



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr D Cooper**

**v**

**Signature Senior lifestyle Ltd and others**

**Heard at:** Watford via CVP  
2021

**On:** 19 February

**Before:** Employment Judge Bartlett

## **Appearances**

**For the Claimant:** Ms Miller

**For the Respondent:** Mr Uduje

## **RECORD OF A PRELIMINARY HEARING**

### **JUDGMENT**

1. The claimant does not have a disability within the meaning of section 6 of the Equality Act 2010.

### **REASONS**

#### **The hearing**

1. The hearing took place via CVP. There were no difficulties with connection or communication at any point during the hearing.

#### **The issue**

2. At the start of the hearing I confirmed with the parties that this preliminary hearing was to determine whether or not the claimant was disabled within the meaning of section 8 of the Equalities Act 2010 which sets out:

*s 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.*

3. Prior to the start of the hearing Mr Uduje had sent a written submission to the tribunal copied to Ms Miller. This submission identified that the only issue in dispute in relation to the disability issue was whether or not at the material times the impairment from which the claimant suffered had a long term adverse effect. I confirmed with Mr Uduje and Ms Miller if “long-term adverse effect” was the only issue in dispute in relation to disability and therefore the only issue for me to decide today. They both confirmed that it was.
4. As this was the only issue to be determined Ms Miller did not seek to call the claimant and instead oral submissions were made by Ms Miller and Mr Uduje. I reserved judgement.

### **Submissions**

5. Ms Miller’s submissions can be briefly summarised as follows:

- 5.1 case law has established that the test is whether the impairment was likely to have lasted for 12 months and was likely means it could well happen;

- 5.2 the claimant was injured on 3 February 2019;

- 5.3 on 17 May 2019 he started garden leave and in practical terms left the respondent’s organisation;

- 5.4 issues regarding that injury were prevailing during the course of those four months;

- 5.5 when the claimant exited the company on 17 May 2019 it was likely that the claimant’s impairment would last a further nine months based on the medical evidence supplied;

- 5.6 reference was made to the following documents:

- 5.6.1 GP notes dated 29 March 2019;

- 5.6.2 the occupational health assessment carried out on 2 April 2019;

- 5.6.3 a letter from Mr Bourke dated 29 April 2019;

- 5.6.4 a letter dated 8 May 2019 from Mr Ridgeway referring to ongoing problems and the need for further investigations.

6. Mr Uduje’s submissions can be briefly summarised as follows:

- 6.1 a considerable amount of medical evidence post dates 17 May 2019 and is therefore of little relevance;

- 6.2 paragraph 7 of the claimant's impact statement makes direct reference to a consultation the claimant had on 11 May 2020 which is almost 12 months after the claimant left the respondent;
- 6.3 1 March to 17 May 2019 is the relevant period and the medical evidence during this time does not suggest that the impairment would last for another nine months;
- 6.4 the claimant was involved in a further accident on 13 August 2019 and there is evidence that the difficulties the claimant complains of relates to that rather than or rather than solely related to the collarbone injury incurred on 3 February 2019;
- 6.5 on 3 June 2019 the consultant orthopaedic surgeon, Mr Kucheria, set out the claimant's fracture was healing and he did not think they needed to take further action;
- 6.6 the claimant's contention that his impairment would have a long term effect is based on an assessment of his current status;
- 6.7 the claimant has not adduced any evidence to support the claim that his current medical status was the same at the relevant date.

## **Decision**

- 7. It is useful to set out a brief summary of the relevant dates:
  - 7.1 the claimant was employed by the respondent as head of IT from 8 May 2018 until 17 May 2019 when he commenced three months' gardening leave;
  - 7.2 on 3 February 2019 the claimant suffered a fall landing on his head and left shoulder giving rise to injuries which included a broken collarbone. It is the effects of this accident and resultant injuries which have led to this claim in the Employment Tribunal;
  - 7.3 the claimant commenced a period of sick leave from 4 February until 8 March 2019 returning to work on 11 March 2019;
  - 7.4 the claimant initially returned on a phased return pattern of 9:00 to 12:00 Monday to Wednesday increasing to full-time;
  - 7.5 the Occupational Health letter dated 2 April 2019 suggested reduced hours in the office from 9:00 to 15:00 homeworking for the remaining hours.
- 8. The bundle provided for the preliminary hearing contained a substantial amount of evidence and a considerable part of which post dated 17 May 2019.
- 9. Ms Miller took me to numerous medical letters which included the following:

9.1 One of the claimant's GP consultation is dated 29 March 2019 which set out the following:

29-Mar-2019 08:58	GP Surgery (BURNHAM HEALTH CENTRE) RAJSINGH, Durgesh (Dr)
Document	eMED3 (2010) new statement issued, may be fit for work (Fit Note Document (Diagnosis: Fracture clavicle + nerve damage?; Duration 29-Mar-2019 - 05-Apr-2019) eMED3 (2010) new statement issued, may be fit for work (Fit Note Document (Diagnosis: fracture clavicle + nerve damage?; Duration 29-Mar-2019 - 26-Apr-2019)
29-Mar-2019 08:24	GP Surgery (BURNHAM HEALTH CENTRE) RAJSINGH, Durgesh (Dr)
History	Some of the equipment ordered has not turned up so still struggling has occ health appt will be seen for it says neck is also hurting weakness and numbness left ring and little finger has noticed this 3 weeks ago, has woken up with numbness
Examination	neck mvts restricted , weakness ulnar distribution not sure level needs investigation refer to Mr Mike thomas PP

9.2 the Occupational Health report dated 2 April 2019 which includes the following:

**An opinion on whether any impairment is temporary or permanent, whether the individual is in receipt of the appropriate medical support and treatment.**

In my opinion I hope that the injury is just temporary. As stated previously he has an appointment to see an orthopaedic surgeon on 17th April. This is due to his GP's anxiety about him having pins and needles in his left hand, and particularly in his left little finger and ring finger. In my opinion he may need further investigations such as nerve conduction tests to make sure there is no ulna nerve damage and possibly an MRI scan of his cervical spine and left clavicle.

9.3 a letter dated 29 April 2019 from Mr Bourke, Consultant Orthopaedic Surgeon which sets out the following:

under when his clavicle was plated. He appears to be uniting only very slowly and has pain at the fracture site. It is too early as I have advised him to say this is a non-union but I would like your opinion on ongoing healing. He also has some numbness in T1 that may be a neuropraxia from the original injury. He is going to be seen again in our fracture clinic in 6 weeks' time but I would be grateful if you could see him for a second opinion.

9.4 a letter dated 8 May 2019 from Mr Ridgeway, Consultant Orthopaedic, Trauma and Spinal Surgeon which includes the following:

Following his surgery to the left clavicle as described above he has had ongoing problems which he has noticed more since he has come out of the sling and about five weeks post-surgery in March. He has got a discomfort in the left thumb, wasting of the left biceps and some weakness in the biceps, numbness in the left hand region, difficulty with neck movements more away from the brachial plexus, some wasting of the trapezius, scar over the left clavicle area, difficulty with abduction and a clicking of the left-sided shoulder joint, acromioclavicular joint.

Given his current symptoms and signs at four months, I suspect he has had quite a significant injury to the clavicle but the question remains why he is getting more significant neurological symptoms and the signs evident on examination today which would suggest there's an associated nerve injury. I am going to arrange a further MRI scan with gadolinium of the cervical spine, left brachial plexus/shoulder area and a CT scan. There is artefact which to some degree and I am also arranging nerve conduction studies and from this hopefully we can pinpoint where the lesions are, what type of lesions these are.

10. In addition I have considered all of the evidence in the bundle including but not limited to a letter dated 23 May 2019 from Mr Ridgeway which sets out:

In relation to your recent enquiry, I advise that I cannot provide any diagnosis or opinion from just your nerve conduction studies which cannot be viewed in isolation. I require mri and CT scans to be able to fully review and provide a detailed diagnosis because from our initial meeting it is clear that you have complex issues going on with your spine.

11. As set out in the claimant's impact statement the long-term impairment the claimant relies on is his limited arm functioning, nerve damage in his neck and chronic pain in his shoulder, neck and area in which he had to have reconstructive surgery.
12. It is important to remember that the relevant test as to whether the impairment was likely to have adverse effect is it could well happen not that it is more probable not. I am not required to consider the knowledge of the respondent on this issue what I must do is assess the situation at the material time which I find is the period 1 March 2019 until 17 May 2019. Whilst I have been provided with substantial medical evidence which post dates 17 May 2019, I do not find that it is helpful to my assessment as to what the situation was at the material time.
13. I find that:

13.1 The claimant had surgery on or around 3 February 2019 and wore a sling for a number of weeks after this date. It is not clear to me exactly how long he wore this sling but it would appear to be about five weeks. Which would take him to the second week of March 2019. I find that during this period the claimant could not be said to have suffered from a long-term impairment and neither could it well happen that he would suffer from a long-term impairment. He suffered an injury he received standard treatment and there was nothing remarkable about his situation. It is not an injury that per se would be expected to result in a long-term impairment;

13.2 what is identified in the medical records is that the claimant suffered from intermittent weakness and numbness in two fingers and had neck pain. Further investigations were suggested by occupational health and Mr Ridgeway. There are some suggestions of nerve damage though none

of the doctors were able to provide a diagnosis or opinion at this stage. Mr Ridgeway specifically states that in his letter of 23 May 2019.

14. Taking the all of the evidence into account I find that it cannot be said that between the first week of March 2019 up to and including 17 May 2019 that it could well happen that the claimant would suffer from an impairment which would have a long-term substantial effect on him for the following reasons:

14.1 17 May 2019 is only just over four months after the claimant suffered a broken collarbone and injuries arising from his fall. This is a substantial injury and would in the ordinary course of events be expected to take a number of months but not 12 months to heal and for the claimant to recover;

14.2 the medical evidence demonstrates that the claimant was suffering from pain, intermittent numbness in two fingers and some restricted movement. It was unclear at this time what was the cause of the symptoms;

14.3 at the material time the claimant's injury was still healing as is evidenced by the letter dated 29 April 2019 from Mr Bourke. The injury was still in the process of healing which would be expected to take some further months to heal and for symptoms to resolve. The letter from Mr Bourke refers to healing of the bony injury and I find that this healing was expected to take some further months but I do not accept that bony injury would be expected to take 12 months to heal and therefore for the symptoms to persist after 12 months;

14.4 it was unclear to the 3 to 4 doctors that the claimant attended between March and 17 May 2019 what was the cause of the claimant's symptoms and that further investigations were needed. The doctors were not able to offer a diagnosis or opinion at this time. I recognise that disability for the purposes of the Equality Act 2010 can and does arise without the need for a medical condition to be diagnosed because it is a functional not medical test. However I consider that the uncertainty about the claimant's healing and the cause of his symptoms at a relatively recent stage after his injury are strong evidence that it could not well happen that he would have a long-term impairment;

14.5 at the material times the doctors wished to carry out further tests so that they could understand what the claimant's problems may be. I recognise that for many people diagnostic tests are not conclusive but when these had not even been carried out and there was a substantial lack of clarity at such an early stage about the claimant's healing process and his potential prognosis in terms of symptoms, I find that it is not possible to conclude that it could well happen that the claimant would have a long-term impairment.

15. I recognise that events post dating 17 May 2019 have demonstrated that the claimant has suffered from a long-term impairment. However I do not consider this hindsight to be material to the issues I have had to consider.

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Employment Judge Bartlett

Date: 19 February 2021

12 April 2021

Sent to the parties on: .....

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For the Tribunal Office