Case No: 1400932/2020/V
1402205/2020/V

EMPLOYMENT TRIBUNALS

Claimant: **Mr W Chant**

Respondent: **Porton Biopharma Ltd**

PRELIMINARY HEARING

Heard at: **Bristol (remotely by CVP)** **On: 14 January 2021**

Before: Employment Judge Midgley

Representation
Claimant: In person.
Respondent: Mr M Raine, Director of Engineering.

JUDGMENT

ON A PRELIMINARY ISSUE

The claimant's conditions of cardiovascular disorder and hypertension amounted to physical disabilities for the purposes of s.6 and Schedule 1 EQA 2010 at the material times between February and November 2019.

REASONS

Claims and Parties

1. By a claim form (on 1400932/2020) presented on 21 February 2020 the claimant brought a complaint of discrimination on the grounds of disability. Early conciliation through ACAS commenced on 5 January 2020 and a certificate of early conciliation was issued on 24 January 2020.

2. On 28 April 2020, the claimant presented a claim of unfair dismissal (1402205/20) which was joined with his initial claim. Early conciliation in respect of that claim commenced on 15 January 2020 and a certificate on 24 January 2020

3. The claimant relied upon a condition of hypertension as a disability for the

purposes of the claims. The respondent disputed that the condition was a disability, and the case was listed for this preliminary hearing to decide the issue.

Procedure, Hearing and Evidence

4. In preparation for the hearing the parties had agreed a bundle of 44 pages, consisting of relevant medical evidence. In addition, I had the benefit of the following:

    4.1. A disability impact statement from the claimant

    4.2. A witness statement from the claimant

    4.3. A statement from Stuart Naylor from the respondent

5. I heard evidence from the claimant by affirmation and the claimant answered questions from Mr Maine and from me. I heard concise verbal arguments from the parties.

Factual Background

6. I make the following findings on the balance of probabilities on the basis of the evidence which I have heard and from that contained in the agreed bundle.

7. The claimant, Mr Chant, was first diagnosed with a cardiovascular disorder on 18 December 2016. He had had issues with high blood pressure prior to that and had been prescribed at various times: ramipril, bendroflumethiazide, amlodipine, indapamide. He was advised to restart taking ramipril, having ceased to use it and the other medications previously, and to consider making changes to his lifestyle, including taking more exercise and reducing his alcohol intake.

8. As a consequence, his symptoms settled in the sense that he was did not regularly will frequently suffer from the symptoms of high blood pressure again until approximately summer of 2017.

9. In January 2017 the claimant's blood pressure medication was changed to bisoprolol. In the spring of 2017 the claimant ceased taking bisoprolol because he feared that it might interfere with his diabetes medication. His high blood pressure was therefore less effectively medicated.

10. On 26 June 2017 the claimant suffered an episode of extremely high blood pressure, which was recorded at 180/110. He sought treatment from his GP who signed him off work, due to stress and hypertension, and advised him not to participate in strenuous exercise. In consequence the claimant ceased attending the gym. The claimant was absent from work until 15 August 2017.

11. Throughout the summer and into early autumn 2017 the claimant suffered from episodes of high blood pressure and hypertension which, when acute, caused him to feel anxious, fatigued, and nauseous and required him on occasion to stop his car journey on his route to work to be sick. On occasion, he would suffer from

joint pains and severe fatigue.

12. On 16 October 2017 those symptoms led him to seek further support from his GP. He was then treated with candesarten and doxazosin in addition to the ramipril.

13. It appears that the combination of those medications largely stabilised the claimant's condition and ameliorated his symptoms effectively until approximately October 2018. The claimant had suffered from a rash on his cheeks on and off since late August 2018 which he believed to be attributable to the medication, so he ceased taking doxazosin because he feared that it and the ramipril were cancelling each other out and may have been responsible for the rash. He sought support from his GP and the 10th and 29th of October. On the 29th he complained of tightness in his chest and pains across his back. He voiced his concern that ramipril might be the cause and so had ceased to take it at that stage. Those symptoms were the inevitable consequence of the claimant's decision to cease his medication and the consequent elevation of his blood pressure to 170/110.

14. The claimant describes in his witness statement that the chest and back pains also caused a shortness of breath and difficulty with walking, and that he would on occasion suffer from blurred vision, his vision pulsing with his heartbeat. He stated that as a result he had difficulty in concentrating and focusing when such pulsing occurred. It is unclear when those symptoms first began, there is no reference to them in the medical consultations from October 2018 or November 2018. In any event, at a further consultation November 2018 with his GP, the claimant was advised to restart his use of the medication and follow that advice. The claimant was at that time still suffering from the symptoms described above.

15. Once again, the claimant's condition stabilised with the use of medication and the symptoms described above largely debated. However, in February 2019, following an argument with a work colleague, the claimant had a further episode of high blood pressure (200/100) which was again accompanied by chest pain kidney pain and blurred vision and fatigue. He sought support from his GP on 4 February 2019 and was given a fit note with stress and hypertension which was extended until 3 March 2019 and his dosage of bisoprolol was increased.

16. The claimant continued to suffer from occasional acute sentence aside blood pressure, including a tight chest, nausea, joint pains and occasionally positive vision.

17. In July 2019, the claimant was sufficiently concerned about his health to seek a second opinion. He therefore changed GPs and underwent a full health screening on 4 July 2019. During that consultation the claimant reported that he walked briskly every day, approximately 10,000 steps. In his evidence the claimant explained that he tried exercise as much as possible whenever his symptoms allowed, but when they were acute, he struggled to walk more than a hundred metres. His medications were increased, and he was started on amlodipine and lercanidipine.

18. On 2 September 2019 the claimant suffered another acute episode of hypertension, having ceased his use of a beta blocker two weeks before as it was causing him to feel fatigued and drowsy at work. Again, he sought medical

support from his GP, and he was prescribed furosemide in addition to his other medications. On that occasion he reported suffering from palpitations lightheadedness confusion, a slight tight chest a dull headache and mildly blurred vision. He described those as chronic problems but then having worsened recently; at the GP recommended a cardiology review which was eventually scheduled for 31 October 2019.

19. On 9 September his GP signed him off work for two weeks with extreme hypertension, which required observation, as the change in medication had not reduced his blood pressure and the kidney pains and tightness in his chest continued.

20. The claimant returned to work on 23 September but continued to suffer with fatigue and occasional blurred vision. The claimant was referred for an occupational health assessment which took place on 3 October 2019. The resulting report dated 7 October 2019 noted the following:

    20.1. the claimant had been advised by the DVLA not to drive as a consequence of his symptoms;

    20.2. if his blood pressure reached very high levels, he "experiences his symptoms of chest tightness, palpitations, low back pain and visual disturbances [and on those occasions] he has been advised to seek urgent medical attention which may lead to absence from work until it returns to normal."

21. The claimant was once again signed off as unfit for work on 21 October as a consequence of anxiety and uncontrolled hypertension. The fit note expired on 3 November 2019. In the interim, on 31 October 2019 the claimant was diagnosed with an enlarged left ventricle due to prolonged hypertension.

22. On 4 November 2019 the claimant resigned his employment.

The Issues

23. The relevant issues were as follows

    23.1. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? In particular:

        23.1.1. Did the claimant have a physical or mental impairment. The claimant argues that he had a physical impairment, namely a cardiovascular condition and/or hypertension.

        23.1.2. Did it have a substantial adverse effect on the claimant's ability to carry out day-to-day activities?

        23.1.3. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

        23.1.4. Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

23.1.5. Were the effects of the impairment long-term? In particular:
23.1.5.1. did they last at least 12 months, or were they likely to last at least 12 months?
23.1.5.2. if not, were they likely to recur?

The Relevant Law

24. Section 6 of the Equality Act provides as follows:

(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.

25. Schedule 1 to the Equality Act 2010 contains further clarification on the matters to consider when determining disability and provides in so far as is relevant:

Long-term effects
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 at 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.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

Effect of medical treatment
5 (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 and the use of a prosthesis or other aid.

26. The Equality and Human Rights Commission Guidance ("the Guidance") was issued in accordance with s.6(5) EQA and by virtue of section 12(1) to Schedule 1 a Tribunal must take it into account when determining whether a person is a disabled person.

27. The meaning of impairment is dealt with at A3 of the Guidance which provides:

> "the term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness."

28. Thus 'Impairment' in s.6 EQA 2010 bears 'its ordinary and natural meaning… It is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects' (McNicol v Balfour Beatty Rail Maintenance Ltd 2002 ICR 1498, CA) The term is meant to have a broad application.

29. In Rugamer v Sony Music Entertainment UK Ltd [2002] ICR 381, EAT, the Employment Appeal Tribunal suggested the following definition of physical or mental impairment under the DDA: 'some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition'.

30. The meaning of 'substantial adverse effect' is considered at section 212(2) EQA 2010 and paragraph B1 of the Guidance which provides "a substantial effect is one that is more than a minor or trivial effect".

31. The Tribunal's focus, when considering adverse effects upon day-to-day activities, must necessarily be upon that which claimant maintains he cannot do as a result of his physical or mental impairment" (see Aderimi v London and South Eastern Railway Ltd UKEAT/0316/12, [2013] ICR 591).

32. In that context, the appendix to Schedule 1 of the Equality Act 2010 includes examples of factors which it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. These include "a total inability to walk, or inability to walk only a short distance without difficulty; for example because of physical restrictions, pain or fatigue, and persistent distractibility or difficulty concentrating."

33. Conversely the guidance indicates that the following factors would not reasonably be regarded as having such an effect: "experiencing some tiredness or minor discomfort as a result of walking unaided from a distance of about 1.5 kilometres or 1 mile; inability to concentrate on a task requiring application of several hours."

34. Day-to-day activities include normal day-to-day activities and professional work activities, even if there is no substantial adverse effect on activities outside work or the particular job (see Igweike v TSB Bank Plc [2020] IRLR 267). In conducting that assessment, the tribunal should disregard the effects of treatment (see Guidance at sections B12 to B-17).

35. The Guidance addresses recurring or fluctuating effects at C5. Examples of how to address episodes of such conditions as depression, or conditions which result in fluctuating symptoms are given at paragraphs C6, C7 and C 11; they provide:

> C6. If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long term.

C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the "long-term" element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.

C11. If medical or other treatment is likely to permanently cure condition and therefore remove impairment so the recurrence of its effects would then be unlikely even if there were no further treatment, this should be taken into consideration when looking at the likelihood of recurrence of those are facts. However, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stops, as is the case with most medication, then the treatment is to be ignored and the effect is to be regarded as likely to recur.

36. In order to determine whether a claimant has a disability the tribunal should consider four questions (see Goodwin v Patent Office [1999] ICR 302, EAT):-

    (a) did the claimant have a mental and/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')
    (c) was the adverse condition substantial? (the 'substantial condition'), and
    (d) was the adverse condition long term? (the 'long-term condition').

37. Appendix 1 to the EHRC Employment Code states that 'There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause' — para 7. This endorses the decision in Ministry of Defence v Hay 2008 ICR 1247, EAT, where the EAT held that an 'impairment' under S.1(1) DDA could be an illness or the result of an illness, and that it was not necessary to determine its precise medical cause.

38. It will not always be 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 — J v DLA Piper UK LLP 2010 ICR 1052, EAT. Similarly, it is not always necessary to identify an underlying disease or trauma where a claimant's symptoms clearly indicate that he or she is suffering a physical impairment — College of Ripon and York St John v Hobbs 2002 IRLR 185, EAT.

Discussions and conclusions

39. I address to the questions set out in Goodwin.

Did the claimant have a mental or physical impairment?

40. There is no dispute in this case that the claimant had a physical impairment, namely hypertension and high blood pressure.

Did the impairment affect the claimant's ability to carry out normal day-to-day activities?

41. There is some dispute as to the nature of the impairment caused by the condition, but I observe that the claimant was first diagnosed with a cardiovascular disorder in December 2016 and since that date has been prescribed medication to manage that condition which he has to take daily.

42. His condition of hypertension appears to have become acute once more or in about June 2017. Since that date, the claimant has required a cocktail of medications and has been trialed at different times on ramipril and bisoprol, subsequently (in 2017) doxazosin and candesartan and in 2019 with bendroflumethizide, amlodopine, and indapamide, and lercanidipine and furosemide. I conclude that absent the effect of that medication, the claimant's symptoms would have been even more acute.

43. I remind myself of the guidance in Igweike that normal day-to-day activities include both professional work activities and day-to-day activities, even though you can do one but not the other. In the circumstances of this case I am persuaded on balance that when the claimant's hypertension was acute there was a material adverse impact on the day-to-day activities in terms of the claimant's ability to walk even short distances because of chest pains and shortness of breath, his ability to focus and concentrate because of general fatigue and blurring of vision.

44. I am therefore satisfied on the balance of probabilities on the facts of this case that there was an adverse impact on day-to-day activities and that it was substantial because it was more than trivial in material period.

Was the adverse condition long term?

45. I turn finally to consider whether the condition was long-term. I am satisfied from the evidence before me that the claimant has established that it was.

46. The condition first began in earnest in 2016 and has persisted, albeit with fluctuating symptoms, being acute in the period June to October 2017 and February to October 2019. The acute symptoms occurred with greater regularity from July 2017, and particularly from the autumn of 2018. However, the symptoms were not so significant or so regular that the claimant required any significant periods of sickness absence from work in 2018. The most acute and severe the symptoms developed in late 2018, when the claimant sought advice and support from his GP, including changing trial different drugs. The symptoms became more acute and more regular in 2019, requiring the claimant take sickness absence in February, July, September, and October.

47. I conclude therefore that the adverse condition has lasted at least 12 months.

Conclusion on disability

48. It follows from those matters that I conclude that the claimant was a disabled person for the purposes of Section 6 EQA 2010 at the material times for the

purposes of this claim, namely between February and November 2019.

Employment Judge Midgley
Date: 28 January 2021

Judgment and Reasons sent to Parties: 12 February 2021

FOR THE TRIBUNAL OFFICE