



EMPLOYMENT TRIBUNALS

PRELIMINARY HEARING

Claimant: Ms K Heatherington v **Respondent:** CB Ventures Ltd

Heard at: London Central Employment Tribunals, by Microsoft Teams

On: Friday, 14th May 2021

Before: Employment Judge Sharma

Appearances

For the Claimant: Ms Bewley, of Counsel

For the Respondent: Ms H. Winstone, of Counsel

RESERVED JUDGMENT OF THE PRELIMINARY HEARING

In relation to the issue of disability and a specifically whether the Claimant's shoulder injury amounted to a disability at the relevant times (9 March 2020 to 15 June 2020) under Section 6 Equality Act 2010, it is this Tribunal's determination that the Claimant's shoulder injury did amount to a disability at the relevant times under Section 6, Equality Act 2010.

Employment Judge Sharma:

16 May 2021

Sent to the parties on:

17th May 2021.

For the Tribunal:



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Ms K Heatherington v **Respondent:** CB Ventures Ltd
Heard at: London Central Employment Tribunals, by Microsoft Teams
On: Friday 14th May 2021, 10.00am
Before: Employment Judge Sharma (sitting alone)

Appearances

For the Claimant: Ms Bewley, of Counsel

For the Respondent: Ms H. Winstone, of Counsel

REASONS FOR RESERVED JUDGMENT OF THE PRELIMINARY HEARING

Purpose of Preliminary Hearing

1. This preliminary hearing was listed to determine the issue of disability; specifically, did the Claimant's shoulder injury amount to a disability at the relevant times (9 March 2020 to 15 June 2020). The burden of proof is upon the Claimant to show that she is disabled.

2. The Respondent has conceded the Claimant, having a disability arising from her asthma.

3. In making my decision, I took account of the evidence provided by the Claimant who gave evidence having affirmed, the extremely helpful submissions of Ms. Bewley for the Claimant and Ms Winstone for the Respondent (the key points of both submissions of which I summarise in paragraphs 19 and 20 below and I also took account of those pages of the bundle of documents comprising 455 pages to which I was taken.

Findings of Fact

4. On 9 March 2020, the Claimant suffered an injury at work to her right shoulder as a result of a fall outside.

5. The Claimant is right-handed.

6. On 11 March 2020, the Claimant was diagnosed with an un-displaced right shoulder greater tuberosity fracture. The shoulder is a ball and socket joint. She had fractured the outside of the ball part.

I find that a fractured shoulder is an impairment. There is no statutory definition of a physical impairment. In *College of Ripon and York St John v Hobbs* 2002 IRLLR 185, it was held that a person has a physical impairment if he or she has something wrong with them physically. I find that on this basis, a fractured shoulder is a physical impairment.

7. In examination in chief, the Claimant was taken to her patient information sheet (121) which informed the Claimant that “the shoulder joint does not respond well to being injured and longstanding stiffness is often inevitable.” On the longstanding stiffness, the Claimant explained how “I have stiffness in the morning, I cannot brush my hair, the top of my arm aches and I struggle to pull the quilt up, if I have to move my right arm then I have to move it with my left one”

8. The medical notes of 3 Aug 2020 (158), recorded that the shoulder was getting better and that the Claimant was doing strengthening exercises regularly. She still has difficulty using her iPad for a long time. She had 3 / 4 full movement and there was shoulder pain post fracture. She was advised to increase the weight of the water bottle beyond 100ml to improve her strength. This she confirmed she did not do.

9. On 24 August 2020 (159), the medical notes recorded that her shoulder was getting better and there was almost full movement, there was pain here and there and the pain she received while turning in bed was manageable. The shoulder pain post fracture was being resolved. She was advised to continue exercising within the pain limits and was given education on self-management and if her symptoms worsened, she was asked to call 111 or her GP.

10. In cross examination by Ms Winstone, the Claimant confirmed that she had not contacted 111 or her GP since August 2020 in relation to her shoulder, although she had contacted her doctor on other matters, for example a skin condition.

11. Both the doctor consultations and the physio were done remotely. In examination in chief the Claimant explained how she had 70% movement in her arm but she did not have strength in it.

12. On 12 May 2021, just 2 days before this preliminary hearing, she spoke with her doctor who wrote a “To Whom It May Concern” letter. The letter stated that although the fracture had improved, she was in pain and she had a limited range of motion. When she moves the shoulder, there is pain. She informed the doctor that she was not back to normal activities. Thus, the doctor referred her to an orthopaedic surgeon. The Claimant confirmed in examination in chief that this was a correct description of her health.

13. Ms Winstone put it to the Claimant that she had not contacted the doctor since August 2020 in relation to her shoulder (but had indeed sought medical advice on other matters). Yet 2 days before this hearing, she had sought a consultation where she informed the doctor that she was in pain and had a reduced range of motion and movement. Ms Winstone suggested that this was done to enhance her case before me at this preliminary hearing that her fractured shoulder was a disability as even up to 25 Jan 2021, she had not spoken to her doctor about her shoulder. Given the descriptions of the effects of the shoulder impairment provided by the Claimant in her impact statement, Ms Winstone questioned why she would not go to the doctor as it was all extreme.

14. Ms Winstone also put it to the Claimant that the reason why she was suffering was because she was not doing her exercises. The Claimant stated that she was doing her exercises.

15. The Claimant stated that she had spoken to her doctor a few weeks ago prior to 12 May but she had continued to do her exercise. After the accident she had all the effects described in the impact statement but it has got better since then. She had improved within 8 weeks of the accident and movement had started.

16 In relation to the entry in the medical notes of 3 Aug 2020, it records the Claimant's shoulder getting better although there was difficulty in holding the iPad for a long time. She was asked to increase the weight of the water bottle to increase the strength. Ms Winstone put it to the Claimant that this medical entry suggested she was getting better but this was in conflict with her impact statement. The Claimant stated that some of the statements in her impact statement related to her condition after the accident happened and some were still are on-going.

17. To understand the effects of the impairment on the Claimant and to understand which effects were still continuing and whether these were a substantial adverse effect, I requested that the Claimant go through her impact statement with me to identify the extent to which she could do the various activities. She gave the following evidence: -

(a) She used to wash her hair every morning but now she can only do it on alternative mornings Holding the hairdryer is hard. She struggled much more for the first few months but now it is not as bad.

(b) She still does not have a bath as she is scared that she will not be able to get out;

(c) She still struggles in putting her t-shirts on and off. She cannot take her right arm across and this is an ongoing problem;

(d) Sleeping on her right side has got a lot better. Her right arm is still stiff and she still has to rotate her shoulder to increase mobility;

(e) Being unable to pull the quilt has eased in the past 6 weeks but prior to then, she could not pull the quilt up.

(f) Even to this present day, she cannot carry heavy shopping bags and has to take someone with her when she goes;

(g) Even to this present day, she cannot Hoover with her right arm;

(h) Even to this present day, she can only iron a few items at a time;

- (i) Even to this present day, she cannot shake her quilt;
- (j) Even to this present day, she still struggles with cooking;
- (k) Even to this present day, she cannot pour anything which is full like a kettle or a jug;
- (l) Even to this present day, she cannot lift a weight of more than a 100ml water bottle;
- (m) Even to this present day, she cannot extend her arm beyond 70 degrees;
- (m) Even to this present day, she cannot hold her iPad for more than around 30 minutes without having to use a cushion for support on my shoulder, so it relieves the pulling
- (o) She can no longer bowl, an activity she enjoyed doing because of her inability to hold the weight of the ball and throw it forward;
- (p) Even to this present day, if walking a dog, she cannot hold the lead in her right hand;
- (q) Being unable to grab her seat belt lasted for 4-5 months after the accident but this has eased;
- (r) Being unable to adjust her driving seat lasted for about 6 months but her husband now uses another car so there is no need to adjust the car seat position;
- (s) Even to this present day, she drives with her right arm resting with her left arm carrying the weight of the wheel;
- (t) When she walks, she have to be very conscience; and
- (u) She is worried that she will not be able to hold her grandchildren when they arrive for periods of time

18. I make the following findings: -

In relation to the issue of whether or not the Claimant's shoulder injury amounted to a disability at the relevant times (9 March 2020 to 15 June 2020), I find that it was a disability at the relevant time for the following reasons: -

- (a) The Claimant had a physical impairment at the relevant times and the impairment has a substantial and long-term adverse effect on the Claimant's ability to carry out normal day to day activities;

Impairment Condition

- (b) The shoulder injury is an impairment and thus the impairment condition is satisfied;

Adverse Effect Condition

(c) During the relevant time, the shoulder injury affected and currently affects the Claimant's ability to carry out normal day to day activities (D3 Guidance) and thus the adverse effect condition is satisfied. After the accident, the shoulder fracture adversely affected her and this adverse effect has continued for 12 months and beyond. This is demonstrated by her difficulty in not being able to wash her hair on a daily basis, not being able to have a bath, struggling to put on a t-shirt, not being able to shop alone, not being able to Hoover with her right hand even though she is right-handed, only being able to iron a few items at a time, struggling to lift a saucepan and thus not being able to cook, not being able to partake in her sport (bowling) and having to adjust the way she drives.

Substantial Condition

(d) I find that not being able to do these activities is more than minor or trivial (s212.EA);

(e) There are a number of activities which at the relevant time she could not do and she cannot do, so the cumulative effect of these constitutes a substantial adverse effect (B4, Code). I am required to focus on what the Claimant cannot do, not what she can do;

(f) Since the relevant time and to date, she is having to avoid doing her sport (bowling), she is not able to bath, she is not able to cook (Appx 1, EHRC Employment Code);

(g) Certain activities she is now doing are, since the relevant time, having to be done in a different way to the way she used to (for example, hair washing, dressing, shopping, ironing and hoovering): B3, Guidance;

(h) The Claimant has had physio therapy and, based on her evidence, she is doing her exercises; if it was not for the physio therapy or if it was not for her exercises, her shoulder injury is likely to have a substantial adverse effect. It could well happen: Para 5 (1), Sch 1) B12, Guidance);

(i) The patient information sheet informed the Claimant that long-term stiffness is inevitable. Further it was recorded in her medical notes that she needed to increase the weight of the bottle to increase her strength. Based on these, her inability to increase the weight and if she stops exercising leads me to conclude that there could be a relapse in her condition (B13, Guidance). Thus, I find that the shoulder injury has a substantial adverse effect;

(j) The physiotherapy stopped because the Claimant had received the maximum sessions available to her on the NHS. Thus, this could not continue. It appears that even if she continued her exercises, this would not create a permanent improvement. Thus, on this basis, I find that the impairment will not cease to have a substantial adverse effect ((B16, Guidance). It is the stiffness that is causing the Claimant to experience the adverse effects by reason of not being able to carry out normal day to day activities. The physio therapy has already stopped. If the Claimant was to stop exercising, then in my view, the adverse effects she is experiencing are likely to continue and even get worse (C11, Guidance).

Long Term Condition

(k) In my determination the effect of the impairment is long term.

(l) The accident which caused the un-displaced shoulder greater tuberosity fracture took place on 9 March 2020.

(m) As my findings set out in paragraph 17 above show, some effects of the impairment were present at the relevant times and are still continuing today, namely on 14 May 2021. Thus, the effects of the impairment have lasted at least 12 months. Thus, I find that the effects are long term.

(n) What is causing the Claimant adverse effects and thus leading to her not being able to carry out normal day to day activities, is the stiffness. The patient information sheet informed the Claimant of the inevitable long-term stiffness. Based on the medical prognosis that the stiffness is long term, I find that the effect of the shoulder fracture is likely to continue in the near future.

(o) I find that this is a long-term condition on the basis that if the exercise by the Claimant does not continue, then the Claimant's stiffness and the more adverse effects she was experiencing previously and those she continues to experience are likely to recur: Para 2(2), Sch 1, Part 1, Supreme Court Case of SCA Packaging Limited v Boyle, C11 Guidance,

(p) I find that even though some activities which were extremely difficult for the Claimant immediately after the accident and are now not as difficult e.g., sleeping on the right-hand side has got better, being able to grab her seatbelt has got better, adjusting her car seat, pulling the quilt has got better, this does not prevent the shoulder impairment being long term. It is not necessary for the effect to be the same throughout the period which is being considered for the 'long-term' element of the definition to meet. The Claimant has satisfied the long-term element of the definition of disability even though the effect of some of the day-to-day activities is not the same in severity: C 7 Guidance.

(q) I share Ms Winstone's surprise that the Claimant did not contact her GP about the pain after August 2020 and that the only time she did contact her doctor was 2 days before this preliminary hearing. This does not, however alter the fact that in my view, the shoulder impairment satisfies the statutory definition of being a long-term condition. I accept the Claimant's evidence that at the relevant times, she was suffering adverse impairment and to a degree this adverse impairment is continuing to this day, 14 months after the accident. I accept that she has been and is currently making adjustments in her life to manage the situation.

(r) I find that it is irrelevant whether or not the Claimant was doing her exercises. Whether or not she has been doing these, for the reasons I set out above, the shoulder impairment falls within the statutory definition of an impairment.

Counsels' Submissions

Ms Winstone's Submissions

19. I summarise the key points of Ms Winstone's helpful submissions: -

(a) This is not a disability. There has been a cynical development of pain. The doctor's letter of 12 May 2021 is indicative of this.

(b)The Claimant did not seek help but she was discharged and told of full movement in Aug 2020. She was told to call her doctor or 111 if necessary (p122) but she did not do so.

(c) In May, then in Oct, Nov, Dec and Jan, she did consult the doctor but not about her shoulder fracture.

(d) The physio examination (156) showed that she was doing well with her exercises and that she was improving with the stiffness and the pain. The physio assessment of 3 Aug 2020 (158) reported that her shoulder was getting better. The Claimant herself did not increase her weight exercise beyond the 100 ml water bottle. The 24 Aug 2020 report (p 159) reported that her shoulder was getting better, she was almost back to full movement and that there were aches and pains here and there but manageable.

(e) The medical reports and the physio reports were thus in conflict with her impact statement. Her visit to the doctor 2 days ago indicated that she was trying to “load” her claim and this is not acceptable.

(f) Was it likely to last for 12 months? No, based on the leaflet. There was no expectation that this would become a disability within a year. We are now here 14 months later.

(g) Will this likely to last? She was informed (122) that any stiffness would settle if she exercised it.

(h) In April, May and June, there was no indication that this would continue for more than 12 months. This is a common injury and she was told to take pain killers. It was not designed to last more than 12 months.

Ms Winstone then made the following additional submissions after Ms Bewley’s submissions:

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(i) The physio is part of the treatment: Any broken bone requires physio: Para C11: (Guidance on disability states that treatment should be taken into account. Treatment which masks over something should be ignored. Physio does not mask it. It is part and parcel: of the treatment. In Aug 2020, she was almost back to normal. It is wrong to ignore the physio as it is likely to cure. Physio is not a mask it is part of treatment programme.

Ms Bewley: Submissions

20 I summarise the key points of Ms Bewley’s submissions: -

(a) She had fractured her shoulder in March 2020. Without a doubt this had a substantial impact during the relevant period of March 2020 to 15 June 2020.

(b) Qsn Can it recur within the next 12 months?

(i) In relation to the test for disability, the test is low. You are looking at “could it happen”. “Likely” means “could it happen?”

(ii) Given the fracture and the initial guidance that it can last 12 months, if you remove the physio, you cannot say that it will not happen. The test is low.

(iii) The test is: looking at the relevant time, it cannot be challenged that it is likely to recur within 12 months

(iv) On the question of whether or not it is possible that a substantial impact could continue for up to 12 months or more, Ms Bewley says yes; these fractures can lead to ongoing stiffness. Could it well happen? Yes. it could well happen and it has.

(v) Could it happen for 12 months? If you take away the treatment, the physio, this could then have a substantial impact for 12 months. Even if you take account of physio, it could be a substantial impact.

(vi) Not seeing the doctor and not being referred to orthopaedic surgery shows it could well happen. Once you have a fracture when you are looking at the future, something could well happen.

(vii) Has it caused problems? The Claimant's evidence has been consistent and clear. A point made against her was that there had been a drop to her shoulder (i.e.it was getting better). What has happened is, things have not got worse: she has 70% improvement and she has continued her exercise. She has managed ways to avoid it. She is managing to live her life but it is classified as a disability because of her weak arm. It is not overwhelming but it is a disability

(viii) This is a physical fracture. She has symptoms and treatment. There is more than adequate evidence that the effects continued during relevant period and for 12 months thereafter.

(ix) She has had a physio but there is no diagnosis to say she is fully better. She carries on doing her exercise. She has not invented anything. Her evidence should be accepted.

(x) As the Boyle case shows, "likely: means "it could well happen "So at relevant time she was disabled.

The Law

21. In making my decision, I took account of the following areas of law: the Equality Act 2010, the Guidance on the Equality Act 2010 and Appendix 1 of the EHRC Employment Code.

22. The law relating to whether or not a person has a disability is set out in Section 6 (1) and Schedule 1, Equality Act 2010, which provides as follows: -

“A person (P) has a disability if: -

(a)P has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day to day activities.

23.I need to consider whether the Claimant had a disability at all relevant times, namely from 9th March until 15th June 2020, namely the period of the alleged discriminatory act.

24. In *Goodwin v Patent Office* (1999) I.C.R 302, Morison J held that the following four questions should be answered in order and these are the 4 questions I have answered in making my decision: -

- (a) Did the Claimant have a mental or physical impairment (“the impairment condition”);
- (b) Did the impairment affect the Claimant's ability to carry out normal day to day activities (“.adverse effect condition”);
- (c) Was the adverse condition substantial (“substantial condition”); and
- (d) Was the adverse condition long term (“long term condition”).

Long Term Condition

25.In assessing whether the adverse condition is long term, para C12 of the Guidance provides that “a person who has had a disability within the definition is protected from some forms of discrimination even if he or she has since recovered or the effects have become less than substantial. In deciding whether a past condition was a disability, its effects count as long term if they lasted 12 months or more after the first occurrence or if a recurrence happened or continued until more than 12 months after the first occurrence.

Substantial Adverse Effect

26.Section 212 (1) EA 10 defines substantial as more than minor or trivial.

27.The cumulative effects of an impairment should be taken into account when working out whether it is substantial. Para B4 of the Guidance provides that “An impairment might not have a substantial adverse effect on a person’s ability to undertake a particular day-to day activity in isolation. However, it is important to consider whether its effects on more than one activity taken together could result in an overall substantial adverse effect.

28.Appendix 1 of the EHRC Employment Code provides guidance on the meaning of substantial:” Account should be taken of where a person avoids doing things which for example causes pain, fatigue or substantial social embarrassment because of a loss of energy and motivation

29.The Guidance sets out a number of factors to consider including the time taken by the person to carry out an activity (B2), the way a person carries out an activity (B3), the cumulative effects of an impairment (B4) the effect of behaviour (B7) and the effect of treatment (B12)

30. B12 provides as follows: -

The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, ‘likely’ should be interpreted as meaning ‘could well happen’. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (Sch1, Para 5(1)). The

Act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (Sch 1, Para 5(2)). In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs.

31. Para 5 (1) of Sch 1 provides as follows: -

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.

32. Para 5 (2) provides that: "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

33. B13 of the Guidance provides as follows: -

This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1

34. Adverse effect on "normal day to day activities":

A tribunal is required to focus on what the Claimant cannot do, not what he can do.

35. B16 of the Guidance provides as follows: -

Account should be taken of where the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement. It is necessary to consider whether, as a consequence of the treatment, the impairment would cease to have a substantial adverse effect.

36. C11 of the Guidance provides a follow: -

If medical or other treatment is likely to permanently cure a condition and therefore remove the impairment, so that 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 effects. However, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stopped, 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.

37. D3 of the Guidance provides examples of "day to day activities".

"In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving,

carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

Long Term Condition

38. Part 1, para 2 of Schedule 1 provides as follows: -

- (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**.

39. In the Supreme Court case of SCA Packaging Limited v Boyle, Lord Hope (para 42, same point made at para 51) opined that “likely” “refers to the kind of risk of an impairment recurring (“it could well happen”).

He went on to opine:” “where someone is following a course of treatment on medical advice in the absence of any indication to the contrary, an employer can assume that without the treatment, the impairment is “likely” to recur. If the impairment had a substantial effect on the patient’s day –to day-life before it was treated, the employer can also assume –again in the absence of any contra indication- that if it does recur, its effect will be substantial”

- (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 not being, long-term.

40. C7 provides that

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.

41. Para C11 provides that: if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stopped, 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.

My Conclusion

(a): Did the Claimant have a mental or physical impairment (“the impairment condition”)?
Yes, this was not disputed that the Claimant had a shoulder injury.

(b) Did the impairment affect the Claimant's ability to carry out normal day to day activities (“adverse effect condition”)?

Yes, for the reasons I have set out in my findings.

(c) Was the adverse condition substantial (“substantial condition”)?

Yes, for the reasons I have set out in my findings.

(d) Was the adverse condition long term (“long term condition”)?

Yes, for the reasons I have set out in my findings.

Employment Judge Sharma

16 May 2021

Sent to the parties on:

17th May 2021.

For the Tribunal:

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