



## EMPLOYMENT TRIBUNALS

*Claimant*

*Respondent*

Mr A Richards

AND

Falanx Group Limited

### REMOTE OPEN PRELIMINARY HEARING

**HELD AT:** London Central                      **ON:** 8 July 2020

**BEFORE:** Employment Judge Brown (Sitting alone)

***Representation:***

**For Claimant:** In person

**For Respondents:** Ms A Meredith, Counsel

### JUDGMENT

**The Judgment of the Tribunal is that the Claimant was a disabled person by reason of his back and knee conditions throughout his employment.**

### REASONS

1. This hearing was listed to determine whether the Claimant was disabled within the meaning of s6 Equality Act 2010 by virtue of:
  - a. Injuries to his back and leg(s) sustained during his service with the British Army; and/or
  - b. Osteoarthritis in his hips.

And, if he was, from what date the Claimant was disabled.

2. The parties agreed that, in considering this question, the Tribunal would need to consider whether the conditions listed above, taken together or separately, amount to a physical impairment(s) having a substantial long-term adverse effect on the Claimant's ability to carry out his normal day-to-day activities.

3. The Hearing was also to determine the Claimant's application to amend his claim to add a new claim of victimisation, which was opposed by the Respondent, and update and finalise the List of Issues.

4. The "material time" for the purpose of the Claimant's claims was between 16 July 2018 (when the Claimant entered into an employment contract with the Respondent) and 2 May 2019 (the date of the Claimant's verbal resignation) [17]. The Respondent contended that evidence relating to the Claimant's condition after 2 May 2019 was not relevant to the Tribunal's determination and should not be taken into account.

5. The Respondent conceded that the Claimant had impairments, but contended that the effects of these on the Claimant's ability to carry out normal day to day activities were neither substantial, nor long term in the relevant period.

6. The Respondent contended, regarding the alleged disability of "injuries to back and legs" that, at an earlier date, the Claimant sustained injury which may have constituted a physical impairment at that time. However, at the material time, the "injuries to back and legs" were not a physical impairment which had a significant adverse effect on normal day-to-day activities. (The Respondent said that the Claimant's GP notes demonstrated that he was not receiving ongoing treatment or attending his GP or any other medical practitioner with any regularity in relation to this.)

7. In relation to the alleged disability of osteoarthritis, the Respondent conceded that the Claimant was diagnosed in October 2018 as having mild degenerative changes related to age. The Respondent said, however, that these were described as "slight age related changes" and "nothing significant". The Respondent said, therefore, that the impact of these on the Claimant (whether in combination with his other alleged impairment or alone) did not constitute a substantial adverse impact on his ability to carry out normal day-to-day activities. Furthermore, the Claimant had provided no evidence to support any contention that was a progressive condition that, at the time, was likely to progress to have a substantial adverse effect on normal day to day activities.

8. I heard evidence from the Claimant. There was a Bundle of documents containing medical records and notes. Both parties made submissions.

9. The Hearing was conducted by CVP videolink. Members of the public had access to the hearing but none attended. There were no problems with internet connection during the hearing.

### **Relevant Law**

10. In coming to my decision, I took account of the following relevant law.

11. By *s6 Equality Act 2010*, 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.

12. The burden of proof is on the Claimant to show that he or she satisfies this definition.

13. *Sch 1 para 12 EqA 2010* provides that, in determining whether a person has a disability, an adjudicating body (which includes an Employment Tribunal) must take into account such Guidance as it thinks is relevant. The relevant Guidance to be taken into account in this case is Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011), brought into effect on 1 May 2011.

14. Whether there is an impairment which has a substantial effect on normal day to day activities is to be assessed at the date of the alleged discriminatory act, *Cruickshanks v VAW Motorcrest Limited* [2002] ICR 729, EAT.

15. *Goodwin v Post Office* [1999] ICR 302 established that the words of the s1 DDA 1995, which reflect the words of s6 EqA, require the ET to look at the evidence regarding disability by reference to 4 different conditions:

- a. Did the Claimant have a mental or physical impairment (the impairment condition)?
- b. Did the impairment affect the Claimant's ability to carry out normal day to day activities? (the adverse effect condition) Was the adverse effect substantial?
- c. (the substantial condition)
- d. Was the adverse effect long term? (the long term condition).

#### *Adverse Effect on Normal Day to Day Activities*

16. Section D of the *2011 Guidance* gives guidance on adverse effects on normal day to day activities.

17. D3 states that day-to-day activities are things people do on a regular basis, examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food., travelling by various forms of transport.

18. Normal day to day activities encompass activities both at home and activities relevant to participation in work, *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706; *Paterson v Metropolitan Police Commissioner* [2007] IRLR 763.

19. D22 states that an impairment may not directly **prevent** someone from carrying out one or more normal day to day activities, but it may still have a substantial adverse long term effect on how he carries out those activities, for example because of the pain or fatigue suffered.

20. The Tribunal should focus on what an individual *cannot do, or can only do with difficulty*, rather than on the things that he or she is able to do – Guidance para B9. *Goodwin v Patent Office* 1999 ICR 302, EAT stated that, even though the Claimant may be able to perform many activities, the impairment may still have a substantial adverse effect on other activities, so that the Claimant is properly to be regarded as a disabled person.

21. If an impairment would be likely to have a substantial adverse effect but for the fact that measures are being taken to treat or correct it, it is to be treated as having that effect - *para 5(1), Sch 1 EqA*. This is so even where the measures taken result in the effects of the impairment being completely under control or not at all apparent - para B13 Guidance.

### *Substantial*

22. A substantial effect is one which is more than minor or trivial, s 212(1) *EqA 2010*. Section B of the Guidance addresses “substantial” adverse effect.

23. Guidance para B2 states, “The time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial. It should be compared with the time it might take a person who did not have the impairment to complete the activity.” The Guidance gives an example of a 10 year old but with cerebral palsy who is able to carry out everyday activities for himself but gets tired very easily and it is harder for him to accomplish task such as eating, drinking, washing and getting dressed and the tasks take much longer to complete compared to a child of 10 without cerebral palsy. The Guidance states that this amounts to a substantial adverse effect.

24. Account should be taken of how far a person can **reasonably** be expected to modify their behaviour, for example by use of a coping or avoidance strategy, to reduce the effects of the impairment on normal day to day activities. Such a strategy might alter the effects of the impairment so that the person does not meet the definition of disability, Guidance para B7.

25. However, it would not be reasonable to expect a disabled person to give up normal day to day activities which exacerbate their symptoms, *Guidance B8*.

### *Progressive Conditions*

26. Where P has a progressive condition and the condition has (or has had) an effect on P’s ability to carry out normal day-to-day activities, but the effect is (or was) not substantial, “P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment,” *Para 8, Sch 1, EqA*.

27. “Likely” means, “could well happen”, *Guidance para C3*.

28. Para B19 of the Guidance explains that “Medical prognosis of the likely impact of the condition will be the normal route to establishing protection under this provision.”

29. Mere diagnosis of a progressive condition would not in itself be sufficient to meet the requirements of Schedule 1 para 8. A claimant must go on to show that it is likely that at some stage in the future there will be a substantial adverse effect on his ability to carry out normal day-to-day activities: *Mowat-Brown v University of Surrey* [2002] IRLR 235.

### *Long Term*

30. The effect of an impairment is long term if, inter alia, it has lasted for at least 12 months, or at the relevant time, is likely to last for at least 12 months.

31. Where an impairment ceases to have an effect but that effect is likely to recur, it is to be treated as continuing, *Sch 1 para 2, EqA 2010*. “Likely” again means, “could well happen”.

32. The correct test when assessing whether a condition would recur is to ask the following questions: (a) whether at some stage there had been an impairment that had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities; (b) whether the impairment had ceased to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities and if so when; (c) what was the substantial adverse effect; (d) whether that substantial adverse effect was likely to recur, not whether the illness was likely to recur.

33. The tribunal must be satisfied that the same effect was likely to recur and that it would again amount to a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities. The tribunal must therefore identify the effect of the impairment with a degree of precision. A substantial adverse effect resulting from a different impairment, which was not a consequence of the original condition, would not qualify as a recurrence, *Swift v Chief Constable of Wiltshire Constabulary* [2004] ICR 909.

34. In assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything occurring after that time is not relevant in assessing likelihood, Guidance para C4 and *Richmond Adult Community College v McDougall* [2008] ICR 431, CA.

### **Findings of Fact**

35. The Claimant served in the British Army's Royal Electrical and Mechanical Engineers (REME) from 1 November 1992 to 21 March 2001 as an Avionic Technician. During this time, he was injured several times, including damage to his lower back, which required physiotherapist treatment three times a week for five months and pain medication. He also suffered

damage to his knees, which required physiotherapist treatment and pain medication.

36. The Claimant told me that he has had to continue to use pain medication since and has a permanent repeat prescription.

37. The Claimant told me, and I accepted, that, when he left the British Army, he underwent a medical examination by a doctor appointed by Veterans UK with regard to his injuries and was awarded a War Disablement Pension.

38. He told me that he was initially assessed as being in the 15-19% disabled assessment band and was awarded a lump sum payment.

39. The Claimant said that, following a deterioration of the Claimant's injuries, he was re-assessed by a Veterans UK doctor as being 20% disabled and was awarded a weekly ongoing payments War Disablement Pension as a final assessment, as his disability was expected to be long term.

40. The Claimant produced a Certificate of Entitlement and Assessment in relation to his War Pension, dated 1 November 2007. This recorded that the Claimant had intermittent knee pain, especially on stairs, that the Claimant could not exercise for more than 10 minutes at a time due to pain in his knee, that he walked with a stiffened gait but normal pace, appeared to be in discomfort from the back condition, had limited extension and left straight leg raising and that the Claimant used analgesic medication as required.

41. At the 2007 War Pension Examination the Claimant said that he back "goes" every 1-2 months. He said that on some days he had no pain, but on other days he woke up in pain, jarring and twisting was painful. He was prescribed ibuprofen, diclofenac and Voltarol by his GP. The examining doctor observed the Claimant having some difficulty sitting, bending to the floor to put on his shoes and getting onto the couch. The doctor considered that this was consistent with other available evidence, page 76.

42. The doctor said that the Claimant's back problem was, "likely to cause difficulty with their prolonged sitting, bending and lifting ability". Page 78.

43. An MRI scan in 2009 showed softening of the cartilage behind the knee, which the treating Consultant said was consistent with the Claimant's reported symptoms. Page 82. The reported symptoms were pain in both knees when walking and standing, which limited his exercise. He also had occasional knee pain when sitting and when in bed, page 80.

44. The Claimants GP records showed only sporadic involvement of medical professionals regarding the relevant complaints:

45. Knee pain and dislocation of shoulder joint in January 2009. [160]

46. Low back pain in June 2012 [161].

47. Prescription for co-codamol in March 2015 [164].
48. Prescription for co-codamol in March 2017. [170]
49. Prescription for co-codamol in June 2018. [171]
50. Pain in the lower back for 2 days since doing cleaning in August 2018. The Claimant refused medical intervention other than a prescription for pain medication [171].
51. Reported pain in the left hip region for around a month on 13 August 2018, and was referred for X-ray. [174]
52. Reported ongoing pain left hip and right elbow region in September 2018. [175] Prescription for co-codamol. [176]
53. The Claimant told me that, in August 2018, he was having significant pain and stiffness in his hips and struggling to get up in the mornings for up to 30 minutes. He was also having trouble sleeping because of pain, and had difficulty doing most normal activities such as gripping things, dressing, lifting things and repetitive actions without pain medication.
54. Having spoken to his General Practitioner (GP) the Claimant was referred for assessment by a physiotherapist. The physiotherapist noted stiffness and restriction of movement as well as pain in the Claimant's hips and advised that the Claimant could have Osteoarthritis.
55. The Claimant had a further appointment with his GP and was then referred for an x-ray of his pelvis. The x-ray confirmed mild bilateral degenerative (osteoarthritic) changes to the hip joint. This was later confirmed and diagnosed as multi-joint pain with mild degenerative change by an MRI scan, page 116.
56. In February 2019 the Claimant had an ultrasound examination to rule out rheumatoid arthritis. The diagnosis was that the Claimant did not have any inflammation in his hand joints and as such the joint pains were caused by early degenerative (osteoarthritic) change in the joints as well as muscle tightness or weakness around the joints, page 121. He was referred to a physiotherapist.
57. In his disability impact statement, prepared in January 2020, the Claimant told me that his current symptoms caused sufficient pain and stiffness to limit his ability to drive for more than 1 hour as the pain becomes unbearable, even with pain medication. Even as a passenger, the Claimant required pain medication and was still in discomfort.
58. The disability impact statement stated that the Claimant could not walk for more than 10 minutes without the use of pain medication and, even with pain medication, he was limited to walking 20 minutes without breaks. The

Claimant also told me that he was unable to stand, unaided, for more than 10 minutes without severe pain and only up to 15 minutes with pain medication.

59. The Claimant agreed in evidence that his symptoms had worsened due to his hip injuries and that the disability impact statement was describing his symptoms in January 2020. He agreed that a GP report, written on 12 February 2020, described his symptoms in February 2020, and not during the relevant period.

60. In July 2018 in a pre-acquisition questionnaire C responded negatively to the question "is any employee suffering from unusual or extraordinary health problems?". [34-35]

61. There was little or no evidence in the Respondent's People HR records demonstrating that the Claimant took unplanned time off for sickness relating to disability or similar [137].

62. However, the Claimant described the pain in his knees as becoming quite acute when he sits for long periods and only being relived through pain medication and moving his legs to a different position. He said that he has difficulty going up and down steps, stairs or steep gradients because of knee and hip pain, and has to use elevators, escalators or other alternative methods where available. In evidence, the Claimant said that these knee problems had been consistent since 2007.

63. He also said that his back problems had been consistent. He said that he has consistently used co-codamol to manage his pain several times a week.

64. I had to decide whether to accept the Claimant's evidence regarding the consistency of his symptoms since 2007. The GP records did not record the Claimant being prescribed cocodamol on a regular basis. The Claimant said that he had a repeat prescription at his pharmacist and that he would not attend the GP to collect prescriptions or see a doctor about his analgesia save for intermittent reviews.

65. I decided that I did accept the Claimant's evidence that he had ongoing knee and back pain from 2007. Indeed, in 2009, his ongoing knee pain was confirmed by an MRI scan in 2009, showing softening of the cartilage behind the knee. The reported symptoms in 2009 were pain in both knees when walking and standing, which limited the Claimant's exercise. He also had occasional knee pain when sitting and when in bed, page 80. These symptoms were present more than 12 months after the 2007 report and were consistent with the knee symptoms described in the 2007 report.

66. I decided that I also accepted that the Claimant had ongoing back pain from 2007, and before, as described in the 2007 report. The Claimant continued to attend the GP intermittently and receive cocodamol for pain thereafter, apparently without question from the GP.



67. I accepted the 2007 medical report as accurate. It described an ongoing state of affairs. The Claimant had pain from his back and knee conditions, and there were intermittent, but repeated, exacerbations of it. On those occasions, the conditions together produced the symptoms recorded and observed at the 2007 War Pension examination: knee pain, especially on stairs; the Claimant could not exercise for more than 10 minutes at a time due to pain in his knee; he walked with a stiffened gait but normal pace; was in discomfort from the back condition, had limited extension and left straight leg raising; had some difficulty sitting; bending to the floor to put on his shoes and getting onto the couch. The doctor considered that these symptoms were all consistent with available evidence.

### Conclusion

68. As the medical report described an ongoing state of affairs, which the Claimant confirmed, I decided that these effects of the knee and back impairments recurred for at least 10 years before 2018. Given their repeated recurrence during this period, I concluded that, after about 3 years from 2007, the effects were likely to further recur, in that, given the previous history, they “could well happen”. From that point, in 2010 the effects were to be treated as continuing, Sch 1 para 2, EqA 2010.

69. I had to decide whether these effects amounted to substantial adverse effects on the Claimant’s ability to carry out normal day to day activities. I decided that they did. Having pain and difficulty on stairs, sitting, bending to the floor and getting onto a bed/couch were, together, more than minor adverse effects on the Claimant’s ability to carry out normal day to day activities. The activities described were not strenuous or difficult, but the Claimant experienced pain even doing those. D22 of the Guidance states that an impairment may not directly **prevent** someone from carrying out one or more normal day to day activities, but it may still have a substantial adverse effect on how he carries out those activities, because of the pain suffered.

70. Accordingly, I found that the Claimant was a disabled person at the relevant times. He had a physical impairment which had had a substantial adverse effect on his ability to carry out normal day to day activities, for more than twelve months.

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Employment Judge Brown

Dated: .....8 July 2020.....

Judgment and Reasons sent to the parties on:

13 July 2020

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For the Tribunal Office