



EMPLOYMENT TRIBUNALS

Claimant: Mrs J O'Dowd

Respondent: Highlea Care Ltd

Heard at: Newcastle (by CVP)

On: 11 March 2021

Before: Employment Judge Parkin

Representation

Claimant: Ms J Callan, Counsel

Respondent: Mr B Williams, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 from mid-April 2019 and at all material times thereafter. Her disability discrimination claims are to proceed to final hearing.

REASONS

1. The proceedings

The claimant presented her ET1 claim on 6 August 2020, claiming unfair constructive dismissal and disability discrimination, in respect of her employment as a support worker with the respondent and her resignation on 14 May 2020. In the long narrative Grounds of Complaint, she put forward her disability as arthritis. The respondent resisted all claims in its detailed ET3 response and Grounds of Resistance.

2. There have been two extensive case management preliminary hearings, before Employment Judge Aspden on 5 October 2020 and Employment Judge O'Dempsey on 4 December 2020. The claimant amplified the disability she relied upon as osteoarthritis or suspected osteoarthritis in the left knee in her Further Particulars and the respondent provided Amended Grounds of Resistance and a Position Statement on Disability, following disclosure by the claimant of some

medical information. There is now a final agreed list of issues with a 7-day final hearing listed by CVP video on 11 to 19 October 2021.

3. This preliminary hearing

3.1 The hearing was held as a remote CVP video hearing (as signified by Code V above). The Tribunal was provided with documents digitally, including an agreed Bundle of 135 pages.

3.2 By its Amended Grounds of Resistance, the respondent denied that the claimant was a disabled person within the meaning of section 6(1) of the Equality Act 2010 at the material times leading up to her resignation, and further denied that it knew or could reasonably be expected to be aware she was disabled at the material times. In its Position Statement on Disability, whilst it acknowledged that osteoarthritis was a long-term condition likely to last longer than 12 months or for the rest of the claimant's life, it challenged in particular that there was a substantial long term impact upon her ability to carry out normal day to day activities. Accordingly, this hearing proceeded to determine whether the claimant qualifies under section 6, i.e. whether the claimant proves that she had a disability as a disabled person within section 6(1) and Schedule 1 at the material time or times when she contends the respondent carried out acts of unlawful disability discrimination towards her.

3.3 Substantial adverse effect? The respondent acknowledged that the medical evidence appeared to bear out in some part that the claimant had a progressive condition of osteoarthritis but contended that her evidence in the impact statement did not appear supported by that medical evidence in terms of an adverse effect upon her ability to carry out day to day activities. This needed to be explored with the claimant, in effect putting her to proof. The claimant maintained that to rely upon the progressive condition provision at paragraph 8 (2) of Schedule 1, Part 1 of the Equality Act 2010, she needed to establish some adverse effect from the osteoarthritis which was not just minor or trivial for paragraph 8 (1)(c), alongside (1)(a) and (1)(b) to apply.

3.4 What is the material time? Whilst acknowledging the claimant's case that some of her allegations of disability discrimination were of acts extending over a period, often called "continuing acts" (and that her constructive unfair dismissal claim relies on acts of disability discrimination as well as breach of the implied term of trust and confidence on a continuing and cumulative basis), the earliest specific acts alleged against the respondent began on 10 and 13 to 15 January 2019. It is therefore appropriate to determine the preliminary issue whether the claimant proved that she was a disabled person in respect of all stages from January 2019 through to the termination of her employment on 14 May 2020.

3.5 Knowledge or deemed knowledge of the claimant's disability, if she proves it, was not an issue for determination at this preliminary hearing, but for the final hearing if it goes ahead.

4. Evidence on disability issue

4.1 The claimant provided an impact statement dated 4 January 2021 together with a supplementary statement dated 8 March 2021, which was prompted by the

respondent's Position Statement. The respondent was highly critical that she had only disclosed four items of medical evidence: an extract from her GP medical notes dated 25 September 2019 from Dr K Fernando, with a X-ray report dated 23 August 2019 following an X-ray on 15 August 2019, a referral and report from Consultant Radiologist Dr S Bethapudi following the MRI scan on 5 November 2020 and a letter dated 4 December 2020 from the Department of Rheumatology Consultant Dr S Pathare. This criticism was valid; although the respondent had never applied for an order for specific disclosure, for instance of the claimant's whole GP records, there must have been more medical evidence relevant to the claimant's condition of osteoarthritis and visits to her GP complaining of symptoms in the left knee amongst other concerns available for her to disclose. Of course, the burden of proving protection under the 2010 Act as a disabled person rests upon her; the risk for her therefore is that she fails to do so because of incomplete or contradictory medical disclosure.

4.2 The claimant gave oral evidence based upon her statements and was cross-examined at some length. For the purposes of this preliminary hearing, the Tribunal concluded that the claimant was not a sophisticated witness and was not deliberately seeking to exaggerate or make up matters of evidence. However, whilst reliable on the central elements relating to her left knee symptoms and difficulties, it could not rely upon her evidence in all regards. For instance, there were additions to earlier accounts of the impact of her condition such as her entirely new oral evidence (some way into cross-examination) that she had had to give up walking her dog from January 2019 because of pain walking. Whilst the Tribunal was not convinced by each of her challenges to the accuracy of the record of Dr Pathare, when he was apparently recounting what she told him at his examination in November 2020, it accepted her evidence that she had already lost weight when she was examined by him. In particular, it did find her wholly reliable and compelling on the key features relating to her left knee condition: the need for breaks when driving to Eyemouth at around Easter 2019 (notwithstanding that this was first raised late in her supplementary statement) with a visit to her GP soon after, the pain causing her to attend her GP again in August which resulted in the X-ray later that month and her ongoing reliance upon Paracetamol and Ibuprofen.

5. The facts

From the oral and documentary evidence, the Tribunal made the following findings of fact on the balance of probabilities.

5.1 The claimant worked for the respondent as a support worker at its care home in Durham, with the number of units or houses where service users lived.

5.2 She had a longstanding weakness in the left knee, a tear of the left anterior cruciate ligament which many years earlier had caused her knee to give way from time to time but had not caused ongoing pain.

5.3 At about Easter in 2019 (which was in mid-April), the claimant accompanied her Service Manager, Tracey Wright, on a journey to Eyemouth in Scotland to take a service user on a family visit. She drove both ways, approximately 97 miles each way, and experienced significant pain when driving such that she needed extra breaks during the journey with the journey each way lasting approximately 2½

hours instead of 1½ hours. On the way there, she needed to take another break in a supermarket car park despite them being very close to their destination because of the pain she was suffering. Her manager Tracey did not drive; for the claimant, this was an exceptional distance to drive since she normally only drove locally including her journey to work of 7 to 8 miles each way three or four times a week.

5.4 As a result of the pain and swelling in her left knee, she consulted her GP after Easter 2019. From then on, as advised by the GP, the claimant started to take Ibuprofen for the swelling and Paracetamol for pain relief, although her GP warned her to be careful about her use of Ibuprofen, only to take it for a few days and not continuously, because it aggravated her asthma. She took this over the counter medication regularly when her symptoms were bad.

5.5 On 9 August 2019, she visited her GP once again about pain in the knee. Either on this or the previous occasion, her GP told her that she may have arthritis in the knee. She was referred for an X-ray which took place on 15 August 2019.

5.6 The claimant says she told Tracey Wright she had been to see her GP and what her GP had said about arthritis and likewise told Tracey Wright when the GP explained the X-rays to her a month later. The Tribunal makes no finding as to this since the respondent's knowledge of any disability is not being determined at this hearing.

5.7 The X-ray report, citing a clinical history of: "Tender medial aspect of left knee. ? Osteoarthritis", recorded: "Joint spaces are well-maintained and there is no effusion although there is some spiking of tibial spines which may represent very early osteoarthritis" (122).

5.8 On 25 September 2019, the claimant attended her GP once again (123). She needed to learn the outcome of the X-ray but had also just experienced major trauma in her life; her marriage had broken down after 26 years and she was signed off as sick with stress initially for a two-week period. At that time, the claimant declined any anti-depressant medication for stress and also declined physiotherapy for her knee when her GP explained the X-ray report to her and gave her the diagnosis of osteoarthritis; however, the Tribunal considered that she was probably more pre-occupied with the separation from her husband which had occurred just a few days earlier than concern to deal with her knee. In making the diagnosis of osteo-arthritis, the GP obviously had the claimant's records and own account as well as the X-ray to work with.

5.9 When the claimant's place of work changed from being based at the West Cottage dormer bungalow in December 2019 (when she rarely needed to go upstairs) to Marrick House with 3 service users to visit upstairs, she was very much more aware of pain during shifts especially when ascending and descending the stairs, resulting in pain during and swelling of the knee after shifts. She began then to carry out sleepover shifts at Ash House, which also involved climbing and descending stairs. Accordingly, her mobility was impaired as was her flexibility to bend the knee and she needed to use Paracetamol pain relief and Ibuprofen anti-inflammatory more than previously.

5.10 On 10 November 2020 (6 months after the termination of her employment in May 2020), the consultant radiologist Dr Bethapudi reported upon an MRI scan of the left knee on 5 November, at the time when the claimant was again reporting increasing pain:

“There is chronic, full-thickness femoral attachment Anterior Cruciate Ligament tear...There is evidence of mild medial tibiofemoral compartment osteoarthritis with chondral thinning, fraying and fissuring, early reduction of joint space and small marginal osteophytes formation. There is evidence of thin sliver of fluid within the semimembranosus/medial gastrocnemius bursa and mild pes anserine bursitis posteromedially. No significant joint effusion.

Conclusion: In summary, there is evidence of complex, medial meniscal tears, mild medial tibiofemoral compartment osteoarthritis and mild pes anserine bursitis in chronic ACL deficient knee. Looks she may need keyhole surgery, also general advice and physio. She would like to consider surgical intervention and discuss with orthopaedic team.” (124)

5.11 On 4 December 2020, the consultant rheumatologist Dr Pathare wrote to the claimant’s GP diagnosing multiple conditions of nodal osteoarthritis, rheumatoid arthritis, bronchial asthma, eczema, hay fever and right renal calculi. He had seen the claimant at the rheumatology clinic that day and had scans of both hands taken. He had not then seen the MRI scan results. He wrote (126-8):

“She has been complaining of a painful left knee for a good few months now, and this has been slowly getting worse. She has not noticed any joint swelling, but says every time she climbs up and downstairs her knee hurts.” The consultant went on:” I have discussed the diagnosis of osteoarthritis and rheumatoid arthritis with her; I spoke to her briefly about the important side effects and the role of disease modifying drug therapy, including Methotrexate and Hydroxychloroquine.

I have also explained to the potential outcome of not treating her inflammatory joint disease, which could lead to joint damage, disability and deformity in the long run. She fully understands these .

I have given her written information about the joke; She did opt for an intramuscular Depo-medrone injection, which should hopefully help her”.

5.12 The claimant had been unaware she suffered from rheumatoid arthritis in the hands before this examination and was alarmed by the consultant suggesting the possibility of the two new drug treatments which might give rise to a variety of side effects such as weight gain, hair falling out, vomiting and lethargy. She was critical of what she believed to be inaccuracies in Dr Pathare’s report especially in the consultant failing to record that she had already lost two stone between September and November 2020, in her attempt to reduce the pressure on her knees. However, she took the opportunity of receiving the steroid injection in the hope of alleviating the knee symptoms at that time.

6. The parties’ submissions

6.1 The respondent contended that the claimant had failed to follow the overriding objective in the limited medical disclosure she had provided. She had exaggerated

her evidence by conflating what she knew now with what she knew in 2019 and elaborating when speaking of “excruciating pain”; in September 2019, she was suffering from multiple conditions. By only disclosing 4 pieces of medical evidence there were more questions raised than answered, such as whether the treatment suggested by Dr Pathare related to either rheumatoid arthritis or to osteoarthritis or to both conditions. It contended the claimant had not even established on the balance of probabilities she had a progressive condition, nor that it was likely to have a substantial adverse effect on her ability to carry out day to day activities. Mowat-Browne v University of Surrey [2002] IRLR 235 was authority for the proposition that application of the progressive condition provisions had to relate to the claimant’s own condition. There were contradictions in her own evidence for instance her declining physiotherapy on her knee and the radiology referred only to mild osteoarthritis with no significant joint effusion; use of paracetamol and ibuprofen was not reflected in the medical evidence until late 2020. On balance, the claimant had not proved that she was a disabled person.

6.2 The claimant pointed out that Mowat-Browne predated SCA Packaging v Boyle which clearly established the lower test whereby “likely” meant “could well happen”, not whether it was more likely than not. People are not referred for X-ray without some background requiring this; the claimant was complaining of pain in her left knee in August 2019 and had been at least since the journey in April 2019 with Tracey Wright. Whilst the diagnosis was in late September 2019 (123), she already had the impairment; declining physiotherapy then should not be held against her in view of her recent marital breakdown. Nor did the description “mild” make it less than a full diagnosis of osteoarthritis or suggest her symptoms would not be progressive. Applying Schedule 1, paragraph 8(2) in 2019 her condition was likely to give rise to substantial adverse effects on her ability to carry out normal day to day activities. She already established some adverse effect which was more than minor or trivial during and as a result of the journey in April 2019 or at least before visiting the GP in August 2019, resulting in the X-ray; the condition must have pre-existed. The medical evidence corroborated her own evidence of impact on her ability to carry out normal day to day activities, especially the regular need for analgesia; GPs do not prescribe “over the counter” medicines because of cost but the claimant gave very strong evidence about her GP’s advice not to over-use Ibuprofen. Turning down powerful drugs which might affect the immune system, when that possibility was first raised by Dr Pathare, was not unreasonable and did not diminish her evidence.

7. The Law

7.1 To gain the protection of the provisions of the Equality Act 2010 relating to disability discrimination, the claimant must first prove on the balance of probabilities that she was a disabled person within the meaning of Section 6 of the Act, taking account of the provisions at Schedule 1.

7.2 Section 6 sets out:

- (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...

(6) Schedule 1 (disability: supplementary provision) has effect.

Schedule 1 sets out at Part 1, 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 at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected;

And at Paragraph 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.

This is often described as the "deduced effects" provision.

And at Paragraph 8, dealing with progressive conditions:

(1) This paragraph applies to a person (P) if—

(a) P has a progressive condition,

(b) as a result of that condition P has an impairment which has (or had) an effect on P's ability to carry out normal day-to-day activities, but

(c) the effect is not (or was not) a substantial adverse effect.

(2) P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment...".

7.3 Therefore the claimant must establish a physical or mental impairment which has a substantial and long term adverse effect upon their ability to carry out normal day to day activities. A substantial adverse effect is more than minor or trivial, a long term effect is one that has lasted more than 12 months or is likely to last more than 12 months and, where the condition is progressive and it has or has had an adverse effect on the ability to carry out normal day to day activities but the impact is not or was not adverse the claimant is treated as having an impairment which has such an adverse effect if the condition is likely to have that effect as it

progresses. Normal day to day activities are not necessarily work activities but some work activities are sufficiently close to normal day to day activities for regard to be had to them.

7.4 There is helpful guidance in relation to the meaning of disability in the Guidance on matters to be taken into account in determining questions relating to the definition of Disability (2011). There have also been many authorities from the higher courts on the meaning of the Section 6 and Schedule 1 provisions. The most important of these is SCA Packaging Ltd v Boyle [2009] ICR 1056 in which the House of Lords ruled that the word “likely” in the equivalent provision of the Disability Discrimination Act 1995 to the “deduced effects” of medical treatment provision at Schedule 1, Part 1, Paragraph 5(1) and also in the recurring impairment provision. The judgment was that “likely” meant “could well happen”, not that it was more probable than not that it would happen (the balance of probabilities test); as many commentators have written, this is not a high threshold. The Tribunal applied the same approach to Paragraph 8, as the same word normally bears the same meaning in a group of provisions within the same statute, as was stated by Lady Hale in her judgment in SCA Packaging. The Tribunal did follow the EAT authority in Mowat-Browne except as to the interpretation of the “likely” test; for Paragraph 8(2), the EAT principle that the claimant needed to establish that her own condition was likely to have a substantial adverse effect remained valid; it would not be enough to show that osteo-arthritis is generally a progressive condition for those who have it.

9. Conclusion

9.1 The Tribunal's decision does not rest only upon the medical evidence but takes into account the claimant's oral evidence and its findings as a result of it, as set out above. The Tribunal was quite satisfied that the claimant proved she had the physical impairment of osteoarthritis; the diagnosis of mild osteoarthritis (as at November 2020, following the MRI) was confirmation of the condition in its early stages which on the consultant rheumatologist's opinion would develop and worsen as time passed and the client became older. Nothing turns upon the consultant's imprecise terminology that she had only “been complaining of a painful left knee for a good few months now”. As at April 2019, she already had a left knee which was damaged with a longstanding torn ligament and she was beginning to experience pain and some swelling after heavier use. The subsequent medical investigation showed it to be the early stages of osteoarthritis involving cartilage deterioration, cracking of bones and growth of bone spurs. The Tribunal was quite satisfied that driving considerable distances occasionally, although not part of the claimant's normal job, amounted to normal day to day activities, as undoubtedly did climbing and descending stairs; both caused her significant symptoms such that she needed to resort to use of Paracetamol pain relief and Ibuprofen anti-inflammatories. This impairment was long term since it was indeed likely to last more than 12 months. Having regard to the “deduced effects”, the Tribunal inferred that the claimant's symptoms which affected her mobility and flexibility would have been rather worse had she not taken the medication. On the balance of probabilities, it concluded that the claimant already had a physical impairment which was likely to last more than 12 months and which gave rise to substantial (more than minor or trivial) adverse effects on her ability to carry out normal day to day activities by mid-April 2019, the time of her drive to Eyemouth and back. That led to a GP appointment because of the knee pain and was only

just over three months before the further GP appointment when she was directly referred for X-ray, since the GP rightly suspected osteoarthritis. On that basis, the claimant proved she was disabled within the meaning of Section 6 and Schedule 1 by mid-April 2019, without relying upon Paragraph 8 of Part 1 of the schedule. The material time or times run from that point; the Tribunal was not persuaded by the claimant's evidence that her knee was already so painful that she stopped walking the dog earlier in 2019 and she thus did not prove that she was already disabled by January 2019.

9.2 In the alternative, if the Tribunal is wrong in concluding that the claimant has proved she was a disabled person by mid-April 2019, having regard to the "deduced effects" but not applying the progressive condition provisions, because the adverse effect upon her ability to carry out normal day to day activities was not yet substantial (more than minor or trivial), the Tribunal applies the latter provisions to conclude that Paragraph 8(2) means that she is to be treated as a disabled person at that time. Whatever the claimant's criticisms, the import of Dr Pathare's report is unequivocal and apparently relates to both her osteoarthritis and her rheumatoid arthritis: "I have also explained to her the potential outcome of not treating her inflammatory joint disease, which could lead to joint damage, disability and deformity in the long run"; this is fully resonant of a progressive condition which will produce still more symptoms in future.

9.3 The final hearing of the claimant's claims has already been listed and the parties were content with the case management orders previously made and confirmed they would be able to comply with them ahead of the hearing.

Employment Judge Parkin

Date: 16 March 2021

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