Tribunal to find that his

evidence was credible. It was clear from the medical evidence that he had struggled for many years with back pain. In response to the Tribunal Judgment that had been referred to he did not agree with the characterisation in the Judgment that he was "traumatised". He did not use those words. He intended appealing the Judgment.

Witnesses

30. I regret to say that many of the acute observations made by Mr Caldow about the claimant have some weight. I did not find the claimant a persuasive witness. He did not provide me with any comfort as to why there are two differing versions of how the original injury occurred. His evidence was not as detailed and grounded in real life experience as I might have expected, I remained conscious that he is a party litigant although one who now has some experience of the Tribunal process, and the position taken by him, recorded by the Tribunal in their Judgment, of differing explanations for giving up working in the care industry had the ring of someone who had changed his position for his own ends. That said where his evidence could be supported by relevant medical evidence, with some hesitation, I found it sufficiently credible and reliable to allow me to determine the issue in hand without summarily rejecting the case.

Discussion and Decision

31. The relevant statute law is Section 6 of the Equality Act 2010 -

Section 6 Disability

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."

32. It is for the Tribunal to determine whether or not someone comes within the ambit of the section. In carrying out the assessment and determining whether

the impairment in question has had a "substantial" effect - which section 212(1) of the Act defines as meaning "more than minor or trivial" - it is also necessary for the Tribunal determine whether the effect of the impairment is long-term, noting it is not the impairment that has to be long-term but the effect.

33. As to whether the effect is long-term, this is defined at paragraph 2 of Schedule 1 of the Act which expressly supplements the definition provided at section 6, as follows:

> "**2. *Long-term effects***
>
> **(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**."

34. In determining these matters the Tribunal ignores the effects of medical treatment when assessing whether the impairment has substantial adverse effects (para 5.1 Schedule 1 of the Act). The Tribunal was not addressed on the guidance that is available but took into account (''Guidance on matters to be taken into account in determining questions relating to the definition of disability'' issued in 2010 by the Secretary of State). An important feature in this case was the claimant's position that he had been regularly taking strong pain killing medication continuously for some years. Mr Caldow submitted that the claimant had given no evidence about the effects of his condition when he was not taking medication or if he ceased. That submission was going too far. The claimant gave evidence that he still found and had in the past found sleeping difficult because of his back pain and as a consequence he, would take more medication before sleep in order that he firstly could sleep and secondly not wake up stiff and sore.

35. As noted earlier the Tribunal was a little surprised at the relative lack of day to day experiences spoken to by the claimant who used the catch all of being "unable to function" without his medication on a number of occasions. This phrase is not without substance when it is borne in mind that it is used in the context of suffering constant back. The claimant also gave some evidence about being unable to sit for even relatively short periods without medication and even with medication being unable to carry out some training involving stooping or bending whilst on placement during his nursing course. Although these physical movements were undertaken at work they are also day to day activities involved in activities such as putting on socks or shoes, tying shoe laces or picking up objects from the floor.

36. The implications of the respondent's position was to suggest that the claimant was engaged in some elaborate masquerade. It was a concern that the medical records did not include the detailed prescribing records that would show regular repeat prescriptions but in this matter I was prepared to accept the claimant's word. There was no indication in any of the medical records or in reports that the claimant was free of pain at any point. This would have been likely to have been commented upon in any assessment as would the attendant cessation of medication.

37. Considering the matter in the round, even taking a sceptical view of the claimant's evidence, it would appear inherently unlikely that someone would subject themselves to taking strong painkillers for some years, with the side effects for example that taking a drug like Neproxin seems to have, without a strong physical reason for doing so. Mr Caldow suggested that in the absence of any physical evidence of an injury the claimant could not demonstrate an impairment especially if his own credibility was so damaged as to undermine the medical reports we have. Ultimately I did not accept this submission.

38. Sometimes an absence of evidence can be revealing. If there was any indication in the records that the claimant's medical advisers, at least one of

whom was an experienced specialist and another an experienced GP who had seen the claimant on a number of occasions, in any way doubted that he was suffering pain or had sustained a back injury then I would have expected that other avenues would have been explored to investigate if the cause was psychological and that some attempt would have been made at some point to reduce the medication he was on.

39. I did not place much weight on the fact that the site of the pain in the claimant's back was sometimes described as middle and sometimes lower thorasic. The claimant has a valid point that all he can usually do is point to the general area or comment if a particular area is sore. I noted that the X suggested that he had Osteophyte formations on his spine. The claimant's suggested that this was the physical evidence of the injury. Unfortunately, the matter is not at all clear and indeed that suggestion goes against the conclusions reached after investigation at the Special Spinal Unit that no physical evidence of a cause could be found. The claimant cannot in such an area go further than his medical advisers.

40. In passing I would say that despite Mr Caldow's invitation I did not place any weight on the note taken by Ms McBurnie (ID p93) about the claimant being pain free. She did not speak to the note nor was it clear what the annotation 'ROM' meant but I suspect it may be something to do with the tests she was performing perhaps 'rotor movement' or 'rotational movement' as the letter appear earlier in her notes. I certainly cannot take this note as being evidence that the claimant was pain free. Such a significant discovery would have surely found it's way into the reports calling into question the claimant's condition. I would also comment that the G.P's comments in his report seem to refer to a 'flare' or 'flare up' he had in July/August 2018 when despite his painkilling medication his pain was described as 'substantial' (IDp124).

41. There is no need for the claimant to show the medical cause of the impairment although in practice many claimants can lead such evidence. It should also

be borne in mind that there is no definition of physical impairment in the Act and given the myriad causes of such impairments this is not surprising. The focus for a Tribunal is on what the employee cannot do and there is sufficient evidence, corroborated by the medical reports and notes, that to show that his day to day activities involving such activities as bending and sleeping are substantially impaired and that he is disabled in terms of Section 6 of the Equality Act.

Employment Judge:	**James Hendry**
Date of Judgment:	**05 December 2019**
Date sent to parties:	**06 December 2019**