



EMPLOYMENT TRIBUNALS

Claimant

Mr Fabio Pacifici

v

Respondent

RD & M Gregg Ltd

Heard at: Bury St Edmunds (by CVP)

On: 27 August 2020

Before: Employment Judge M Warren

Appearances

For the Claimant: Miss E Dubar, Solicitor.

For the Respondent: Miss B Omotosho, Solicitor.

COVID-19 Statement on behalf of Sir Ernest Ryder, Senior President of Tribunals.

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The claimant was not a disabled person at the material time, (1 October 2018 to 14 October 2019).

REASONS

Background

1. Mr Pacifici was employed by the respondent as Head of Web Development from 23 October 2017 until his dismissal on 14 October 2019. He has brought two tribunal claims against the respondent: the first filed on 5 September 2019 claiming disability discrimination and unpaid holiday pay, the second filed on 13 January 2020 claiming unfair dismissal, disability discrimination, (including victimisation) and notice pay. The claim of unfair dismissal was rejected due to lack of service. The claims were consolidated on 30 January 2020.

2. This Open Preliminary Hearing to determine whether or not Mr Pacifici was a disabled person as defined in the Equality Act 2010 during the relevant period was set up by Employment Judge Bloom at a Closed Preliminary Hearing on 28 February 2020. I held a telephone hearing with the parties on 14 July 2020, giving the respondent leave to rely on a late witness, Miss Rhonda Stone.
3. Today's hearing was conducted by CVP. I heard live evidence, but the representatives have provided written submissions.

The Issues

4. The issue before me today is to determine whether or not Mr Pacifici was a disabled person as defined in the Equality Act 2010 during the relevant period. At the outset of the hearing the representatives agreed that the relevant period was 1 October 2018 to 14 October 2019. The condition relied upon by Mr Pacifici as amounting to a disability is Ulnar Nerve Entrapment (UNE). Expressly, Mr Pacifici does not rely on his back condition as amounting to a disability at the relevant time.

The Law

5. For the purposes of the Equality Act 2010 (EqA) a person is said, at section 6, to have a disability if they meet the following definition:

“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.*

6. The burden of proof lies with the Claimant to prove that he is a disabled person in accordance with that definition.

7. The expression 'substantial' is defined at Section 212 as, '*more than minor or trivial*'.

8. Further clarity is provided at Schedule 1, which explains at paragraph 2:

“(1) The effect of an impairment is long-term if –

- (a) it has lasted for at least 12 months,*
- (b) it is likely to last for least 12 months, or*
- (c) it is likely to last for the rest of the life of the person affected.*

- (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur”.*

9. As to the effect of medical treatment, paragraph 5 provides:
- “(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –*
- (a) measures are being taken to treat or correct it, and*
- (b) but for that, it would be likely to have that effect.*
- (2) ‘Measures’ includes, in particular medical treatment ...”*
10. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government’s office for disability issues entitled, ‘Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability’. Although I acknowledge that the guidance is not to be taken too literally and used as a check list, (Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19) much of what is there is reflected in the authorities, (or vice versa).
11. As to the meaning of ‘substantial adverse effects’, paragraph B1 assists as follows:
- “The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences and ability which may exist amongst people. A substantial effect is one that is more than a minor or trivial effect”.*
12. Also relevant in assessing substantial effect is for example the time taken to carry out normal day to day activities and the way such an activity is carried out compared to a none disabled person, (the Guidance B2 and B3).
13. Paragraph B12 explains that where the impairment is subject to treatment, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or the correction, the impairment is likely to have this effect. The word ‘likely’ should be interpreted as meaning, ‘could well happen’, (see SCA Packaging below). In other words, one looks at the effect of the impairment if there was no treatment. A tribunal needs reliable evidence as to what the effect of an impairment would be but for the treatment, see Woodrup v London Borough of Southwark [2003] IRLR 111 CA.
14. Similarly, on the question of whether an impairment has lasted or is likely to last more than 12 months, it is the substantial adverse effect which must have so lasted.

15. As for what amounts to normal day-to-day activities, the guidance explains that these are the sort of things that people do on a regular or daily basis including, for example, things like shopping, reading, writing, holding conversations, using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, taking part in social activities, (paragraph D3). The expression should be given its ordinary and natural meaning, (paragraph D4).
16. The guidance suggests that whilst specialised activities either to do with one's work or otherwise, are unlikely to be normal day-to-day activities, (paragraphs D8 and 9) some work related activities can be regarded as normal day-to-day activities such as sitting down, standing up, walking, running, verbal interaction, writing, driving, using computer keyboards or mobile phones, lifting and carrying (paragraph D10).
17. As to what amounts to a 'substantial effect', the guidance is careful not to give prescriptive examples but sets out in the Appendix a list of examples that might be regarded as a substantial effect on day-to-day activities as compared to what might not be regarded as such. For example, *'difficulty picking up and carrying objects of moderate weight, such as a bag of shopping or a small piece of luggage, with one hand'* which would be regarded as a substantial effect, as compared to, *'inability to move heavy objects without assistance or a mechanical aid, such as moving a large suitcase or heavy piece of furniture without a trolley'* which would not be so regarded.
18. When considering substantial effect, we should focus on what the claimant cannot do, (guidance B9). It would be wrong to weigh what a claimant can do with what a claimant cannot do and decide on balance, thereby, whether he is disabled.
19. The word, "likely" in the context of the definition of disability in the Equality Act 2010, means, "could well happen", or something that is a real possibility. See SCA Packaging Ltd v Boyle [2009] ICR 1056 HL and the Guidance at paragraph C3.
20. A claimant must meet the definition of disability as at the date of the alleged discrimination. That means for example, if the impairment has not lasted 12 months as at the date of the alleged discrimination, it must be expected to last 12 months as at that time, (not the date of the hearing). (Richmond Adult Community College v McDougall [2008] ICR 431 CA, Tesco Stores Ltd v Tennant UKEAT0167/19).
21. The indirect effects of an impairment must also be taken into account, (the Guidance at D22). For example, where the impairment causes pain or fatigue, that pain or fatigue may impact on the ability to carry out day to day activities to a degree that it becomes substantial and long term.

22. In Goodwin v Patent Office [1999] ICR 302 the EAT identified that there were four questions to ask in determining whether a person was disabled:
1. Did the Claimant have a mental and/or physical impairment?
 2. Did the impairment effect the Claimant's ability to carry out normal day-to-day activities?
 3. Was the adverse condition substantial? and
 4. Was the adverse condition long term?
23. In J v DLA Piper UK LLP [2010] IRLR 936 Mr Justice Underhill, President of the EAT at time, observed that it is good practice to state conclusions separately on the one hand on questions of impairment and adverse effect and on the other hand on findings on substantiality and long term effect. However, Tribunals should not feel compelled to proceed by rigid consecutive stages; in cases where the existence of an impairment is disputed, it makes sense to start by making findings about whether the Claimant's ability to carry out normal day-to-day activities is adversely effected on a long term basis and then consider the question of impairment in light of those findings. It is not always essential for a Tribunal to identify a specific 'impairment' if the existence of one can be established from the evidence of an adverse effect on the Claimant's abilities. That is not to say that impairments should be ignored, the question of impairment can be considered in light of findings on day-to-day activities.

Review of the evidence

24. I had before me a bundle of documents in pdf format running in total page 199. Within the bundle starting at page 76 is Mr Pacifici's Impact Statement dated 9 April 2020. Mr Pacifici confirmed under oath that the contents of that statement were true and answered questions in cross examination.
25. I also had before me a witness statement for the respondent by Miss Rhonda Stone. She too gave live evidence and was cross examined by Ms Dubar.
26. In his Impact Statement, Mr Pacifici said that he first experienced the symptoms of his UNE at the end of August 2018, with a tingling sensation in his right hand, pins and needles in his right arm, pain in the right side of his neck spreading down his shoulder proceeded by nausea, vomiting and dizziness in the evening.
27. In his Impact Statement, Mr Pacifici set out the impact he says the UNE had on his day to day activities. In answer to questions from me in evidence, he put a date on when each of those symptoms manifested themselves. I list the symptoms he described and the date he says that they started as follows:
- 27.1 Problems with typing and writing, 1 long letter taking several days to complete, from August 2018.

- 27.2 Difficulty preparing food, from August or September 2018.
 - 27.3 Difficulty brushing teeth, from August or September 2018.
 - 27.4 Difficulty getting dressed, since August or September 2018.
 - 27.5 Difficulty lifting anything of weight, since late October 2018.
 - 27.6 Difficulty opening packets, since September or October 2018.
 - 27.7 Difficulty shopping, since November 2018.
 - 27.8 Inability to undertake housework, from the end of August 2018.
 - 27.9 Unable to exercise – anything involving the neck being moved – from August 2018.
28. Mr Pacifici said at paragraph 15 of his Impact Statement that if he carried out any activity for more than 2 hours, pain in his back and his neck increased, “heavily”. If he worked at a computer for more than 2 hours, he developed paralysis for a few minutes in his ring finger and right arm. He said prolonged activity caused him vomiting and nausea and would wipe him out for a week.
29. There is correspondence in the bundle to which Mr Pacifici was taken during cross examination, correspondence passing between himself and his employers in which he expresses dissatisfaction with his rate of pay. His contractual rate of pay was £11 per hour. On 28 September 2018, he emailed the respondent to say that he was expecting a pay increase in the sum of £22.20 per hour. It is a robust email and shows that there had been an ongoing dispute about his rate of pay since July 2018. On 3 October 2018, Mr Pacifici was informed his demands would not be acceded to and that he would continue to be paid in accordance with his contract, subject to review the following January. Mr Pacifici replied the same day, stating that he was “*not a slave*” and that he was not prepared to continue working for £11 an hour. Subsequently on 7 October, he emailed the respondent to state that after taking advice, he understood the respondent was entitled to continue to pay him in accordance with his contract at £11 per hour and at this point, stated that he had a repetitive stress inflammation (UNE) and, “*I understand that you disagree with any change to the contract, but we need to agree with the new working hours as I won’t come back to full time work for at least the next 5-6 weeks*”. Whilst there is no doubt that he genuinely had an issue, that he was suffering from UNE which was causing him to be absent from work, he appears to have been linking his return to work to a change to his contract of employment.
30. Mr Pacifici began a period of absence from work through ill-health on 7 October 2018 and did not return.

31. By an email dated 19 September 2018, an Italian osteopath, (Alessandro Sartori) sent Mr Pacifici an email in which he confirmed Mr Pacifici's diagnosis of UNE in which he stated, "*it will take approximately 4/5 weeks for the nerve to recover*". Following this email in the bundle (page 167) there is at page 168 a note from an Italian doctor, (Dr Luigi Mossa, Specialist in Orthopedics and Traumatology). I am unable to ascertain the date of this document, it is inserted as if to suggest it follows from the email of September 2018, but that cannot be the case, the author is certainly different. The note from Dr Mossa refers to Mr Pacifici suffering from mixed UNE and an intra-foraminal hernia right C4-C5. In other words, this document relates both to the UNE and to the back problem. Dr Mossa recommends medication in the form of Nicetile, Bentelan, Nexium and also physiotherapy and postural gymnastics. I am not told what this medication is for, although I happen to know that Nexium is for gastric issues.
32. I was referred to medical notes in the bundle for November 2018 at pages 85 and 86, which relate to Mr Pacifici seeing a physiotherapist. The notes record Mr Pacifici having the following symptoms:
- "Right sided neck and upper limb pain, started end of August 2018 ...
- Constant pins and needles in right hand – no numbness but arm feels heavy.
- Some loss of strength in right hand.
- Pain moves down in his right arm, is not improving.
- Has not tried or taken any form of analgesia.
- Eases – rests at night with right arm elevated, sees an osteopath has a massage which gives short term relief, is not at work off work sick for this.
- Aggs – using keyboard, washing hand behind back movements.
- 24 hour sleep is disturbed at night, no change during the day, work agg his pain."
33. The respondent submits that these recorded symptoms suggest that Mr Pacifici's stated symptoms in his Impact Statement are exaggerated. Mr Pacifici answers that these are the physiotherapist's notes of what he said. I note that in cross examination, Mr Pacifici said that at this time he was not able to get off his bed and that he was suffering from vomiting because of the pain. One might perhaps have expected to see symptoms of that magnitude recorded here.
34. On 9 January 2019, Mr Pacifici had a telephone appointment with a physiotherapist which he did not keep. The medical notes at page 87 record that the physio telephoned him three times without an answer. In cross examination, Mr Pacifici said that he was waiting for the phone call and he does not know why the physiotherapist did not get through.

35. In cross examination, Mr Pacifici acknowledged that he refused the respondent permission to access his medical records in May and June 2019. He gave no explanation. One wonders why he might behave in that way, perhaps he was acting in bad faith?
36. On 5 June 2019, (page 132) a senior physiotherapist called Ms Samantha Barr wrote to Mr Pacifici, suggesting that his problems could be resolved with some simple exercises.
37. On 13 June 2019, a report from the Norfolk and Norwich University Hospital, Department of Clinical Neuro Physiology referred to a, "*very mild Ulnar Neuropathy focal to the right elbow*".
38. On 4 July 2019, the Norfolk Community Hospital Integrated Therapy Partnership wrote to Mr Pacifici's GP to say that they had written to him with advice and suggested exercises, that they have heard nothing further from him and that they had therefore discharged him from their care.
39. The medical notes at page 90 show that upon consultation, Mr Pacifici was offered an early appointment, which he declined. He did subsequently have an appointment with a physiotherapist on 2 September 2019 in relation to neck and right arm pain. It is clear from the notes of the consultation that there is a cross over from the issue with Mr Pacifici's arm and the problems with his lower back. It is not possible to distinguish between the arm issue and the back issue. When one reads of his expressed symptoms of feeling dizzy and losing his balance when walking, it does rather look as if the more serious issues are related to the back problem rather than the arm problem.
40. On 22 September 2019, Mr Pacifici wrote a letter to the respondent, (page 75H). In this letter he wrote:

"After only 1 hour sitting on a desk, typing and moving a mouse, I experience pain, needles and tinglings to my right hand. Pain to the elbow and neck become heavy with the activities continued for longer than an hour: and that leads to complete paralysis for a few minutes ... I am currently unable to spend over an hour, in good days ... on a computer or sitting on a desk for a prolonged time without feeling pain in the arm, neck and pain in the junction ... the neck pain keeps me down for days for days every week and I cannot sleep at night."
41. I have been referred to a report dated 11 October 2019 which begins at page 136. The author is a radiologist, Mr T Marshall. This is a report about Mr Pacifici's back problem, as it says in the heading, "MRI spine cervical". Mr Pacifici was at the time clearly in a great deal of pain because of his back issue.

42. I was referred to a letter from an orthopaedic consultant surgeon of the Norfolk and Norwich University Hospital dated 15 January 2020, which is at page 163. This states:

“I can confirm that you have Ulnar Neuritis which causes pain in the Ulnar nerve distribution of the right arm. I first reviewed you on 17 April 2019 with a history that you had had pain in the right arm since August 2018. The effect of the impairment will need to be assessed by an occupational therapist/work-based assessor.

It is impossible to project how long the impairment will last. Inflammation of nerves are quite rare. The next plan is to repeat the nerve conduction studies to ensure there is no worsening of actual nerve function and that is the next point of medical contact.

The pain you have in your right arm is consistent with the diagnosis of Ulnar Neuritis.

Because the outcome of this condition is unknown it at this stage cannot be called progressive.”

43. I should record that in Ms Dubar’s written closing submissions at paragraph 9, she suggests that this letter states Mr Pacifici’s UNE is a disability. It does not.
44. In his witness statement, Mr Pacifici states that he is taking Amitriptyline, Gabapentin and Ibuprofen. That is under the heading of “Ongoing symptoms and treatment” and is a reference to the medication which he is taking at the time of the witness statement i.e. April 2020. What is relevant to the decision which I have to make is of course the medication that he was taking during the relevant period, (October 2018 to October 2019) and what effect that medication may have had on alleviating the symptoms of UNE that he would otherwise have experienced. I am provided with no evidence about that.
45. The medical records at pages 194-199 certainly show that Mr Pacifici being prescribed Amitriptyline in January 2019 and again on 2 October 2019, along with Gabapentin on 18 October 2019 in the medical notes. It is far from clear whether the pain that is being addressed with this medication is pain caused by the issue with the arm, or the issue with the back. I can also see that he is prescribed 600mg of Ibuprofen on 11 December 2019. The difficulty I have is that I have been provided with these medical notes and am expected by the Claimant and his advisors to draw conclusions on their content, without any assistance from a medical expert.
46. Miss Omotosho makes the point that these notes show that Mr Pacifici was prescribed Amitriptyline in January 2019 and was not prescribed it again until October 2019, suggesting that he is exaggerating the pain in the meantime.

47. In cross examination, Mr Pacifici was questioned closely about evidence produced by the respondent of various online courses he had undertaken during his period of absence from work. The suggestion was that his undertaking these courses showed that he was exaggerating the effect of UNE on his ability to sit at and operate a computer. I did not find this evidence particularly useful; I was unable to tell to what extent those courses had to be completed in continuous prolonged periods sitting at a computer, nor the extent to which the operation of a mouse and use of a keyboard would have been necessary.
48. The evidence of Miss Stone was that between October 2018 and April 2020 she had witnessed Mr Pacifici riding bicycles, shopping, carrying baskets of groceries and out walking.

Findings of Fact and Conclusions

49. I am afraid that on balance, I did not find Mr Pacifici a credible witness. I reached this conclusion on the basis of the cumulative effect of the following points:
 - 49.1 There is a remarkable coincidence of timing between Mr Pacifici stating the major impact of his UNE, the culmination of his debate with the respondent over his rate of pay and his absenting himself from work.
 - 49.2 I had to press Mr Pacifici to answer my questions and put dates on when the symptoms he describes in his Impact Statement began to manifest themselves. I did not find his answers convincing and felt that he was simply linking everything to the period between August and October 2018 so as to help his case.
 - 49.3 He wrote long emails on 28 September, 3 October and 7 October 2018 at a time when he says he was experiencing debilitating symptoms.
 - 49.4 In cross examination he was unable to explain the gap between pain relief prescriptions in January 2019 and then later in October 2019.
 - 49.5 His explanation for the physiotherapist not being able to contact him despite ringing him three times in January 2019 was unconvincing. That together with his discharge on 24 June 2019 and his turning down an earlier appointment in August 2019, make his assertions as to the severity of his symptoms the less convincing.
 - 49.6 The report of 13 June 2019, (page 160) refers to, "very mild Ulnar Neuropathy".

- 49.7 Lastly, although I do not place too much emphasis on this, there is Miss Stone's evidence of his cycling and carrying groceries. I entirely accept that people suffering from episodes of pain may well experience it in varying degrees from time to time and have varying degrees of mobility.
50. It seemed to me that Mr Pacifici and indeed his solicitors, appeared to be eliding the symptoms of Mr Pacifici's back issues, (which are not relied upon) with those of UNE. I conclude and find that during the relevant period, Mr Pacifici undoubtedly experienced an impairment from his UNE which consisted of pins and needles in his right arm, some numbness in his fingers and some pain in his right arm which will have caused some discomfort after prolonged use of a mouse and keyboard, (a day to day activity). However, I find that such symptoms were no more than trivial and did not amount to a substantial impact on his ability to undertake day to day activities. For this reason alone, I find that Mr Pacifici does not meet the definition of a disabled person at the material time.
51. Had I found otherwise, the difficulty I would have faced would have been to determine at what point in time it could have been said that Mr Pacifici's UNE met the definition. As at August 2018, the impairment had not lasted for more than 12 months. The only evidence which I have as to whether at that time it could have been expected to last more than 12 months is the Italian physiotherapist's suggestion that the symptoms would last 4 or 5 weeks. It is not a progressive condition. Therefore, very clearly as at August and September 2018, he would not have met the definition of a disabled person, even if his symptoms had amounted to a substantial impact on his day to day activities, (which they did not).
52. I would then have faced the difficulty in determining at what point between October 2018 and 8 August 2019, (at which point the symptoms would have lasted for 12 months and he would then have met the definition of a disabled person had the impact been substantial) could it have been said that the impairment was likely to last more than 12 months. I have no evidence on this whatsoever, which would have left me apparently having to guess at what point a medical expert might have said the state of this impairment is such now that it could be expected to last more than 12 months. In the absence of such evidence, I would have had to have concluded that he became disabled in late August 2019, on the anniversary of the symptoms first appearing. Presently, that issue does not arise.
53. A further problem which I would have had, had I not found that as a matter of fact, the impairment does not amount to a substantial one, is the effect of medication. I have no clarity in the evidence provided to me as to whether the medication provided, (which did he did not start to take until January 2019) was to alleviate the back pain, the problem with the UNE, or both. Nor do I have evidence to assist me in determining to what extent such impact as there was, would have been worse without the medication.

54. For these reasons, I conclude that Mr Pacifici does not meet the definition of a disabled person in the Equality Act 2010.

Case Management

55. Although the claimant will not be able to proceed with his case that he was discriminated against by reason of disability, EJ Bloom identified a claim of victimisation, (which does not require the claimant to actually be disabled) and for holiday pay. I have therefore arranged for the case to be listed for a further telephone closed preliminary hearing on 18 December 2020.
56. I have also listing the case for a final hearing on 25 and 26 February 2021. The parties have not been consulted about those dates. If they are inconvenient for some compelling reason, the hearing may be postponed to a later date on provision of an explanation with supporting evidence, provided the same is supplied within 14 days of the date this decision is sent to the parties.
57. If the parties can agree on a list of issues and case management orders that meet the approval of an employment judge and provided that there are no issues with the final hearing dates, the preliminary hearing can be vacated.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

Preliminary Hearing

58. This case has been listed for a telephone closed preliminary hearing in order to identify the issues and make case management orders at 10:00 on **18 December 2020**.

Final Hearing

59. This case is listed for a final main hearing at The Magistrates Court Building, Bishopgate, Norwich, Norfolk, NR3 1UP with a time estimate of 2 days on **25 and 26 February 2021**.

Employment Judge M Warren

Date: 13 October 2020

Sent to the parties on: 21st Oct 2020..
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For the Tribunal Office