



EMPLOYMENT TRIBUNALS

Claimant: Mr Andras Toth

Respondent: HR GO (Liverpool) Ltd (R1)
Mayr-Meinhof Packaging UK Ltd (R2)

HELD AT: Wrexham (a hybrid hearing) **ON:** 1st & 2nd February 2021

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Mr Andras Toth for himself
Respondents: Mr. E. McFarlane, Consultant (R1)
Mr. J. Anderson, Counsel (R2)

Interpreter: Ms J. Lyndsey (Hungarian/English languages)

RESERVED PRELIMINARY HEARING JUDGMENT

The judgment of the Tribunal is that at all material times the claimant was a disabled person by virtue of pain, discomfort and numbness in his back, neck, shoulders and upper limbs, in accordance with the definition of disability at s.6 Equality Act 2010.

REASONS

1. The Issues:

1.1.1 I was tasked to judge whether the claimant was a disabled person at the material time in relation to this claim to the tribunal, in accordance with the definition set out in section 6 Equality Act 2010 (EqA), where the claimant says that he has a physical impairment having a substantial adverse long-

term effect on his ability to carry out normal day-to-day activities. The respondents challenge each part of that definition in so far as the claimant relies upon it.

1.2. I have had an opportunity of reading the relevant documents in the hearing bundle including the claimant's medical records, his written witness statement, and the written submissions made by the claimant and both respondents. I also heard oral evidence from the claimant where he was cross examined at some length.

2. The Facts:

2.1. From 2015 to date the claimant has suffered pain in his upper limbs and at times neck and lower back. In particular he suffers pains in his wrists and shoulders. He has both intermittent pain and numbness, which sometimes affect his fingers.

2.2. The claimant has undergone examination, x-rays, nerve conduction tests and MRI scans. He has been attended upon by occupational health consultants and his general practitioner. He has received medical attention at the Walton Centre's Spinal Physiotherapy Clinic.

2.3. There have been several diagnoses.

2.4. Over the last five years the claimant has been informed of various diagnoses including tendonitis causing wrist pain in November 2015, polyarthritis causing shoulder pain in May 2016 and cervicgia causing neck pain in February 2017. Also in 2017 tests revealed advanced degenerative changes to his cervical spine and signs of stenosis. Nerve conduction tests detected mild bilateral carpal tunnel syndrome and partial denervation of the right bicep muscles.

2.5. The claimant has received various injections over the period from 2015 to date. He takes anti-inflammatory medication when his symptoms are at their worst. The claimant most often wears a wrist support. He uses a spinal inversion table which involves hooking his feet up and he hanging down to relieve spinal pressure and release spinal fluid.

2.6. Certain of the claimant's symptoms were caused and/or exacerbated at various times by his working conditions, most notably when he worked in a chicken processing factory lifting heavy weights, doing strenuous manual work, in a cold working environment.

2.7. He has managed his symptoms at work better when performing light duties and when not working in a chilled or cold environment. More recently having made known his symptoms he has generally been allocated to tasks within his physical capabilities that did not exacerbate symptoms.

- 2.8. He generally manages his symptoms, and to the extent that he was advised at the Walton Centre that at this stage surgery would not be advantageous.
- 2.9. The principal concerns to the claimant are his symptoms of pain and discomfort with their effect upon his upper body, mobility, and manual dexterity. At times when he has been able to demonstrate to his medical practitioners a good or even apparently full range of movement, he has only been able to do so with pain.
- 2.10. Consequent upon all of the above the claimant's ability to dress is compromised such as putting on and taking off socks or a jacket, or removing items from his pockets such as a wallet. He cannot carry objects of 5 kg or more comfortably and struggles for example to lift heavy cookware off the top of an oven. He cannot easily open, or open without pain, jars, cans, and bottles. His sleep is impaired and it is difficult for him to find a comfortable position owing to pain and discomfort in his shoulders, neck and lower back. When he has tried to use pain relieving gels he cannot apply them himself.
- 2.11. The claimant has not enjoyed an easy or good relationship with some of his medical practitioners and the difficulties appear to include communication issues as the claimant's first language is Hungarian. He has had in excess of 20 medical appointments over the time since 2015 with his GP when he has relied on interpreters albeit on at least eight occasions none was available to him. His requests for fit notes have been met on occasion with some apparent scepticism or mild resentment at the way the request was made. All that said however, it is clear from both the medical records and the claimant's oral evidence that he has been under investigation for quite some time and there have been a number of relevant diagnoses accepting of, and consistent with, his complaints of pain, discomfort and numbness.
- 2.12. Whilst the claimant's working conditions have, on occasions, been more congenial since he left the chicken processing factory nevertheless the claimant is on occasions required, or would like to, lift goods such as shopping and household utensils, that may weigh 5 kg or more; he is restricted in doing so by the experience of pain. Living as we do in northern Europe he cannot either always rely on carrying out such activities in warm or ambient temperatures and he is subject to intermittent pain and discomfort in the cold.
- 2.13. Owing to the claimant's acceptance that his condition is chronic but progressing with age coupled with his coping mechanisms as described above, where the alternative would appear to be surgery that at the moment is thought not to be advantageous, the claimant has not required assistance from his general medical practitioner since March 2017. As I have already observed they do not enjoy a good relationship and appointments are far from straightforward with the need to involve interpreters. In the absence of interpreters or at stages when sometimes family members were relied upon it is evident from the notes that the GP either did not understand or misunderstood what was being said. Examples of this latter problem are where the records ascribe a wrong nationality to the claimant and made a

significant error with regard to his age. Notwithstanding the lack of evidence of repeated, frequent or even occasional visits to the doctors surgery in more recent years I accept the claimant's evidence that he continues to suffer symptoms of pain, discomfort and numbness causing restrictions to his movements and manual dexterity but that he lives with them; he modifies his activities so as to reduce pain, discomfort and numbness; he puts up with restrictions or relies on his family for assistance.

3. The Law:

- 3.1. The definition of disability includes a physical impairment that has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities.
- 3.2. The physical impairment does not require a specific or recognised medical diagnosis.
- 3.3. An impairment is substantial if it is more than minor or trivial.
- 3.4. Long-term is considered to be 12 months, that is where an impairment has lasted that length of time and is likely to continue or is expected to be of at least that duration.
- 3.5. Day-to-day activities are those activities that one would normally carry out as opposed to any specialised skill or unusually onerous task. They can include work activities and even the activity of attending work.
- 3.6. Guidance has been published by the Secretary of State in relation to matters to be taken into account in determining questions relating to the definition of disability (published in 2011). This guidance is comprehensive and useful giving specific examples of each of the matters to be taken into account in relation to those elements of the definition.
- 3.7. Where there has been, or is continuing, treatment the tribunal is to consider what is referred to as the deduced effect, making its judgment on what the situation would be in the absence of such treatment.
- 3.8. Where the effect of an impairment ceases, the substantial effect is treated as continuing if it is likely to recur. Conditions with effects which recur only sporadically for short periods can still qualify as impairments for the purposes of the act in respect of the meaning of long-term.
- 3.9. The fact that a person can manage or cope with an impairment does not necessarily prevent a finding of disability. The question is rather whether the impairment has a substantial adverse effect on the ability to carry out activities. Having to cope may illustrate that there is a substantial adverse effect. That will depend in part on the coping strategies where a minor alteration, for example to a diet, could militate against an impairment being said to have a long-term adverse effect on day-to-day activities.

4. Application of law to facts:

- 4.1. The respondents are sceptical about the claimant's credibility. In fact they do not believe him. They consider that he has had past difficulties which were probably specific to one place of work and onerous conditions, having to carry out strenuous manual work in a chilled environment. They interpret the medical records as indicative of scepticism by all medical practitioners and a suspicion that the claimant is exaggerating his symptoms with a view to either claiming benefits or avoiding returning to work.
- 4.2. I believed the claimant. I found his evidence to be plausible and credible. I do not expect him to prove a particular diagnosis but it is clear from the various diagnoses that he has had and has one or more conditions that give rise to pain.
- 4.3. Pain is subjective and therefore difficult to measure or assess. One of the medical reports confirms that the claimant's estimation of the pain on a range of 1 to 10 (where 10 is the higher level) at 6-7. In view of the various diagnoses or attempted diagnoses his treating clinician at that time did not gainsay the claimant's estimation; to do so would be very difficult. The difficulty with pain is that there is a school of thought that will say pain is what the patient says it is, and that it is as bad as the patient says it is. Measurement of pain is dependent on the history given by the patient. Different people have different pain thresholds. The pain level that would have a substantial adverse effect for one person is not necessarily the same for another.
- 4.4. Taking into account the fact of diagnoses over time of conditions each of which could give rise to pain, discomfort, and the imposition of restrictions on mobility and dexterity as set out in the evidence before me I find that, whatever the name of the prevailing condition is and has been and whatever the cause or exacerbating environmental factors, for some five years the claimant has had disabling pain; he has it to date. Pain and discomfort, with some numbness in his limbs, has had a substantial and long-term adverse effect on his ability to perform day-to-day activities, where examples of those activities are set out in the claimant's witness statement. The claimant gets some relief from the use of aids such as a wrist band and an inversion table. The claimant gets some relief from anti-inflammatory and painkilling medication, and the fact that he can buy this over the counter without prescription or any need to visit his GP does not take away from the need for, or efficacy of, that medication.
- 4.5. Because of the claimant's coping mechanisms and the type of work that he has had since leaving the food processing factory, the claimant has had no or less need to obtain fit notes. In the situation where he did not have a good relationship with his GP he has not sought to visit the GP. He saw no need. It seems to me that the claimant is resigned to being disabled as described above and is getting on with his life as well as he can. There is no requirement for regular or repeated medical appointments, albeit I accept that

there could be more supportive and corroborative medical records. Ultimately it comes down to my believing the claimant's evidence.

Employment Judge T.V. Ryan

Date: 22.03.21

JUDGMENT SENT TO THE PARTIES ON 6 April 2021

FOR THE TRIBUNAL OFFICE Mr N Roche