



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Curtez

**Respondent:** (1) Department for Work and Pensions  
(2) Andrew Hampson

**Heard at:** Nottingham                      **On:** Thursday 13 February 2020

**Before:** Employment Judge M Butler (sitting alone)

## Representation

**Claimant:** In person

**Respondent:** Ms H Trotter of Counsel

# RESERVED JUDGMENT

The Employment Tribunal Judge gave judgment as follows:

1. At the material time the Claimant was not disabled for the purposes of section 6 of the Equality Act 2010.

# REASONS

## The claim

1. The Claimant was employed by the 1<sup>st</sup> Respondent as an Administrative Officer from 25 July 2016 until his dismissal for gross misconduct with effect from 31 March 2019. By a claim form presented on 28 June 2019, following a period of early conciliation from 26 April 2019 to 28 May 2019, the Claimant brought complaints of unfair dismissal, race and disability discrimination, discrimination on the grounds of marriage/civil partnership and for holiday pay and unpaid wages.

2. The Claimant claims he is disabled because he is a Coeliac. At the time of the Preliminary Hearing in this matter heard on 22 November 2019, the Claimant had been unable to particularise details of his disability or the effect it had on his ability to carry out normal day to day activities. Since then, in accordance with my order, the Claimant has provided his GP notes and has listed the symptoms of his condition which impacted on him carrying out normal day to day activities.

3. This Preliminary Hearing was listed to specifically deal with whether the Claimant was a disabled person during his employment with the Respondent. The Respondent accepts that Coeliac disease is a disability but questions whether he was disabled at the material time and denies any knowledge of the disability.

I have reminded myself in considering this judgment that the Preliminary Hearing was for the purposes of determining whether the Claimant was disabled and matters relating to the knowledge of the Respondent are matters to be dealt with at the substantive hearing.

### **The law**

4. Section 6 of the Equality Act 2010 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.

### **The evidence**

5. I heard oral evidence from the Claimant who was cross-examined. There was an agreed bundle of documents consisting largely of the Claimant's GP notes and occupational health letters.

### **The factual background**

6. The Claimant's medical records produced begin on 31 October 2017 when he was diagnosed with abdominal cramps. Following further tests, he was diagnosed with helicobacter pylori, a stomach infection. Thereafter, apart from the period between the end of December 2017 and 4 June 2018, he attended numerous GP appointments where, essentially, the diagnosis was abdominal pain. In June 2018 further tests were carried out and on 12 June 2018 an entry in his records states "negative results, makes Coeliac disease unlikely". He subsequently underwent gastroscopy and endoscopy procedures and I note failed to attend four appointments at his GP's surgery in October 2018. In November 2018 he was further diagnosed with abdominal pain which continued through until January 2019. In February 2019 he underwent a colonoscopy which revealed an internal haemorrhoid and diverticulosis of the colon. Further diagnoses of abdominal pain were noted in his medical records up until March 2019.

7. On 11 July 2019 his GP's diagnosis is "?Coeliac disease...".

8. Throughout this time he was referred to the Respondent's occupational health service which noted the following:

(i) On 18 November 2017 – "based on the clinical assessment today and on his current symptoms it is my opinion that Mr Curtez is not fit to be in work at present". It further notes that "he cannot drive at present, he is restricted from doing his hobbies...". His condition was noted "unlikely to be considered a disability...".

(ii) On 16 December 2017 – "Mr Curtez is managing his daily activities as he can pace himself" and "recurring symptoms are unlikely". Again his condition was "unlikely to be considered a disability...".

(iii) On 13 June 2018 – “he is however, able to carry out normal daily activities at present”. Further, his “sickness absence record is unlikely to improve until his condition is optimally treated”. He “is however, fit for work at present” and it would “be prudent to allow him flexibility to access toilet facilities as and when necessary throughout the day, where operationally feasible. This provision would allow him to better manage his symptoms as and when they occur, whilst minimising any further impact on his long term attendance”. There is further reference in this report to the Claimant refraining from late shifts for a short time as this “is likely to interfere with his food intake and treatment regime and may exacerbate symptoms further”.

(iv) On 31 January 2019 it is noted “Marsa tells me that his condition is nothing to do with the helicobacter pylori and he is to attend hospital tomorrow for a colonoscopy and biopsy”. The report continues “in my opinion, based on the information provided today, Marsa is unfit for work in any capacity. I cannot advise on any adjustments which would allow him to return to work any earlier. I would advise a further referral to occupational health once he receives the results of his colonoscopy/biopsy when he may by then have been given a diagnosis”.

9. Throughout the period covered by his medical reports, the Claimant was absent from work between 17 October 2017 and 18 December 2017; 18 December 2017 to 1 January 2018; 28 November 2018 to 20 March 2019.

10. Having been ordered to provide an impact statement, the Claimant provided at page 7 of the bundle a “statement of physical and mental impairments”. There then followed a list of 22 symptoms which, along with matters referred to in his GP notes, include hallucinations, headache, blurry vision, lack of coordination and dizziness.

11. Under cross-examination, the Claimant was taken through the medical records and occupational health reports. He acknowledged that there was no reference to a diagnosis of Coeliac disease while he was employed. However, he did express his difficulty in attempting to pinpoint the beginning of his disability to a particular date and said the fact he was not diagnosed for some time did not mean he did not have it at the material time. Further he said the references to abdominal pain by his GP was a matter for the GP and not him.

## **Submissions**

12. For the Respondent, Ms Trotter concentrated on the alleged lack of knowledge of the Claimant’s condition on the part of the Respondent. As previously referred to above, this was not an issue before me. In her skeleton argument, she did make one reference to the fact that all but one of the occupational health reports did not make any comment on the Claimant’s ability to carry out normal day to day activities.

13. The Claimant argued that it was wrong to consider his disability claim purely in the context of the eventual diagnosis of Coeliac disease. His claim of disability discrimination should be focussed on his symptoms.

## Conclusion

14. It is for the Claimant to establish that at all material times he was disabled for the purposes of section 6 EQA. The Claimant is a litigant in person who has had very limited advice in relation to this claim. However, I refer to my Order dated 5 December 2019 regarding disclosure of medical evidence and, more importantly, at paragraph 2.2, "He (the Claimant) must state, in relation to each impairment relied on, between which dates it is alleged the Claimant was a disabled person because of that impairment dealing, by specific reference to schedule 1 to the Equality Act and any relevant provision of any statutory guidance or code of practice, with the effects of the alleged disability on the ability of the Claimant to carry out normal day to day activities. At the Preliminary Hearing some guidance was given to the Claimant as to what should be included in such an impact statement".

15. For the purposes of section 6 EQA, I have no doubt that the Claimant has been suffering from a physical impairment since, according to his medical records, the end of October 2017. There are countless visits to his GP where he was diagnosed as having abdominal pain and, later, helicobacter pylori. He underwent numerous blood tests, a gastroscopy, endoscopy and colonoscopy. His evidence was that, after the colonoscopy, the consultant told him he had Coeliac disease. The Respondent recognises that as a disability. However, there is no evidence in his medical records that the consultant ever confirmed to his GP that he was a Coeliac. Indeed, in July 2019, after his dismissal, it seems his GP confirmed a diagnosis of Coeliac disease. That possibility had previously been discounted by his GP and on close scrutiny of his medical records it is noted that in relation to Coeliac disease they say "?Coeliac disease". I do not think it is by any means certain on this evidence that he suffers from that condition but I further note that it is not essential that he has a label to attach to his symptoms.

16. The physical impairment affecting the Claimant is clearly long term having, as at the date of his dismissal, lasted for more than a year.

17. The difficulty in this case for the Claimant arises in establishing whether the impairment has a substantial and long term adverse effect on his ability to carry out normal day to day activities. As already mentioned, I referred the Claimant at the previous Preliminary Hearing to the relevant guidance. The EQA does not define normal day to day activities but the guidance gives some insight to matters which may be assumed to be such. At paragraph D3 it lists examples as including shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. It is possible that some work activities may fall within the ambit of normal day to day activities. Considering the evidence before me, however, I can find only two references to activities which might fall within the definition of normal day to day activities. In the Claimant's statement prepared for this hearing he says "not being able to move and spending long periods at my desk makes me take more medication which increases the type of symptoms describe (sic) in the (2.1) physical statements. Both statements appear at page 7 of the bundle. As previously noted, these comprise 22 symptoms which include hallucination, blurred vision, lack of coordination and dizziness.

Nowhere in the medical records before me do any of those symptoms appear. More particularly, and despite the explanation of what was required of the Claimant in my order and my verbal explanation at the time, there is no indication of in what particular way any of these symptoms affect the Claimant's ability to carry out normal day to day activities.

18. The second reference to normal day to day activities is found in the occupational health report dated 18 November 2017 at page 26. This merely states, "he is restricted from doing his hobbies" but does not state what they are.

19. Further, the occupational health report dated 16 December 2017 states that the Claimant's impairment is unlikely to be considered a disability because it "is not having a significant impact on his ability to undertake... normal daily activities". This is repeated in the occupational health report dated 13 June 2018 at page 30 which states "he is however, able to carry out normal daily activities at present".

20. For the above reasons, the Claimant has not satisfied the burden of proof upon him to establish that he is disabled for the purposes of section 6 EQA and this element of his claim is dismissed.

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Employment Judge M Butler

Date 6 March 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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