



EMPLOYMENT TRIBUNALS

Claimant: Mrs L Brown

Respondent: Scobie Vending Services Limited

Heard at: London South Croydon via CVP

On: 2 December 2020

Before: Employment Judge Sage

Representation

Claimant: In person

Respondent: Ms Balmelli of Counsel

REASONS

Requested by the Claimant

1. The hearing was slightly delayed because the parties were having problems with the connecting on the CVP platform. Both sides consented to this matter being heard remotely via CVP.

The Issues

2. It was agreed at the beginning of the hearing that the issues in the case where as follows :
 - a. Did the Claimant have a physical or mental impairment ;
 - b. Did that physical or mental impairment affect her ability to carry out day to day activities:
 - c. Was the adverse impact substantial :
 - d. Was the adverse impact long term?
3. These questions should be posed sequentially. The issue of whether something has a substantial adverse effect is a matter for evidence and there must be a causal link between the impairment and the substantial adverse effect. Substantial means more than minor or trivial and the comparison must be with someone who is not impaired and section B1 of the Guidance was referred to. The focus should be on what the Claimant cannot do or can only do with difficulty.

The Witnesses

4. The witnesses before the hearing were the Claimant and for the Respondent Ms Tricarico.
5. At the commencement of the hearing there was a discussion about the impairments relied upon by the Claimant as there was a reference in the hearing bundle to depression and her shoulder injury. She confirmed prior to taking the witness stand that she only relied on the shoulder injury.

Findings of Fact

6. The medical evidence in the bundle in respect of the Claimant's shoulder showed that the cause and extent of the injury was unknown before surgery, however after surgery it was confirmed to be a dislocation and torn lebrum (as confirmed in her disability impact statement on page 37 of the bundle). The physical impairment affected her right shoulder and neck and caused pain and discomfort.
7. The Claimant confirmed in cross examination that she had difficulties carrying out basic tasks and if she overused the arm or performed repetitive activities. If overused it caused the arm to ache and become painful. In her disability impact statement (page 37) the Claimant identified experiencing difficulties with things like brushing her hair and cleaning her teeth and doing household chores (such as hoovering, ironing and washing up). She confirmed in cross examination, that the pain caused by the shoulder injury became unbearable in November 2018. The Claimant accepted when taken to a document at page 64 of the bundle, which was an entry in her GP records on the 28 December 2017, that the pain in her shoulder was better at weekends but worsened towards the end of the day. The Claimant confirmed that during the time she was employed by her previous employer, she was involved in heavy data inputting which made her neck and shoulder a lot worse.
8. The Claimant joined the Respondent company on the 30 April 2018. When she joined the company she ordered a gel support for her wrist and a keyboard wrist support. She also swapped her chair for one that was more comfortable. The Claimant confirmed that when she was working for the Respondent, she was able to vary her tasks in order to minimise the adverse impact she suffered as a result of typing or using a mouse. The Claimant had to take painkillers at times to manage the pain.
9. The Claimant had surgery to repair her shoulder on the 12 February 2019 and a bankart repair was carried out on a dislocation and a torn lebrum. She was required to wear a sling for 6 weeks after the procedure and was signed off for the 6 week recovery period.
10. The Claimant told the Tribunal that the operation was not a complete success because she still experienced difficulties with daily tasks and still had difficulty reaching her arm behind her and struggled with heavy lifting and repetitive tasks. It was the Claimant's evidence that in her view, it could take over a year or more for her to be what she described as "fully mobile".

11. The Claimant was taken in cross examination to a number of documents firstly page 143, which was a letter written by Mr Selvan, the consultant surgeon who carried out the operation, after a clinic on 4 March 2019. It was his view that he carried out a satisfactory repair and the Claimant was advised to keep her arm in a sling for six weeks and to follow regular physiotherapy. She was advised to take painkillers to manage the pain. The medical evidence therefore concluded that the operation successfully repaired the injury but the Claimant would need physiotherapy to increase her mobility. There was no medical evidence to suggest that the procedure was not successful.
12. The Claimant returned to work on 24 April 2019 on reduced hours. The Tribunal saw the return to work minutes on page 152 of the bundle. It was put to the Claimant in cross examination that in her return to work meeting she conceded that she did not have a disability as the box on the form completed during the meeting indicated that she replied in the negative when asked this question. The Claimant denied that these were the minutes of the meeting and could not recall this being discussed. The Tribunal did not find this evidence to be particularly compelling as the minutes were not agreed by the Claimant and neither were subsequent minutes that appeared in the bundle at page 157.
13. The Claimant confirmed in cross examination that after her return to work she was able to drive, wash and brush her hair; she clarified that she was able to do this a couple of days before her return to work on the 24 April. The Claimant explained that she was able to manage her own workload and change up tasks to manage any discomfort after her return. The Tribunal find as a fact that both before and after the procedure, the Claimant was able to adjust or modify her behaviour to lessen the adverse effect that her physical impairment had on her daily activities.
14. The Tribunal was taken to a letter written by the Claimant's consultant surgeon at page 155 of the bundle, after a clinic on 27 May 2019, where he stated that the Claimant still had "*some stiffness, especially on external rotation and full elevation and is currently having physiotherapy. She will have a phased return to work and altered hours and steadily return to activities*". This letter indicated that the Claimant would return to his clinic in three months' time which was what he described as a final check up. There was no mention in his letter that the Claimant was experiencing significant pain apart from stiffness or that she was unable to carry out normal daily activities. The reference in the letter to her being able to steadily return to daily activities strongly suggested that he envisaged that she would make a full recovery and not suffer an impairment going forward.
15. The Tribunal was then taken to page 101 of the bundle, which was a consultation which took place on 31 May 2019 with Mr Johnson a Clinical Practitioner; it was recorded that the pain the Claimant experienced in her neck was now much reduced (from 10/10 whilst at work to 3/10 when at the appointment). The Claimant also stated that the repetitive use of the arm and using a mouse was the prime aggravator. There was no mention of the Claimant finding it difficult to perform household chores such as Hoovering, cleaning or cooking. The only aggravator referred to in this

consultation was when using a mouse. This record also showed that the shoulder was improved and when not at work the pain was reported to be significantly reduced.

16. At page 102 the Tribunal was taken to a medical record dated 24 June 2019 with Mr Moran Clinical Practitioner where the Claimant was recorded to have said "*feels shoulder is improving slowly. More movements and less pain.*" There was no reference in this consultation to the Claimant experiencing difficulties with daily household chores. This consultation a few weeks before dismissal reported a significant improvement with less pain and greater use of the arm. There was no indication that the Claimant was experiencing any adverse effects on her ability to care for herself or to carry out daily activities.
17. The Claimant was dismissed on the 10 July 2019.
18. The Tribunal was then taken to the Claimant's consultant surgeon's letter dated 26 July 2019, after a consultation on the 22 July 2019 at page 175 of the bundle. This consultation took place 12 days after dismissal. The letter stated that the Claimant was doing well but was suffering from some stiffness as a result of surgery. It was noted that the following was included in the letter "*Mrs Brown has work commitments, but still has some disability and must take things easy. This disability could last for a year from the date of surgery. The stiffness could take a year from the date of surgery to improve*". The Claimant was taken to this quote in cross examination and explained that she told her consultant of her dismissal and he included this quote to backup what she had told the employer at the time. This was the first time that the consultant used the word disability when referring to the shoulder movement and function.
19. The Tribunal find as a fact that the consultant included the reference to disability and the stiffness taking one year to resolve in the letter because this is what he was told by the Claimant. Although the Claimant told the Tribunal that the surgeon wouldn't have written the letter in this way unless he believed it, the Tribunal find as a fact that the reference to one year in this letter was to the stiffness experienced post surgery. The Tribunal saw in the medical records that the pain suffered by the Claimant was significantly reduced by 70% by this time as reflected in the above medical reports. There was no evidence to suggest that the Claimant was suffering the substantial pain experienced prior to her operation. The medical records leading up to his letter all suggested that the pain the Claimant experienced had reduced and her shoulder was improving.
20. Although the Claimant told the Tribunal that she had previously been informed that she would suffer a further one-year of pain after the operation and therefore this would amount to disability, there was no evidence in the bundle that this was the case. It was noted that the consultant's previous letters had referred to a six week recovery period and the need to have physiotherapy. Although the Claimant told the Tribunal she was told it would take up to a year to heal, the letter on page 175 did not state that, it only referred to the stiffness taking some time to improve.

21. There was a medical entry for the 17 September 2019 written by Mr Moran Clinical Practitioner where the Claimant was reported to have said “*feeling shoulder is 70% there. Still painful if cleaning or doing repetitive tasks*” (page 102 of the bundle), this appeared to be the first reference in any of the medical records to the Claimant experiencing difficulty with daily household duties, all previous references were limited to experiencing increased pain when using the mouse at work.
22. The Tribunal was also taken to page 103 of the bundle made by Mr Johnson Clinical Practitioner, which was an entry for 18 September 2019, where the Claimant identified that the symptoms were aggravated being at work with repetitive motions and noted that using the mouse and looking at one screen to another aggravated pain.
23. The Tribunal was then taken to page 104 of the bundle, which was a letter written after a consultation with Mr Moran Clinical Practitioner on the 17 February 2020. The Claimant was recorded to have said that she felt that the shoulder was 70% improved, but it was still painful if she used it for long periods, but wanted to be pain free. The Claimant was discharged from care after this appointment. There was no mention in this consultation to the Claimant having any problems with daily activities household chores or with her own personal care.
24. The last medical record referred to was on page 181 of the bundle dated 7 August 2020 and this was a consultation with Ms Hemmings. The consultation notes recorded that aggravating factors were “cleaning/washing up/hovering/ironing/brushing hair”. The Claimant added that the pain was not as bad as before the operation. It was noted that this was the first time that the Claimant indicated she was experiencing difficulties with tasks such as hair brushing in any medical records. It was also noted that the Claimant had confirmed to the Tribunal that she was able to brush her hair shortly before her return to work in April 2019. The Claimant’s evidence on this point appeared inconsistent as it was again included in aggravating factors some 16 months after she conceded that she was able to brush her hair in April 2019. This was the first time that the Claimant listed a number of household activities as aggravating factors that caused her pain.
25. In the Claimant’s witness statement at paragraph 60 she stated that she had trouble “with daily tasks, repetitive movements and activities with certain stretches of the right arm”. Included in the list of activities she had “trouble with” were brushing her teeth, doing her hair, ironing, Hoovering, cleaning, getting dressed, using a mouse and excessive typing. It was noted that this list again included ‘doing her hair’ to that extent her statement appeared to be exaggerated in the light of the concession she had made in cross examination. It also included for the first time that she had trouble getting dressed but this was not recorded as a problem during consultations with Clinical Practitioners or with her consultant or GP. The Claimant provided no explanation of how her physical impairment caused her to experience difficulties when carrying out these tasks. There was no explanation of what the Claimant could not do or could only do with difficulty, her description of ‘having trouble’ with daily chores, gave no

indication of the severity of the problem or how her ability to carry out each type of activity was impaired. There was no evidence to suggest that the shoulder injury was causally linked to the problems she was experiencing at the time.

The Respondent's closing submissions

The Respondent's submissions were oral and were as follows:

26. The burden of proof under the Equality Act is on the Claimant as to whether she has a physical or mental impairment. The material date for assessing this is the date of dismissal which was the 10 July 2019. The Respondent does not dispute that the shoulder injury was a physical impairment. However the effect on normal day to day activities should not be assessed on how the Claimant feels today, that is not the focus of the enquiries. The focus is whether she meets the definition as at the 10 July 2019.
27. The effect on normal day to day activities must be more than minor or trivial to amount to a disability and this is not borne out by the medical documents. There are issues as to the level of detail provided in August 2019, the Claimant said that the doctor didn't mention what she told him but perhaps she did not say.
28. The Claimant has told the Tribunal that she was not able to do her hair or to drive shortly after the surgery but in April she was able to return to work and to drive. In March the Claimant said that she could not do her hair or drive but by the end of April she could do both.
29. The Claimant has made some vague allegations and it is unclear as at the 10 July 2019 what she could not do. One point that arose in questioning, at work she said she would switch up tasks if she was in pain. The Tribunal can consider the Guidance in this case at B7 which says that account can be taken of how far a person can be expected to use coping mechanisms.
30. B9 of the Guidance says that people have coping mechanisms or avoidance strategies and the examples that the Guidance gives for B7 is where someone has an allergy. However reference should also be made to B9, this scenario shows that someone could completely avoid doing something.
31. The Claimant lists a litany of things she cannot do today even though she accepted she had a 70% improvement. Her evidence is therefore inconsistent.
32. It was only after she was dismissed that she claimed she was disabled. She has previously pursued claims of unfair dismissal and disability discrimination. However the medical evidence before you does not support the claim that she is disabled.

33. The Claimant did not consider herself disabled when she completed the ET1 (she did not tick the box). The Claimant did not say she considered herself to be disabled when she attended her return to work meeting. Her evidence should be treated with circumspection. You should prefer the evidence of Ms Tricarico, she said the Claimant never had any problems with day to day tasks. This is only a device to claim unfair dismissal.
34. There was no evidence of the Claimant taking medication and no evidence on which a Tribunal can make a finding. The Claimant has not discharged that burden.
35. In relation to the issue of whether the adverse condition was long term you ask has it lasted for 12 months or was it likely to. The Claimant was vague as to when the day to day tasks were adversely affected. It seems to be November 2018 which was less than 12 months to July 2019 therefore at the relevant time it had not lasted for 12 months.
36. The next question to ask is whether it was likely to last for 12 months. I refer to page 175 of the bundle and if this is read as a whole, although the Claimant had stiffness, it would be resolved by physiotherapy. The surgery and the one year prognosis by the surgeon who said that there would be an improvement therefore the adverse impact would be reduced as they went on. Permanent improvements should not be disregarded. I refer to the case of Abadeh v BT Communications [2001] ICR 156 which stated that where there was a permanent improvement that must be taken into account.
37. The Claimant has not established that she suffered from a long term adverse effect, she continued to improve. If you find that there was a substantial impairment at the date of dismissal it would not have lasted for 12 months.

The Claimant's closing submissions

38. Under the Equality Act I would class myself as disabled. I have had this for over a year and it is likely to last longer. I specified pain relief, I take pain relief to ease it. I also mentioned naproxen and have a prescription for loperamide for a dodgy stomach. I have other aids such as gel and heat packs.
39. The Respondent mentioned the issue of long term, I was going to have the surgery in February 2019 that would take it to February 2020, July fits in between those dates. I would class myself as disabled as it has lasted over a year.
40. It was said that I did this because I could not claim for unfair dismissal. I went for disability discrimination because they should not have dismissed me because of my shoulder because it was discrimination, I was dismissed whilst I was on sick leave with a disability.
41. I have had a tendon repair in my ankle, I was given crutches and cannot weight bear on my shoulder so I brought a wheel chair to get around in Court.

42. There are several things I cannot do, I can't bowl because it is too heavy. I don't play pool anymore. I couldn't do repetitive tasks such as mashing vegetables, washing up and cleaning. Every day is a struggle. I just go all day and there is an issue regardless of what is said here I consider myself to be disabled because I struggle every day.

The Law

The Equality Act 2010

6 Disability

- (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.
- (2) A reference to a disabled person is a reference to a person who has a disability.
- (3) In relation to the protected characteristic of disability—
 - (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
 - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

Schedule 1 Equality Act 2010

2. Long-term effects

- (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.

Guidance on matters to be taken into account in determining questions relating to the definition of disability

Meaning of 'substantial adverse effect'

B1.

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 in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the **Act at S 212(1)**. This section looks in more detail at what 'substantial' means. **It should be read in conjunction with Section D which considers what is meant by 'normal day-to-day activities'**.

Effects of behaviour

B7.

Account should be taken of how far a person can **reasonably** be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.

For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities. **(See also paragraph B12.)**

When considering modification of behaviour, it would be reasonable to expect a person who has chronic back pain to avoid extreme activities such as skiing. It would not be reasonable to expect the person to give up, or modify, more normal activities that might exacerbate the symptoms; such as shopping, or using public transport.

B9.

Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would **not** be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability **it is important to consider the things that a person cannot do, or can only do with difficulty.**

In order to manage her mental health condition, a woman who experiences panic attacks finds that she can manage daily tasks, such as going to work, if she can avoid the stress of travelling in the rush hour.

In determining whether she meets the definition of disability, consideration should be given to the extent to which it is reasonable to expect her to place such restrictions on her working and personal life.

Decision

43. It was not disputed by the Respondent that the Claimant suffered from a physical impairment and to this end, the first part of the test is met.
44. The next part of the test is whether the adverse effects on normal daily activities were substantial. The evidence showed that the effects were worse when at work (when working in her previous employment) due to the nature of her role. However, when she joined the Respondent she was able to take action that reduced the substantial adverse effect by switching tasks. Having taken into account the guidance at B7, the Claimant's strategy of switching between tasks appeared to reduce the adverse effect to such an extent that it was no longer substantial. At the relevant time the main aggravator was the use of the mouse and screen so switching away from these tasks regularly reduced the adverse effect to a manageable level as the condition appeared to be exacerbated by repetitious tasks.
45. Although the Claimant was able to use avoidance strategies the evidence suggested that the shoulder problem was continuing and required surgical intervention. The Claimant confirmed in evidence that from November 2018, despite being able to employ strategies to reduce the adverse effects, the effects had become substantial.
46. After the operation in February 2019 the Claimant was able to return to work on the 24 April 2019. It seemed that she had made a significant recovery by that date as in cross examination she confirmed when she returned to work she was able to drive and do her hair. The medical evidence showed that by May 2019 the Claimant self-described the pain to be 70% improved during her consultation and only referred to pain reverting to 100% when at work using the mouse. There was no mention in her medical records of reporting that she was unable to perform basic household chores or that she was unable to tend to her own personal care.
47. By June the Claimant was reporting more movement and less pain which showed that she was making a steady recovery.
48. The evidence reflected that her physical condition was therefore much improved by June 2019 and it was found as a fact that the evidence that the Claimant provided during her consultations at the time were likely to be most accurate when describing whether or not her impairment had a substantial adverse effect on normal daily activities. At the date of dismissal the medical record for June showed that the Claimant had less

pain and more movement and there was no suggestion that she was experiencing any problems with normal daily activities. The only activity shown to aggravate her shoulder was the use of the mouse. The contemporaneous evidence was consistent that the Claimant was making a good recovery and her pain was reduced and her movement had improved. There was no evidence to suggest that at the date of termination the physical impairment had a substantial adverse effect on the Claimant's ability to perform daily activities.

49. Although that was the evidence at the date of the alleged act, there are circumstances where the medical evidence available after the discriminatory act may be relevant. For example when it may provide evidence that a condition has not improved with the passage of time.
50. The evidence the Tribunal was taken to in the bundle in relation to consultations that took place after dismissal were inconsistent with the medical evidence before dismissal. It was only after dismissal that the consultant referred to the Claimant's stiffness as amounting to a disability despite previously reporting that the operation had gone well and was subject to physiotherapy improving her mobility. Findings of fact were made about the background to the insertion of these words into the letter and they are above at paragraph 18-19. The Consultant inserted these words at the request of the Claimant to show consistency with what she had told the employer. The letter was written in this way to assist the Claimant. The reference to one year was not recorded in any other documentation in the bundle or by any other medical practitioner.
51. The Claimant's evidence to the Tribunal was that her shoulder injury had a substantial adverse effect on her daily activities but there was no consistent evidence that this was the case and not reported to any of her medical team until after she was dismissed. The medical records showed that the Claimant reported a consistent improvement of 70% until after dismissal where she introduced the definition of disability when discussing her recovery with her surgeon. It was also noted by the Tribunal that the Claimant did not make reference to her physical impairment having a substantial adverse effect on normal day to day activities until after dismissal in July 2019 as reflected in the above findings of fact. The list of activities that she found difficult became more extensive in the Claimant's witness statement and in the most recent consultation with her GP on the 7th of August 2020.
52. The Tribunal found the Claimant's evidence on the substantial adverse impact to be unreliable. The Claimant admitted that she was able to brush and wash her hair by the time she returned to work in April 2019 and was able to drive. However the Claimant continued to allege that this was something she had difficulty doing in her statement and in the disability impact statement. Her evidence on this point was unreliable and it must be concluded that her evidence was exaggerated on this point. It was also noted that the Claimant in her witness statement referred to not being able to dress herself, this was something that she had not previously mentioned in any medical consultations. If the Claimant had been unable to dress herself it would have been mentioned in the many consultations

referred to above. It was not and therefore it must be considered to be a further exaggeration.

53. The Claimant in closing submissions referred to her shoulder preventing her playing pool and going bowling, however these are not normal day to day activities.
54. Having considered the evidence produced after the date of dismissal, it showed an inconsistency with the evidence before that date. The inconsistency was in relation to the extent that the Claimant had problems with daily activities. There was no evidence to suggest that she was unable to do daily housework or that she could only perform those tasks with difficulty. In her evidence to the Tribunal the Claimant only referred to 'having trouble' with performing these tasks but again no details were provided as to what this trouble was or the extent to which she was prevented from engaging in these normal daily tasks.
55. The burden of proof is on the Claimant to show that at the date of the discriminatory act that the adverse impact on normal day to day activities was substantial. On all the evidence before me, I conclude that at the date of dismissal the adverse impact on her ability to carry out day to day activities was no longer substantial. The consistent medical evidence showed a 70% improvement with reduced pain and increased movement and no consistent evidence to show that the Claimant continued to suffer a substantial adverse impact on her ability to carry out normal daily activities.
56. On the issue of whether or not the physical impairment was long term and this must be assessed at the date of termination on the 10 July 2019. I conclude that on the evidence it began in November 2018. The Claimant was able to return to work on the 24 April 2019 but during this time was still recovering from surgery. There was no evidence to suggest that in July the substantial adverse effect had lasted for 12 months, by that date it had only lasted for 5 months. The next part of the test is whether it was likely to last for more than 12 months. The test for whether something was likely to last for 12 months is whether it "could well happen". There was no evidence to suggest that at the date of dismissal the substantial adverse effect on daily activities would be likely to last for 12 months.
57. I also considered whether the letter from the surgeon written after dismissal suggesting that the recovery from the residual stiffness would last or was likely to last for 12 months should be given any weight and if so how much. As referred to before, this letter was written to assist the Claimant, it was not a medical prognosis. At its highest it makes reference to residual stiffness it did not suggest that the Claimant would continue to suffer substantial adverse effects for 12 months. The letter was also inconsistent with the other medical evidence referred to above, where it was recorded that good progress was being made and pain was reduced and mobility increased. I conclude therefore that the letter carried little weight, the consistent evidence was that the impairment did not have a substantial adverse effect and was not long term.

58. The Claimant was not disabled at the relevant time within the meaning of the Equality Act.

Employment Judge **Sage**

Date: 28 January 2021