



EMPLOYMENT TRIBUNALS

Claimant: Mr D Bennett
Respondent: DD Data Exports Limited
Heard at: In Chambers **On: Wednesday 19 May 2021**
Before: Employment Judge Matthews

Representation:
Claimant: Mr G Lee - Solicitor
Respondent: Mr J Gunnion - Solicitor

RESERVED JUDGMENT

Mr Bennett was, at the relevant time, a disabled person within the meaning of section 6(2) of the Equality Act 2010.

REASONS

INTRODUCTION

1. Mr Daniel Bennett brought claims of disability discrimination against the Respondent Company.
2. The Company does not accept that Mr Bennett has a disability and otherwise defends the claims.
3. This is a Preliminary Hearing listed by Order of Employment Judge Postle sent to the parties on 24 May 2020 (the "Order"). The Order can be seen in the bundle at 35-38.
4. The Order sets out the matter for determination at this hearing as:

“Whether the claimant has a disability, an impairment to his right leg which satisfies the definition of disability within the meaning of s.6 of the Equality Act 2010.”

5. That issue is dealt with in this Judgment. The Tribunal has also made case management orders on the subject of the issues and preparation for the full hearing.
6. The Tribunal heard from Mr Bennett by reference to a written *“Disability Impact Statement”*. On the Company’s side the Tribunal heard from Mr Jonathan Norman (a Director of the Company) who also produced a written statement. There was a written statement from a Mr Nigel Herrick. Mr Herrick did not appear. The Tribunal explained to the parties that it would read Mr Herrick’s statement but accord it little evidential weight. There was an “electronic” bundle of documentation consisting of 184 pages. References in this Judgment are to pages in the bundle unless otherwise specified. Mr Lee produced written argument.
7. The hearing was a remote hearing using the Common Video Platform consented to by the parties. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way.
8. It was not possible to both consider and give judgment on the issue of disability whilst leaving time for case management. Judgment on the issue of disability was, therefore, reserved.

FACTS

9. Mr Bennett had a car accident on 2 December 2007. Mr Bennett broke the fibia/tibia in his right leg.
10. Nearly ten years later, on 30 August 2017, Mr Bennett started work with the Company. Mr Bennett was dismissed with effect from 5 September 2018.
11. Mr Bennett says that, for a long period of time after his accident including his period of employment with the Company, he took Tramadol to alleviate the continuing pain he experienced as a result of his accident. The Tribunal understands Tramadol to be a strong opioide painkiller used to treat moderate to moderately severe pain. Mr Bennett says that he took 8 x 50mg tablets daily and CBD oil (a Cannabinoid). As far as the Tramadol is concerned, The Tribunal understands this to be at the high end of the normal dose. Notwithstanding, Mr Bennett describes the pain he experienced as *“excruciating”* (WS11). Mr Bennett’s evidence was that the effect of his injury would have been much greater if he had not taken this

medication, especially on his ability to walk (as to which, see below). There is, however, an issue about whether or not Mr Bennett was taking Tramadol during his period of employment with the Company and the Tribunal returns to this in paragraph 21 below.

12. In the period between his accident and his dismissal by the Company, Mr Bennett underwent a number of treatments for his injury. These included the insertion of artificial bone, keyhole surgery to his kneecap and bone cutting and re-bracing.
13. Mr Bennett worked for the Company as a van fitter. His primary job was to wire electrical units, such as fridges, into campervans. He also helped to fit bed and seat units. Mr Bennett says that he used a number of aids to enable him to do this, whilst at the same time managing the pain associated with his injury. These included knee pads and a chair to enable him to sit whilst working. Mr Bennett also says that he took *“regular rests when needed for short intervals”*. Mr Bennett was able to ride his bicycle around at lunchtimes at work to help him keep his leg joint moving. Mr Bennett does not seem to have taken his walking stick to his workplace at the Company.
14. Apart from his injury causing him pain, the only adverse effect on his day-to-day activities that Mr Bennett describes in any detail is on his ability to walk. The Tribunal assumes that this was an effect for the whole of the period between the date of Mr Bennett’s accident and 5 September 2018, when he was dismissed by the Company.
15. Mr Bennett says this (WS26):

“I use a walking stick whenever I am walking for any length of time but cannot walk further than 200 yards unaided without having to stop and click the knee to release the pressure” “rest for a few minutes before continuing, which the Tramadol did not control or help”.
16. Mr Bennett says (WS18 and 20) that he has tried to make the best of the effects of his injury. In the Tribunal’s view, Mr Bennett has sought to minimise the effects and lead a life as near as possible to that he would have led had he not had the injury.
17. There is a photograph in the bundle of Mr Bennett paragliding behind a boat with his children on 1 September 2018, four days before he was dismissed by the Company. The Tribunal attaches no significance to this. This form of paragliding is open to people with all sorts of physical impairments.
18. The bundle contains a great deal of medical input. Much of this postdates Mr Bennett’s dismissal by the Company. To that extent it

does not assist the Tribunal in deciding what was known about the effects of Mr Bennett's injury at the time of the dismissal. The Tribunal does, however, note the following.

19. On 28 September 2017 Mr David Goodier, a Consultant Orthopaedic Surgeon with the Royal National Orthopaedic Hospital NHS Trust wrote to Mr Rob Pollock, Consultant Orthopaedic Surgeon, on the subject of the injury to Mr Bennett's knee (59-60). The letter included this:

"Many thanks for asking me to see this chap with his right knee. He had a road traffic accident ten years ago sustaining a fracture of the lateral tibial plateau, and has had a rather valgus tibia since then. He was working as a Tree Surgeon and then subsequently had an office job and is now working renovating mobile homes and caravans.

His main limiting factor is pain in the right knee."....

"Examining him he has his right knee in fixed inflexion of about 10 degrees or so, and there is obvious mal-alignment of the limb as a whole." [In evidence Mr Bennett described this as being "bow legged".]

"The bottom line is that I think he would benefit greatly from realignment." "Unfortunately this would require about five months in a Taylor spatial frame."....

"He has recently started his job so he may elect to put things off until 2018,"

20. On 16 May 2018 Mr Goodier wrote to Mr Bennett's GP, Dr Srivastava (63-64). Mr Goodier commented:

"He is getting some knee pain."

"He requires correction."....

"We have discussed when best to do this. He is on holiday in September so I think October would be perfect."

21. On 12 July 2018 Ms Anna Timms (Clinical Nurse Specialist Limb Reconstruction) wrote to Dr Srivastava (67-68). The letter included this:

"He suffers with a lot of pain,"

“Mr Bennett took Tramadol to help with his pain for 10 years and had a difficult experience stopping it. He now takes CBD (Cannabinoid) oil from Holland and Barratt which he feels is beneficial. He has had several surgeries to try to correct the deformity in his limb after which he has found 1V paracetamol to be more beneficial than a morphine PCA. He would prefer not to take Tramadol again.”

APPLICABLE LAW

22. Section 6 of the Equality Act 2010 (the “EA”), so far as it is relevant, provides:

“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.”

“(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

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

23. The Government has issued “Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)” (the “Guidance”) under section 6(5) EA.

24. Section 212(1) of the EA, so far as relevant, provides:

“(1) In this Act-”....

““substantial” means more than minor or trivial”

25. Paragraph 2(1) of Part 1 of Schedule 1 to the EA provides:

“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.”

26. Paragraph 5 of Part 1 of Schedule 1 to the EA, so far as it is relevant, provides:

“5. Effect of medical treatment

(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.”

CONCLUSIONS

27. Mr Bennett’s case is that, during the period of his employment with the Company, he had a physical impairment as a result of the injury he had suffered to his right leg and that it had a substantial and long-term adverse effect on his ability to carry out normal day to day activities. It is for Mr Bennett to show that he satisfies the statutory definition.

28. Did Mr Bennett have a physical or mental impairment?

29. Quite properly, in the Tribunal’s view, the Company conceded that the injury to Mr Bennett’s right leg was a physical impairment for the purposes of section 6 EA. The Tribunal is of the same view.

30. Did that impairment have a substantial adverse effect on Mr Bennett’s ability to carry out normal day-to-day activities?

31. Having identified that Mr Bennett had a physical impairment, the Tribunal must now consider whether or not it adversely affected his ability to carry out normal day-to-day activities and whether or not any effect was substantial. Here the focus is on what Mr Bennett could not do, rather than on what he could do.

32. Mr Bennett described various adjustments that he made to the way he worked, to alleviate pain. None of those, in the Tribunal’s view, reflect a substantial adverse effect on Mr Bennett’s ability to carry out normal day-to-day activities.

33. The obvious effect that Mr Bennett describes which might amount to a substantial adverse effect on his ability to carry out day-to-day activities, is the effect his injury had on his ability to walk.

34. The Appendix to the Guidance includes this:

*“An illustrative and non-exhaustive list of factors which, if they are experienced by a person, **it would be reasonable** to regard as having a substantial adverse effect on normal day-to-day activities.”*

“A total inability to walk, or an ability to walk only a short distance without difficulty; for example because of physical restrictions, pain or fatigue.”

*“An illustrative and non-exhaustive list of factors which, if they are experienced by a person, **it would not be reasonable** to regard as having a substantial adverse effect on normal day-to-day activities.”*

“Experiencing some tiredness or minor discomfort as a result of walking unaided for a distance of about 1.5 kilometres or one mile.”

35. On the evidence, Mr Bennett could only walk a distance of around 200 yards without having to stop to click his knee and have a rest. In the Tribunal’s view, applying the Guidance, that amounts to a substantial adverse effect on normal day-to-day activities, without more. It seems that Mr Bennett sometimes took a stick and sometimes did not, but nothing flows from that. Nor does the question of whether or not any medication Mr Bennett took affected the position.

36. In concluding that the effect was substantial the Tribunal takes note of the Guidance. The Guidance, amongst other things, has this to say on the 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.”....*

37. The Tribunal’s conclusion is that the effect on Mr Bennett’s ability to carry out the day-to-day activity of walking was substantial. The effects described above were more than minor or trivial. The effect of

Mr Bennett's impairment crosses the threshold into the statutory definition of disability.

38. Was that effect long-term?

39. The alleged act of discrimination was, in effect, the dismissal on 5 September 2018. At that point in time the Tribunal has no hesitation in finding that the effect of the impairment was long-term. It had lasted for at least 12 months and it was likely to last for at least another 12 months if not the rest of Mr Bennett's life.

40. For these reasons, Mr Bennett was a disabled person within the meaning of that term in the EA by reference to the effects associated with his leg injury. Mr Bennett had that disability throughout the period of his employment by the Company.

Employment Judge Matthews

Date: 24 May 2021

JUDGMENT SENT TO THE PARTIES ON

.....01/07/2020.....

FOR THE TRIBUNAL OFFICE