



EMPLOYMENT TRIBUNALS

Claimant: Mr R Saleh

Respondent: Royal Mail Group Ltd

HELD: Via CVP

ON: 19th August 2020

BEFORE: Employment Judge Eeley

REPRESENTATION:

Claimant: Mrs C Fowler, solicitor

Respondent: Mrs R Cairney, solicitor

RESERVED JUDGMENT

1. The claimant was disabled at the relevant time by reason of supraspinatus tendinitis of the left shoulder.

REASONS

1. The case was listed for a preliminary hearing in order for the Tribunal to determine whether or not the claimant was disabled within the meaning of the Equality Act 2010 at the relevant time. For the purposes of the hearing I was provided with an agreed bundle of documents running to 225 pages which included the claimant's disability impact statement at p39. I read the documents to which I was referred by the parties. I heard oral evidence from the claimant via an interpreter and was assisted by oral submissions on behalf of both parties.

2. The claimant was employed by the respondent as a postman between 29th December 2015 and 7th August 2018. He pursues claims of unfair dismissal and disability discrimination as clarified in the case management summary of Employment Judge Brain dated 11th July 2019. The impairment relied upon by the claimant is supraspinatus tendinitis. The relevant period for which disability must be established for the purposes of this claim is the end of June 2018 to the end of August 2018. The respondent's position is that whilst the claimant currently meets the definition of a disabled person, it is not conceded that he did so at the material times, specifically up to and including his dismissal by the respondent on 7th August 2018. The respondent queries whether the adverse impact on the claimant's day to day activities was substantial. The respondent also queries whether the impairment met the longevity requirements of the Equality Act definition.

Findings of fact.

3. The claimant's GP records start at p58 of the bundle. There is some reference to intermittent back pain on the left-hand side in 2016 with reference to the scapula region. He attended his GP on 21st November 2017 and a shoulder examination was carried out. There was a query about rotator cuff disorder. A shoulder x ray was commissioned but it appears that the claimant did not book his appointment and so was removed from the waiting list.
4. At an appointment on 8th May 2018 the claimant was referred to a physiotherapist complaining of shoulder pain. On 28th June 2018 There is a record of supraspinatus tendinitis following ultrasound scan. The GP gave advice regarding exercises. On 11th July 2018 it is recorded that the claimant had been suspended from work. It is noted that he was in lots of pain and could not complete what he was doing. A fit note was issued and reference was made to areas where he was "walking up and down flats." A further appointment record on 3th August 2018 notes "back pain as well, left thoracic since started job. carries heavy bag on that side." It further notes that the claimant was made to deliver to flats which involved a lot of stairs with a very heavy bag. He is recorded as wanting a letter of support to state pain can be variable and aggravated by certain activities.
5. On 25th March 2019 there is reference to ongoing pain in the left shoulder. He was referred back to the musculoskeletal service/physiotherapy. He is noted as having no swelling and that movements were ok. It was noted that there was still heavy lifting at work- can't avoid it completely. There is also a copy of a fit note dated 11th July 2018 indicating that due to the supraspinatus tendinitis the claimant would benefit from amended duties including a period where he is not required to carry heavy postbags on his shoulders. There are also copies of GP letters dated 3rd August 2018 and 11th July 2018, apparently addressed to the claimant's employer.

6. The physiotherapy records run from p49 to p53 of the bundle. The first relevant record in the claimant's physiotherapy records is dated 13th May 2018 where it is noted that he is referred for physiotherapy. On 18th July 2018 he is recorded as follows: "2.5 yrs Hx gradual L shoulder and L scapula pain linked to postman job linked to lifting and carrying....worse when delivering to flats AGGS lifting EASES: rest Off work 2/52." On examination it appears that there was stiffness and tenderness. He also attended on 15th August 2018 when specific exercises were recommended and there was a note of a likely cuff weakness. It was noted that it was improved and should see a very good improvement with exercises. This appointment post-dated the claimant's dismissal from his employment with the respondent.
7. There were further physiotherapy attendances on 14th September, 12th October and 2nd November 2018 where examinations took place, advice was given and exercises recommended. He was noted as discharged to doctor on 2nd November 2018.
8. There was a further physiotherapy entry on 3rd April 2019. The results of a radiological examination were reported on 10th May 2019 and it was noted that: "The supraspinatus tendon is thickened and heterogenous consistent with tendinopathy." There were further attendances noted in June, July and August 2019. There is a discharge letter from physiotherapy dated 5th July 2019 which confirms that the claimant had had 9 physiotherapy appointments.
9. The claimant's evidence is that he first noticed back and shoulder pain around 2013-14 but it was not serious enough at that stage for him to take any action about it. The claimant says that he went to the GP about the pain in April 2016 and May 2016. At this point in time it was not very bad and did not bother him other than at night and on getting up. He was referred for an x-ray but this did not show anything abnormal. As the pain did not initially get any worse he ignored it. However, it did not go away and in late 2017 it started to get worse. He notes that he went to the GP again in November 2017 and was referred for an ultrasound scan of his shoulder. He did not receive the letter in relation to this as it was wrongly addressed. At a doctor's appointment on 21 November 2017 he was booked in for physiotherapy with regards to the pain in his leg. He changed GP practice in April 2018 and contacted his new GP in May 2018 as the shoulder pain was getting worse and it was increasingly affecting day-to-day activities. He was struggling at work. In May 2018 his new GP referred him for physiotherapy on his shoulder. His first appointment was not until July 2018. He also had an ultrasound scan of the shoulder in June 2018 and was prescribed ibuprofen painkillers. His GP diagnosed the condition as supraspinatus tendinitis. He was advised to alternate the shoulders on which he carried his mailbag. The claimant says the shoulder pain got worse to the point where he could not complete his duties at work.
10. The claimant's evidence is that he had a telephone consultation with the doctor on 11 July 2018 where he informed her that he had been accused of wilfully delaying the mail. She provided him with a fit note for 28 days and

recommended that he undertake amended duties where he did not have to carry a heavy postbag on his shoulders.

11. The claimant had his first physiotherapy appointment on 18th July and was given exercises. He returned to the GP again on 3 August as the pain was spreading to the left side of his back. He saw a different GP and she wrote a further letter explaining his condition. He had further physiotherapy appointments on 15th of August, 14th September, 12th October and 2nd November when he was discharged. He continued to do the physiotherapy exercises but the pain persisted and he returned to his GP in March 2019. He was re-referred for physiotherapy and prescribed painkillers for four weeks. The painkiller prescribed was naproxen as he found paracetamol ineffective. However, as a result of side-effects he did not continue with the naproxen. He had two further physiotherapy sessions in June and July and was discharged again. He notes that the pain had not disappeared but he was told to continue with the exercises as it could take a further year for his shoulder to heal. He has been told that if it does not, surgery may be an option if he wants to consider it.
12. The claimant says that from early 2018 until the present time the pain in the shoulder has stopped him from doing several things he used to do and affected the way he does other things. He asserts that he used to use an old model, normal size, Dyson Hoover which was bulky and heavy. That caused pain and discomfort so he bought a mini Hoover that has a ball that pivots when in use thereby making it easier to manoeuvre. The smaller size of the Hoover makes it lighter to carry. He says that Hoovering the carpeted stairs is still struggle and it takes him longer to do because of the smaller Hoover. He has to take several breaks whilst Hoovering which he did not have to do before the pain in the shoulder started. He has got rid of the rugs in the living room, bedroom and kitchen as they collected dirt and dust quickly and Hoovering the wooden flooring or the kitchen floor is a lot easier for him.
13. He finds it difficult to carry a full load of laundry up the stairs so he splits the washing into two halves to make it easier to carry. This means that the task takes longer. He finds it difficult to carry a full bag of rubbish outside to the wheelie bin and so he takes it out when it is half full and empties the bin inside more often. He tries to avoid dishes piling up for washing or he soaks them in hot water to make cleaning easier as prolonged standing whilst washing heavy utensils and equipment can strain his back and shoulder. Again, he takes a break between cleaning to avoid extra pain and discomfort. He has de-cluttered his kitchen to get rid of many utensils that were heavy and to minimise the strain on his shoulder. He buys some grocery items in bulk, such as 5-10 kg bags of rice flour. Whereas before he would have had no difficulty moving these around, he now empties them into smaller containers bit by bit to minimise the amount he has to move large bags.
14. The claimant explains that his back garden is uphill and quite big. He now takes breaks when mowing the grass and sometimes pays someone to do it for him. He now struggles to carry his son, who is a toddler, upstairs whilst asleep. He cannot play for too long with his son and cannot allow him to climb on his back or throw a ball to him because it causes pain and

discomfort in the shoulder. His shoulder pain affects his sleep. He gets up several times at night to change position and places extra pillows to help him sleep more comfortably. He tries to find car parking spaces nearest to the shopping place he intends to visit. Before the shoulder pain it did not matter where he parked but now he finds that he worries about carrying heavy bags back to the car or pushing the pushchair uphill back to the car. He always places his son sitting in the trolley at the supermarket to avoid having to pick him up whilst in the supermarket, as this causes pain. He no longer carries shopping bags from the trolley to the car but instead takes the trolley to the boot of the car for unloading. He no longer carries bread and milk back from the supermarket on foot as he finds it difficult to carry the milk home. He takes the car instead. He takes his son's pushchair with him even if his son does not sit in it as it helps to carry the shopping bags. When unloading the shopping into the house he takes many trips back and forth to the car to bring everything in. Carrying a case of water or a 10 kg bag of rice is a struggle and hurts. He has to park his car as close as possible to the front door when unloading shopping.

15. When working for the respondent he tried to alternate the shoulder on which he would carry the mail delivery bag as much as possible. Since his dismissal he has worked as a courier driver for Amazon. He has to drive long distances to deliver parcels. The long hours of driving made his shoulder pain worse. He has recently found more local work and has been able to do less of the Amazon work. Although working as a courier does not require him to carry heavy loads on his shoulder, the fact that the van is high means every time he gets back into the driver's seat he has to use his left arm to pull himself up into the seat. He needs to do this up to 120 times a day. When working for Amazon he is nearly always the person who is "debrief", as he requests this role. This means he has fewer parcels and deliveries to do. Whenever he has a heavy parcel to deliver he has to check if the customer is at home before taking the parcel with him as he doesn't want to carry heavy parcels unnecessarily. This means taking longer to do the deliveries as he has to go back-and-forth to the van.
16. The claimant used to play football but hasn't played for a long time. A couple of months ago he started to play one day a week after finding a group of mature players who were willing to play "friendly". However, he still worries before and during the match about someone knocking his shoulder or the ball accidentally hitting his shoulder. He therefore usually requests to be the referee. He used to enjoy going swimming but no longer does so as it causes pain in his shoulder. He used to regularly clean the inside of the car but now avoids doing this as he struggles with it. He purchased a new car on finance for the first time in 2017. Two years later he decided to settle his contract early and purchased a different car as he found the space in the car was not practical for his needs. The boot was too small making loading and unloading the shopping and pushchair difficult. He also struggled to get his son into the car seat. After changing his car in 2019 he found it easier to do all these things. He also changed to a car with an automatic gear box. His wife is expecting their second child and he is concerned about the limitations on his shoulder in relation to preparation for and caring for the new baby.

17. Much of the evidence the claimant gave about the impact of his shoulder injury on his day-to-day activities was apparently a description of his limitations as they currently are. When asked about the point in time when these limitations started he indicated that the pain got worse at the beginning of 2018. He was asked about when he felt the impact was serious enough to require him to go to the doctor. He confirmed that he did not go to the doctor earlier than April 2018 because he changed GP in April 2018. Prior to changing GP surgeries, he was travelling to Dubai for three weeks in February and March. When he came back he changed GP. His medical records were transferred between the two GP practices and this took 2-3 weeks. It was at this point that he went in for an appointment and he was referred for an ultrasound. He confirmed that this is why there was no GP visit between November 2017 and May 2018. This did not indicate a lack of symptoms during this time. He booked his appointment as soon as possible when he came back from travelling. I accept the chronology as he describes it and accept that his symptoms started to have the adverse impact on his normal day-to-day activities from the beginning of 2018. He further confirms that he was first prescribed medication in the form of ibuprofen in May 2018. Prior to that he had no medication or treatment for his shoulder symptoms. His first physiotherapy for his shoulder was after May 2018.
18. In the claimant's view the shoulder condition really started at the end of 2017 and not in May 2018. When asked why his GP entry on 4 May made no mention of any impact on day-to-day activities from his shoulder injury he confirmed that this was because he wasn't asked about it. He was just shown the outcomes and the recommendation was that he should ask for light duties. He also pointed out that the physiotherapy report mentioned it affecting his day-to-day activities. He was asked about the entry on 28 June 2018 where the doctor says "if needs note for amended duties at work can ring the duty doctor". It was put to him that he did not ask for such a note for amended duties at the time. The claimant says that he did not know he should ask for that. He says that he asked what to do if the pain got worse and it was the GP who would know the correct procedure. It was the GP who did not give him a letter until he was suspended. This was not the claimant's choice. When asked why he hadn't requested medication on 11 July 2018 the claimant confirmed it was because he takes medication if the doctor prescribes it but doesn't ask for it as he is not a doctor. It was put to him that even after the incident with the mail on 6 July 2018 the doctor still was not saying that the claimant was unfit for work (page 95). The claimant's position was that the doctor was supposed to issue that document before his dismissal. He was dismissed from work and only then received this document from the doctor. The claimant went to the doctor on 11 July to ask for a letter about his shoulder because he had been suspended. That letter is at page 96 of the bundle. The letter states "*I understand that this gentleman has recently been suspended from work as he has been struggling to complete his mail delivery duties. Mr Saleh is suffering from a severe supraspinatus tendinitis (damage to the rotator cuff of the shoulder) and as a result he is finding it extremely difficult to carry heavy bags on his shoulder during the working day. He is awaiting further treatment for this condition from our MSK service. When I last saw Mr Saleh at the GP surgery, I offered him a sick note but he was determined that he would carry on work for as long as possible. I'm sure that his failure to complete his delivery last week was not in any way deliberate; rather it was*

down to the pain he is experiencing in his shoulder. I would be grateful if you would take these factors into consideration when you meet with him in the near future. I provided a doctor's note for amended duties which I think you will require on his return to work." That letter was sent on 11 July 2018.

19. The claimant was questioned about his pattern of attendance for physiotherapy. It was pointed out that on 15 August 2018 some improvement was noted and that his condition should improve with exercises. It was also pointed out that there was a gap in physiotherapy appointments between November 2018 and March 2019. It was suggested that this meant his condition had improved during that gap in treatment. The claimant's position was that he did not go back to the doctor until March 2019 because he had been advised to continue doing the exercises for a year and to come back to the doctor if he didn't see improvement. He accepts that he went back to the doctor in December 2018 and January 2019 for unrelated issues. He confirmed that he always told his doctor about his shoulder if he was asked about other conditions. The claimant confirmed that it was only in March 2019 that the symptoms became severe.

20. The claimant explains that he only changed his car in 2019 because the contract only permitted him to change the car every two years. He had to wait. The implication is that, had there been no contract limitation, he would have changed to the automatic car which helped with his symptoms earlier than 2019. He confirms that he made the changes to his hoovering activities in 2018. He also made the changes to how he does the laundry and deals with refuse bins in 2018 – 2019. Likewise, the changes to his shopping habits happened in 2018. Whilst he confirmed that his symptoms only became severe in March 2019 he says that he did suffer symptoms and pain before that date - it just got worse when he worked for Amazon.

The law

21. Section 6 of the Equality Act 2010 states: "(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"

22. Schedule 1 to the 2010 Act confirms at paragraph 2 that 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. 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.

23. Section 212 of the Act indicates that "substantial" means more than minor or trivial. As per Aderemi v London and South Eastern Railways Ltd [2013] ICR 591 the Act does not create a sliding scale between matters which are clearly of substantial effect and those which were clearly trivial but provides that unless an effect could be classified as trivial or insubstantial it is necessarily substantial. When considering the statutory requirements, it is

important to focus on what the claimant cannot do or only do with difficulty. Paragraph B2 of the “Guidance on matters to be taken into account in determining questions relating to the definition of disability 2011” reminds me that 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 that impairment to complete an activity. I am also directed (by paragraph B3) to consider the way in which the activity is carried out compared with someone who does not have the impairment. I also reminded myself that it is necessary sometimes to consider the cumulative effect of the impairment on particular activities. Taken together more minor effects on particular activities may be substantial in their effect overall (paragraph B4). I also bear in mind that account should be taken of how far a person can reasonably be expected to modify his behaviour for example by using a coping strategy to prevent or reduce the effects of the impairment on the normal day-to-day activities. In some cases a coping or avoiding strategy might improve the effects of the impairments the extent that they are no longer substantial. In other instances, however, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities. (Paragraph B7 2011 guidance). It is important to consider the things that a person cannot do or can only do with difficulty. It would not necessarily be reasonable to conclude that a person who employed an avoidance strategy was not disabled (see paragraph B9 of the 2011 guidance).

24. “Normal day-to-day activities” is not defined by the Act although illustrative examples of day-to-day activities are set out in the appendix to the 2011 guidance. Day-to-day activities are things people do on a regular or daily basis and examples include carrying out household tasks and can include general work-related activities. The term “normal day-to-day activities” is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether an activity is a normal day-to-day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. It need not be carried out by the majority of people. Where activities are themselves highly specialised or involve highly specialised levels of attainment, they would not be regarded as normal day-to-day activities for most people. In some instances, work-related activities are so highly specialised that they would not be regarded as normal day-to-day activities. Paragraph D 10 of the 2011 guidance indicates that many types of specialised work-related or other activities may still involve normal day-to-day activities which can be adversely affected by an impairment. For example, they may involve normal activities such as sitting down, standing up, walking, running, verbal interaction, writing, driving, using everyday objects, and lifting or carrying everyday objects.
25. “Likely” should be interpreted as meaning that it “could well happen” (see paragraph C3 2011 Guidance). In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything which occurs after that time will not be relevant in assessing the likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age). (Paragraph C4 more 2011 guidance).

Conclusions

26. The claimant clearly had a diagnosed condition of supraspinatus tendinitis. This was a physical impairment. Taking into account all the available evidence (both written and oral) I conclude that his condition became more significant from the end of 2017/beginning of 2018. The symptoms became more significant and started to impact more and more on the activities of daily life.
27. The medical records show that he had started to suffer with this condition in particular in 2018. I accept that the medical records are not verbatim accounts of what he has told the doctor or the physiotherapist. They have not been prepared specifically with the Tribunal in mind and the claimant has no control over what is written in them. They are a summary prepared by the clinician and not by the claimant. It is not surprising that a GP would focus on the impact of his symptoms upon his ability to work particularly in circumstances where the claimant has asked for his doctor's support to get him back to work and avoid dismissal. I would not necessarily expect to see a description in the medical records of the impact of his condition on other aspects of day to day life. I do not conclude that the absence of such a description necessarily means that the shoulder condition did not in fact have such an impact on his day to day activities.
28. I accept that the claimant's shoulder condition was a physical impairment. I also accept that it had an impact on his ability to carry out day-to-day activities. The most obvious impact was on his ability to carry bags at work. Hence it is noted in his medical records. However, I also accept that an injury of this nature would impact upon his ability to carry out normal day-to-day activities. Lifting and carrying is a normal day-to-day activity whether he is carrying a mailbag at work or shopping bags or cleaning equipment around the home. The claimant has given a clear explanation of how he has modified the activities of daily living in order to accommodate his shoulder condition. He has made significant changes to the way he carried out household chores and shopping, for example. This is not surprising when one considers the nature of the claimant's condition. The shoulder joint is involved in very many bodily movements and is intrinsically part of many load bearing activities.
29. I accept, based on the evidence before me, that the impact as described by the claimant is more than minor or trivial and therefore constitutes a substantial adverse impact upon the ability to carry out normal day-to-day activities as required by the Equality Act 2010.
30. The main question is when the impact became substantial. Although the claimant accepted it didn't become severe until March 2019, the test for disability doesn't require "severe" symptoms. It just requires that the impact upon normal day-to-day activities is more than minor or trivial. The fact that the claimant went to his GP and sought treatment in May 2018 indicates that the symptoms were more than minor or trivial by this stage. Indeed, I

am prepared to accept what the claimant says about the reason why he delayed going to his GP, namely the fact that he moved GP practices and also was travelling in February and March 2018. This indicates that his symptoms deteriorated at the beginning of 2018 and probably needed treatment well before his first appointment with his GP, towards the beginning of 2018 (say February/March). I also accept his explanation for the gap in consultations between the first course of physiotherapy and his return to the GP to get the second course of physiotherapy. It is perfectly understandable that the claimant would take a period of time after discharge from physiotherapy treatment to see if the condition had resolved or improved and would only go back to the GP once it became clear that he had not seen the hoped-for improvement.

31. As at the relevant period in July and August 2018 it is clear that the claimant's impairment had not already had a substantial adverse effect on his ability to carry out normal day-to-day activities for the required period of 12 months. By that time he had had the requisite impairment for five or six months. However, the Equality Act also asks me to consider whether the impairment was likely to last 12 months as at the date of the alleged discrimination. Likely means "could well happen". There is no clear doctor's prognosis in the paperwork before me to indicate that the doctor had applied his or her mind to the likely duration of the impairment as at the date of the alleged discrimination. However, taking account of the nature of the diagnosis and the duration of the symptoms together with the ongoing need for treatment and the lack of any sustained improvement I consider that there is sufficient in the evidence for me to be able to conclude that the impairment "could well" last for 12 months as at the date of the alleged discrimination. It is notable that the claimant's July fit note did not say he had fully recovered and still requested amended duties at work. In addition, he had not had any form of treatment, such as surgery, which might be expected to completely cure him of the condition. He has also given evidence that he asked his manager not to give him rounds of deliveries with lots of hills and steps. All of this, and the musculoskeletal nature of the condition, leads me to conclude that the effects could well persist for 12 months or more when viewed at the date of the alleged discrimination.
32. I accept the evidence given by the claimant is honestly given to the best of his ability. He cannot remember precise dates for when things started to change but realistically he would not be expected to, given the nature of the condition. He did not suffer a traumatic injury as the result of an accident (in those circumstances a layperson could more realistically be expected to pin the date of deterioration to a specific incident). I accept that a shoulder condition will, of its very nature, make it more difficult to carry out the range of activities which use the back and shoulder. Picking up and lifting items is on the list of activities given in the examples to the Equality Act.
33. The respondent points out that there is only one mention of an impact on day-to-day activities in the record and that is after May 2019 (i.e. after the material time). The respondent points out that all references in the medical records are to carrying heavy bags as a postman or completing deliveries on hills or within flats. The respondent asked me to accept that this indicates there was no impact on wider day-to-day activities. I do not accept that. The problems at work were problems with lifting and carrying that is a day-to-

day activity. If it impacted on his ability to lift and carry at work then it is reasonable to accept his evidence that it also impacted upon lifting and carrying in day-to-day life at home. Likewise, the fact that the claimant was not signed off as completely unfit to work does not mean that there was no substantial adverse impact on day-to-day activities. The respondent asked me to take an overly simplistic approach and conclude that if he is fit for work in any capacity then he cannot be disabled. That cannot be right. If he needs amended duties at work but can still carry out some work that can be consistent with a substantial adverse impact on normal day-to-day activities. The fact that there was no medication taken for a period of time until March 2019 does not in of itself indicate that his symptoms weren't of sufficient severity. It also does not take account of the fact that he was given exercises to perform which is a legitimate form of treatment for the condition he suffered from. A patient's reluctance to take medication does not necessarily indicate that the symptoms or limitations of the condition are not sufficiently severe.

34. In terms of the longevity of the condition the respondent refers me to the physiotherapy records in August 2018 which indicate that the claimant should see a good improvement with exercises. The respondent says that this suggests that there was not likely to be a long-term impact at the material time. I do not accept that. 'Likely' for the purposes of the Act means "could well happen." I do not consider that the physiotherapy record negates the likelihood of continued significant symptoms and limitations. There might well be an improvement but, then again, his symptoms and impairment 'could well' continue at a more than minor or trivial level. Furthermore, that evidence post-dates the dismissal and so I should avoid taking it into account when considering whether the claimant disabled at the material time.
35. In light of the above I conclude that the claimant was indeed disabled at the material time. He had a physical impairment, which had a substantial adverse effect on his ability to carry out normal day to day activities and this was likely to last for at least 12 months.

Employment Judge Eeley

Date 28th September 2020

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