



5

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4104188/2018

10

Held in Glasgow on 5 August 2019

Employment Judge: J D Young

15

Mr Christopher Lowe

**Claimant
Represented by:
Ms L Neil –
Solicitor**

20

GAR Trading Limited T/a Cashing In

**Respondent
Represented by:
Mr W Lane –
Solicitor**

25

30

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was a disabled person as that is defined in s6 of the Equality Act 2010 in the period between 27 September 2017 and 24 January 2018.

35

REASONS

E.T. Z4 (WR)

1. In this case the claimant presented a claim to the Employment Tribunal complaining that he had been unfairly dismissed; discriminated against on the grounds of disability and due notice pay by the respondent.
2. The respondent denied these claims. They disputed that the claimant was a disabled person as that is defined within section 6 of the Equality Act 2010; even if he was a disabled person he was not discriminated against on those grounds; that the respondent did dismiss the claimant but for reasons of gross misconduct and that dismissal was fair; and as the dismissal was for gross misconduct no notice pay was due.
3. The Tribunal determined that there should be a preliminary hearing on the issue of disability status. The issue for the Tribunal was whether or not, at the relevant time, the claimant was a disabled person as that is defined in section 6 of the Equality Act 2010. The claim form for the claimant complained of discrimination in the period 27 September 2017 through to the effective date of termination of his employment, being either 10 or 11 January 2018, and the subsequent appeal of 24 January 2018.

Documentation

4. The parties had helpfully liaised in producing a Joint Inventory of Productions for the hearing paginated 1 – 130 (J1-130).

The Hearing

5. At the hearing evidence was given by the claimant; Patrick Collins MBChB MD FRCS, Consultant General and Colorectal Surgeon at Dumfries and Galloway Royal Infirmary; Andrew Lowe, the claimant's father; and Mrs Joan Ross, wife of the respondent's Director George Ross and fifty per cent shareholder in the respondent.
6. From the documents produced, relevant evidence led and admissions made it was possible to make findings in fact on the issue.

Findings in Fact

7. The respondent is a Pawnbroker in Dumfries. George Ross is a Director of the respondent. His wife Joan Ross assists him in the running of the business.
8. The claimant was employed by the respondent in the period from 7 December 2010 until either 10 or 11 January 2018 (there being a slight difference
5 between the claimant and respondent as to the effective date of termination).
9. The claimant was Manager of the business in Dumfries from around April 2016 until termination of employment. On a day to day basis he would open the premises and prepare for the day's business. The stored items received by the respondent were located up to two floors above the shop premises and
10 so it was necessary for the claimant to take the stairs to collect or store items in the course of a day. He would also require to process transactions through the tills and deal with the necessary paperwork. He estimated that he may deal with 50/100 customers in a day not all of whom would make a sale or a purchase. He would require to assess the value of any items brought for pawn and the decision was then with the customer as to whether or not to accept
15 the value given.
10. On 23 September 2017 he fell ill with "fever and flu like symptoms and vomiting". His health deteriorated over the succeeding few days and on 27 September 2017 he considered himself unfit to remain at work and closed the
20 shop early. He was unable to attend work the following day. After text exchanges with Mr Ross he attended work on 29 and 30 September 2017.
11. However in terms of the "medico-legal report" prepared by Patrick Collins, Consultant General and Colorectal Surgeon at Dumfries and Galloway Royal Infirmary (J128/130) he was admitted to Dumfries and Galloway Royal
25 Infirmary on 3 October 2017 with a "4 day history of worsening pain in his buttock/perineal area and faecal incontinence." At that time he was diagnosed with "potentially life threatening necrotising infection of his perineum".

12. The “triage information” noted on arrival at the Royal Infirmary (J42) indicated “infection/inflammation cellulitis” with “loss of bowel control 2 days ago, c/o of pain when mobilising and sitting.”
13. The claimant had necrotising fasciitis being a “flesh eating bug” that kills the flesh and produces toxic blood and is capable of infecting vital organs”. The report from Mr Collins indicates that this illness will have led to “acute delirium and impairment of mental functioning secondary to systemic sepsis” and that “during early recovery, strong opioid painkillers may have also impaired cognitive function to a degree”. The claimant described that he “slipped in and out of consciousness” at this time.
14. The initial employee “statement of sickness” form for SSP purposes issued to the respondent and completed by the claimant indicated that he was suffering from a “bacterial infection” (J43/44). Thereafter his father submitted a “statement of fitness for work” with a letter of 11 October 2017 (J45/46) which advised the respondent that the claimant was not to attend work because of “necrotising fasciitis (gluteal) requiring diversion stoma”. His accompanying letter addressed to Mr Ross advised that if he “googled” the condition he would “appreciate how seriously ill” was the claimant (J45).
15. The claimant was in hospital for approximately 3 weeks. There was conducted on 3 October 2017 an “emergency surgical debridement of the necrotic (dead) and infected perineal tissue” and he then returned to theatre on 5 October 2017 for further debridement of the perineal wound. At that time there was formed a “transverse loop colostomy”.(J128/130)
16. His condition was then managed on the ward with regular re-dressing and treatment of his wounds. He worked with a stoma care nurse to learn how to manage his stoma and had intensive input from physiotherapists.
17. He was pronounced fit for discharge on 17 October 2017. At that time he was reported as “eating and drinking normally, managing his stoma bag independently and mobilising short distances (30 metres) with the aid of a walking stick”

18. On discharge he required daily input from the district nursing team to manage his wound. The discharge letter from the Royal Infirmary (J48) advises that the claimant as at 17 October 2017 was “coping well with his stoma care and will recuperate at his parents’ home”.
- 5 19. The claimant attended hospital in Dumfries on 4 December 2017 as he had a pain at the stoma site and was “passing mucus”. At that time he was examined and the stoma was found to be working correctly and he would be continued to be monitored at a clinic as previously arranged. At that time he was noted to have an “uncomplicated parastomal hernia”.
- 10 20. However the parastomal hernia increased in size and by end December 2017 was the “size of a melon”. That resulted in the stoma occasionally leaking due to the increased size of the hernia. It was stated in a referral letter by his GP to the Royal Infirmary that the obvious parastomal hernia almost required the claimant to “carry it in his hands”.(J52) As a result of the hernia his sleep
15 was interrupted; he was not able to stand for any length of time; or able to sit easily or properly; or climb stairs.
21. Mr Collins indicated that a hernia was a common complication of a stoma and particularly a loop stoma being the procedure carried out for the claimant. The pain on the stoma site could be exacerbated by standing, straining or heavy
20 lifting.
22. Given the size of the wound involved the claimant was reviewed by a plastic surgical team at the New Victoria Hospital Glasgow on 26 February 2018. At that time it was reported that his wound was still “in the process of healing” and no formal plastic surgical intervention was deemed necessary.
- 25 23. The claimant was admitted to the Royal Infirmary on 8 May 2018 for planned reversal of his colostomy and repair of his parastomal hernia. At that time the perineal wound had healed. This surgery was successful and the claimant was discharged on 12 May 2018. On discharge it was reported he was
30 “mobilising with a stick and had managed twenty eight stairs with the physiotherapist supervising” (J128).

24. Mr Collins advised that no mesh implant was made around the stoma area when the hernia was repaired in May 2018 as that may cause infection. He advised also that recurrence of a hernia after such a procedure is “quite high”.
25. That proved to be the case with the claimant as the claimant then suffered an “incisional hernia”. Mr Collins advised that it would be more appropriate to term the second hernia as an “incisional hernia” i.e. caused by the incision in the previous procedures.
26. The claimant was seen by Mr Collins at a surgical outpatient clinic on 12 November 2018 and was placed on the waiting list to have this hernia repaired. That procedure took place around 17 January 2019 when a mesh implant was used to repair the hernia.
27. In his report (J128/130) Mr Collins anticipated that in the absence of complications the impairment of the claimant caused by the hernia would resolve “six weeks after the operation i.e. around beginning March 2019”.
28. In the disability impact statement provided by the claimant (J33/34) he advises that symptoms of these procedures have had a substantial adverse effect on his ability to carry out normal day to day activities such as “walking, bending over, kneeling, sitting, lifting, sleeping and driving”. Mr Collins’ position was that all these symptoms “would be expected” in respect of the claimant’s condition.
29. He also advised that “up to 50% of people would get” a parastomal hernia after a reverse loop colostomy and that was still likely six months after such a procedure. Use of a mesh on repair of a hernia might reduce the risk to 20/50% but mesh was not used in the procedure of May 2018 given the risk of infection.
30. As these matters progressed the claimant’s father continued to advise the respondent of the claimant’s condition. On 24 October 2017 he sent a copy of the hospital discharge summary giving dates when the claimant was in hospital.(J56) At that time he advised that it was expected that the claimant would be unfit for work for a period. A further statement of fitness for work

was submitted on 1 November 2017; and then again 10 November 2017. Those certificates (J58/61) identified “necrotising fasciitis” as the condition affecting the claimant including the “functional effects of your condition”. In the meantime arrangements were made by the respondent for disciplinary meetings with the claimant.

5

31. The claimant remained absent from work until his employment was terminated by the respondents with effect from 10/11 January 2018 with an unsuccessful appeal hearing on 24 January 2018 (J62/94 and J98/106).

10

32. The claimant lived with his parents immediately following the surgery to deal with the necrotising fasciitis. In the period between May 2018 and November 2018 he would spend four or five days at a time at his parents’ home and three or four weeks after the January 2019 procedure returned to his own house. He used a walking stick when he was discharged from the hospital in October 2017 until about January/February 2018. He then used a walking stick again after the operation in May 2018 for a period.

15

33. The evidence of Mr Lowe Snr was accepted to the effect that at the onset of the necrotising fasciitis the claimant was confused and somewhat delirious and that after his operation was in the high dependency unit for 3/5 days. At that time he messaged the respondent to indicate that the claimant would not be at work and then submitted the statements of fitness to work and other information to the respondent regarding his son’s illness. When the son arrived to their home after the operation he required “24 hour care”. His son was in pain throughout the early stages and initially was bed bound.

20

34. He found the claimant restricted in his mobility and noted that it was very difficult for him to bend, lift objects or make any sudden movement. He and his wife washed and cooked for him. Until May 2018 his son became quiet and did not wish to go out. He had been a person who socialised and enjoyed physical activity but that changed subsequent to the operation and the continuing issues over the parastomal hernia. With the parastomal hernia and colostomy bag he was “terrified to drive” and the safety belt would impinge on both.

25

30

35. After the colostomy was reversed and treatment given to his hernia in May 2018 he was “a bit more confident” but still found that he would be in pain and not wish to go out of the house. After the second hernia operation in January 2019 his condition improved.
- 5 36. The claimant advised that his condition had affected his mental health. He was aware that had he not received emergency surgery he would have died from necrotising fasciitis. He advised he has suffered from not wishing to eat, low mood; not been able to socialise or have contact with friends or use social media. He has been “snappy with his parents over small matters” and has not had any desire to “get out of bed” and had feelings of being “intimidated”.
- 10 37. The objective evidence in relation to the likely effect on the claimant’s mental health consists of:-
- (a) NHS UK material (J70/73) on necrotising fasciitis which indicates that the recovery process from surgery involves extended “physical therapy and long term psychological and emotional healing”.
- 15 (b) The evidence of Mr Collins to the effect that he understands the claimant has a past diagnosis of clinical depression and it was “reasonable to assume that his illness and protracted recovery would have had a negative impact on his mental health” and that there will be an element of “post-traumatic stress disorder”.
- 20 (J128/130)
38. The claimant was prescribed Ofloxacin as an antibiotic as he made recovery from the surgery and ongoing issues arising. He has not been prescribed any medication in respect of depression. He has continued to take “over the counter” pain relief medication when required.
- 25 39. Mrs Joan Ross had been an A&E nurse with some experience of colorectal issues. She saw the claimant twice after his absence from work. On the first occasion in December 2017 he had come to have his “wages cheque endorsed” and when she spoke to him she thought that he was in good spirits.

She thought he was using a stick at that time but had been able to get up the steps into the office.

40. She saw him on a second occasion in January 2018. She had come to the shop with her husband to find the claimant talking to one of the staff. She
5 thought that he was showing his colleague the size of his hernia at that time. There was no conversation at that point but he did not “seem in pain”.

Submissions

41. It was agreed that the parties would lodge written submissions within 14 days of the hearing. No disrespect is intended in making a summary of the helpful
10 submissions lodged.

Submissions for the Claimant

42. It was submitted for the claimant that clear evidence had been given from the claimant and his father and Mr Collins which was factual and measured. It was submitted that the evidence of Mrs Ross was unsympathetic of the claimant; that she seemed angered by the claimant and not prepared to
15 accept his account of his symptoms.

43. Reference was made to the definition of disability within the Equality Act 2010 and it was maintained at the material time during which the claimant was disabled was from 27 September 2017 until the final act of discrimination on
20 24 January 2018.

44. Reference was made to the history of the onset of necrotising fasciitis and the subsequent parastomal hernia which had developed and the subsequent review for surgery on 26 February 2018 when the perineal wound was “still in the process of healing”.

- 25 45. It was maintained that the impairment was physical and mental. Initially that impairment was necrotising fasciitis and then the parastomal hernia

46. On mental impairment it was submitted that the focus should be on the effect on the claimant’s day to day activities which in terms of *JB v DLA Piper UK*

Lip UKEAT/0263/09 would confirm that the claimant was suffering from an impairment which had produced that effect as a matter of inference.

47. It was submitted that the claimant commenced suffering from medical symptoms in September 2017 due to the necrotising fasciitis and became solitary. It was submitted that the impairment had an effect on the appellant's day to day activities which was substantial. He would be unable to stand for lengthy periods. He would be unable to lift objects of any weight. He would have problems bending, kneeling, sitting, lifting, sleeping, driving and socialising. His mood was affected. Those were matters which would affect day to day activities including the normal activities at work. These matters were more than minor or trivial.

48. It was also submitted that the impairments had a long term effect as they were likely to last for more than 12 months.

49. It was submitted that in terms of *Patel v Oldham Metropolitan Borough Council* and *Rushcroft Primary School UKEAT/0225/09* that two consecutive impairments can be aggregated for the purposes of determining the duration of an impairment provided they are related. That was reflected in the guidance on the Equality Act 2010 at paragraph C2.

50. The evidence was that the hernia resulted from the initial surgery. The surgery to correct the first hernia was the cause of the second hernia.

51. Thus there was a long term effect. The disability would end on recovery from the final surgery associated with his condition on 21 January 2019. That was well outwith the 12 month period from September 2017.

Submissions for the Respondent

52. It was agreed by the respondent that the relevant period was between 27 September 2017 and 24 January 2018. The burden was on the claimant to demonstrate that he was disabled as that as defined in terms of the Equality Act 2010.

53. It was accepted that the claimant had a physical impairment during the relevant time namely necrotising fasciitis but denied there was any mental impairment. No report had been made on the claimant's mental condition. No medication or other treatment had been conducted in respect of this matter.
54. It was denied that the claimant's impairment had a substantial adverse effect on his ability to carry out normal day to day activities except for the three week period between 27 September and 16 October 2017. While the claimant had provided evidence of adverse effect on his ability to carry out normal day to day activities after August/September 2018 due to the recurrence of a hernia that period was considerably outside the relevant time.
55. It was submitted that the medical evidence in respect of the period between 17 October 2017 and 24 January 2018 did not suggest there was a substantial adverse effect on the claimant's ability to carry out normal day to day activities. It suggested that recovery was being made.
56. Neither was it suggested in any other document that there was an ongoing substantial adverse effect.
57. The claimant was able to participate in the disciplinary and appeal meetings without difficulty and at that time did not suggest there was an ongoing substantial adverse effect.
58. The claimant's disability impact statement was prepared around December 2018 sometime after the relevant period and so was of limited value. It was significant that the claimant had only sought over the counter medication for pain relief. Mrs Ross had described him as looking well and wanting to get back to work when she met him in December 2017/January 2018.
59. It was submitted that there was no long term effect and that the sole material issue was the hernia which developed in December 2017 but that was repaired in May 2018. It therefore did not appear likely that the effect of the claimant's impairment would last for at least 12 months.

60. If it was contended that hernias after being repaired might recur then it was submitted that none of the medical records indicated that was likely. While Mr Collins gave evidence that in general hernias recur after repair he accepted that he did not inspect the claimant's hernia at the relevant time and so was not able to provide any specific evidence on that aspect of matters.

61. Mr Collins had not commented on whether the likelihood of the hernia which has recurred after being repaired could re-appear to bring about a recurrence of substantial adverse effect on day to day activities.

Conclusions

62. The protection for disability discrimination afforded by the Equality Act only applies in respect of those who fall within the Act's definition of a disabled person. The act defines a disabled person as a person who has a "disability" – section 6(2) and that is the case if he or she has a "physical or mental impairment" which has a "substantial and long term adverse effect on [his or her] ability to carry out normal day to day activities" – section 6(1). The burden of proof is on the claimant to show that he satisfies this definition.

63. Supplementary provisions for determining whether a person has a disability are in Part 1 of Schedule 1 to the Equality Act 2010.

64. In addition the government has issued "Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)" (the "Guidance") under section 6(5). The Guidance does not impose any legal obligations in itself but a Tribunal must take account of it where relevant. Finally the Equality and Human Rights Commission (EHRC) has issued a Code of Practice on Employment that has some bearing on the meaning of disability. Like the Guidance the code does not impose legal obligations but a Tribunal must take into account any part of the code that appears relevant.

65. The time at which to assess the disability is the date of the alleged discriminatory act(s). This is the material time when determining whether that the impairment has a "long term effect". The relevant period in this case is between 27 September 2017 and 24 January 2018.

66. The words used to define disability require a Tribunal to look at the evidence by reference to four different questions:-

- Did the claimant have a mental and/or physical impairment?
- Did the impairment affect the claimant's ability to carry out normal day to day activities?
- Was the adverse condition substantial?
- Was the adverse condition long term?.

Physical and mental impairment

Physical impairment

10 67. The claimant's position is that in the material period he had a physical and mental impairment. The evidence for the physical impairment is the onset of necrotising fasciitis and the life saving surgery undertaken which left him with a large wound after the debridement of the dead and infected perineal tissue. The onset of the necrotising fasciitis was on 23 September 2017. It is
15 accepted that the initial symptoms involve flu like symptoms and fever and that quickly an individual can become extremely ill as the infection enters the bloodstream involving dehydration, vomiting and intense pain.

68. Surgery was undertaken on 3 October 2017 to remove the dead and infected perineal tissue. He returned to theatre on 5 October 2017 for further
20 debridement of the perineal wound and at that time there was performed a "transverse loop colostomy". He was discharged from hospital on 17 October 2017.

69. In terms of the report from Mr Collins the claimant did have a physical impairment in the aftermath of his surgery. At that time his mobility was
25 limited. Pain would be made worse by prolonged standing, straining or lifting.

70. A parastomal hernia developed. An urgent referral was made to Dumfries and Royal Infirmary by the claimant's GP (J51/52) in which it was stated that

the claimant had “recently been discharged from hospital” and that he had a “known parastomal hernia”. That had been “getting bigger over the last two months and is now the size of a melon”. Apparently the hernia had become so prominent that he “always needs to carry it in his hands”. This condition developed as a consequence of the surgery and transverse loop colostomy. That condition continued through to May 2018 when further surgery was undertaken. As at 26 February 2018 Mr Collins notes in his report that his wound “was still in the process of healing”. Accordingly the evidence showed that the claimant did have a physical impairment in the material period.

Mental Impairment

71. I would also accept the evidence that the claimant had a mental impairment in that period. While Mr Collins is not a psychiatrist he was able to advise that it was reasonable to assume that his illness would have a negative impact on his mental health. He advised that there would be an element of post traumatic stress disorder. The illness would have led to acute delirium and impairment of mental functioning in the initial period and the strong opioid pain killers would have impaired his cognitive function to a degree. The NHS UK Literature produced also indicates that the recovery process from necrotising fasciitis can involve long term “psychological and emotional healing”.

72. The evidence of the claimant was that in this period he did not “wish to see anyone, eat, go out or contact people on social media” and was “snappy with his parents over small matters” and “would not wish to get out of bed all day” and had a feeling of “being intimidated”.

73. The inference sought from the evidence of Mrs Ross was that the claimant was exaggerating the symptoms as she saw him on two occasions in December 2017 and January 2018 when he seemed “fine”. That impression of course was only a snapshot gained over a very short meetings. I could not accept that because Mrs Ross saw the claimant on two occasions and thought he was well meant that he was exaggerating his symptoms. Mr Lowe Snr also described his son’s condition over the period September 2017/January 2018 and that his son was “quiet, very depressed, not go out, not go where

crowds” and did not continue with any physical activity such as the gym or socialising such as going to the pub to meet friends. I accept that a father will want to be supportive of his son but his evidence was given in a matter of fact way and I would accept that in the material period the claimant was affected
5 by a mental impairment namely depression in his low mood and social isolation. I do not think that it is a difficult inference to make from the life saving operation and the consequences of the large wound, colostomy bag and development of the very large hernia in the material period.

The Guidance

10 74. (A6) states that “it may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore the effects of a mainly physical nature may stem from an underlying mental
15 impairment and vice versa”. Accordingly the Guidance recognises that effects of a mental nature may stem from an underlying physical impairment which would meet the circumstances of this case.

75. In those circumstances I would accept that the claimant had a mental or physical impairment in the material period.

20 Did the impairment affect the claimant’s ability to carry out normal day to day activities

76. In the material period I consider that there was an effect on the claimant’s ability to carry out normal day to day activities. I accept that the combination of physical and mental impairment meant he had no wish to see people or
25 use social media; that he spent long periods in the house; that he had difficulty walking, bending, stretching and lifting and did not drive. That would restrict his ability for example to carry shopping bags, walk for any distance, carry out housework tasks and to exercise and socialise. He found it difficult to sleep. These would be considered normal day to day activities.

Did the impairment have a “substantial adverse effect”

77. Substantial is defined in section 212(1) of the Equality Act as meaning “more than minor or trivial”. Appendix 1 to the EHRC Employment Code provides guidance on the meaning of “substantial” where it states that the “requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people. Account should also be taken of where a person avoids doing things which for example cause pain, fatigue or substantial social embarrassment because of a loss of energy and motivation” – paragraphs 8 and 9.

78. The claimant described the social embarrassment of having to deal with the colostomy bag in company. Hygiene of course was of paramount importance to prevent any cross infection. That isolated him within his home until such time as he would not have to cope with the colostomy. The additional factors were his difficulty in driving due to the weight of the hernia and the discomfort that caused in bending and wearing of a seat belt.

79. Additionally his mobility was restricted as a consequence of the recover from the operation and the additional impact of the hernia.

80. His low mood continued in that period to prevent him from socialising. I would consider that these were factors which would mean that the adverse effect on day to day activities was substantial. These were matters which went beyond the normal differences in ability which might exist among people.

Was the adverse condition long term

81. This is the most difficult area in this case. Under paragraph 2(1) of Schedule 1 to the Act the effect of an impairment is “long term” if it –

- has lasted for at least 12 months (paragraph 2(1)(a))
- is likely to last for at least 12 months (paragraph 2(1)(b) or

- is likely to last for the rest of the life of the person affected (paragraph 2(1)(c))

82. The time at which this assessment has to be made is at the date of the alleged discrimination. The meaning of “likely” in the context of disability
5 discrimination legislation means that something “could well happen”. (*SCA Packaging Ltd v Boyle [2009] UKHL37*).

83. In this case in considering the position as at the date of the alleged discriminatory acts the effects of the impairment had not “lasted for at least 12 months” and so the requirement is to look prospectively under paragraph
10 2(1)(b) as to whether the effect of the impairment was “likely to last for at least 12 months”.

84. The initial impairment suffered by the claimant was necrotising fasciitis. That entailed a reverse loop colostomy. By the end of the relevant period (from about December 2017) the claimant developed a large parastomal hernia. A
15 finding has been made that there was a substantial adverse effect on day to day activities given the combination of circumstances which affected the claimant’s mental health and his physical capability.

85. Assessing the position in the relevant period to 24 January 2018 it would be expected that at some point in the relatively near future further surgery would
20 entail to remove the colostomy bag and repair the hernia. It was likely that would be completed within a few months of the end of the relevant period. There would then be a necessary recovery period from that surgery, probably around 2 months or so. If there were likely to be no further issues at that time then it would be difficult to say that the effects of the impairments would have
25 been likely to last at least 12 months.

86. However the evidence from Mr Collins was that in the circumstances where a parastomal hernia is being repaired no mesh is used in that procedure given the risk of cross infection. Accordingly considering the position within the relevant period knowing that the claimant would require to have repair to the

parastomal hernia then the likely position was that would be done without mesh.

87. The position of Mr Collins on the likelihood of a further incisional hernia developing was put at 20/50%.

5 88. That assessment is in my view sufficient to make a finding that after repair of the parastomal hernia a further hernia could well happen. The test that something is “likely” is not a test on the balance of probability which may require an assessment of more than 50%. The standard is lower and in my view a risk of between 20/50% means it “could well happen”.

10 89. In that event one requires to assess the likely effects. The hernia would cause pain and physical discomfort. There would again be the difficulty in bending, stretching, driving, lifting heavy objects such as shopping and sleeping comfortably.

15 90. I have found that the claimant’s mental condition was affected by the initial surgery in October 2017 the colostomy and parastomal hernia. It was likely that on further hernia developing (which could well happen) his mood would be affected by the further hernia. It would be realisation that the claimant was not at the end of the road in respect of surgical procedures. He would know there was more surgery to come. It was likely that it would affect his ability to socialise. It would affect his ability to exercise and the lack of exercise was not likely to lift his mood but lower his mood.,

20 91. In those circumstances I consider that these conditions are related. If the claimant had not suffered from necrotising fasciitis there would have been no need for the stoma and colostomy bag. That meant a likely chance of a parastomal hernia. The repair to the hernia without mesh (given the risk of cross infection) meant the likelihood of a further incisional hernia. In determining whether the effects of an impairment are long term the effect of an illness or condition likely to develop or which has developed from another illness or condition forms part of the assessment of whether the effect of the original impairment is likely to last or has lasted at least 12 months. (*Patel v*

25

30

Oldham Metropolitan Borough Council UKEAT/0225/09/CEA). Here the parastomal and incisional hernia are likely to develop from the initial illness and so can form part of the assessment of whether the effect of the original impairment is likely to last for twelve months.

5 92. Separately in respect of long term effect, the Guidance states that the likelihood of recurrence should be considered taking all the circumstances of the case into account including what the person could reasonably be expected to do to prevent the recurrence (paragraph C9 of the Guidance). Again in assessing the likelihood of a claimant's impairment recurring and thus
10 qualifying as "long term", an Employment Tribunal should disregard events taking place after the alleged discriminatory act prior to the Tribunal Hearing.
Richmond Adult Community College v McDougall [2008] ICR 431.

15 93. Paragraph 2(2) of Schedule 1 to the Equality Act 2010 provides that 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 treated as continuing to have that effect if the effect is "likely to recur". Again "likely to recur" means "it could well happen". In this case assessing the position within the relevant period it was certain that the claimant would require to have further surgery to remove the colostomy and repair the hernia. That was likely to happen within a few
20 months of the end of the relevant period. Again there was a likely recurrence of hernia given that it would not be repaired with a mesh due to the risk of cross infection. Again Mr Collins' evidence was that the risk of recurrence of the hernia was between 20/50%. In those circumstances the recurrence of the hernia could well happen. Again the test is not on the balance of probability which may mean likelihood greater than 50% but on a lower standard. (*SCA Packaging v Boyle 2009 ICR1056 HL*)
25

30 94. In those circumstances even if there was a period of time where the impairment ceased to have a substantial adverse effect on a person's ability to carry out normal day to day activities it is treated as continuing if the effect is "likely to recur". In those circumstances I consider that it could well happen

that the effects of the impairment in this case were likely to be long term i.e. greater than 12 months.

95. In those circumstances I find that the claimant has been able to discharge the burden on him of establishing that he was a disabled person as that as defined
5 in section 6(1) of the Equality Act 2010. In those circumstances a further Preliminary Hearing should be arranged (preferably by telephone) to determine future procedure.

Employment Judge: J D Young
10 Date of Judgement: 18 October 2019

Entered in Register,
Copied to Parties: 22 October 2019

15

20

25

30

5

10