



EMPLOYMENT TRIBUNALS

Claimant: Mr Q Atkinson

Respondent: Rentokil Property Care Ltd

HELD by: CVP
chambers)

ON: 17 August 2021 and
18 August 2021 (in

BEFORE: Employment Judge Shulman

REPRESENTATION:

Claimant: Mr P Morgan, Counsel

Respondent: Ms C Urquart, Counsel

RESERVED JUDGMENT

1. The claimant did not at the relevant time have a disability within the meaning of the Equality Act 2010 section 6(1).
2. Therefore, the claims of failure to make reasonable adjustments and discrimination arising from disability are dismissed.
3. The unfair dismissal claim remains and case management orders have been made accordingly.

REASONS

1. Introduction

This is a preliminary hearing to consider whether the claimant has a disability within the meaning of section 6(1) Equality Act 2010, the claimant having made claims for discrimination arising from disability and failure to make reasonable adjustments. (The claimant has also made a claim for unfair dismissal which is not relevant to this hearing).

2. Issues

These were recorded by Employment Judge Lancaster in a preliminary hearing dated 13 July 2020 (PH). The issues which related to disability are as follows:

“4.1. Did/does the claimant have a physical impairment, namely knee problems?

4.2. If so, did/does the impairment have a substantial adverse effect on the claimant’s ability to carry out normal day/to/day activities?

4.3. If so, is that effect long term? In particular, when did it start and;

4.3.1. Has the impairment lasted for at least 12 months?

4.3.2. Is or was the impairment likely to last for at least 12 months or the rest of the claimant’s life, if less than 12 months? “

3. The law

The Tribunal has to have regard to section 6(1) Equality Act 2010, Schedule 1 of the Equality Act 2010 and Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) (Guidance). In so far as the provisions of Guidance are relevant they will be referred to in the body of these reasons.

4. Facts

The Tribunal, having carefully reviewed all the evidence (both oral and documentary) before it, finds the following facts (proved on the balance of probabilities):

4.1. The claimant made a disability impact statement (DIS). In DIS he recorded that his left knee gave way, whilst working, in January 2017, but it is common ground between the parties that the relevant commencement time with a possible finding of disability in relation to the left knee was March 2018, when the claimant underwent an arthroscopy on that knee, following which he was off work for seven weeks.

4.2. The claimant subsequently twisted his right knee when working. DIS stated that this was in August 2018, but the claimant agreed in cross-examination that the date was in fact late October 2018.

4.3. The claimant did experience pain and also his knees giving way and at some point or points this affected his walking, driving, undertaking domestic chores, such as hoovering, cutting the grass and DIY. It also affected his shopping, showering, dressing and his sex life, together with the undertaking of social activities such as go-karting,

mountain biking or walking when camping. However as we shall see from the claimant's evidence and the medical records, the claimant's adverse effects throw more light on the contents of DIS.

- 4.4. In a letter dated 19 April 2019 Mr A C Maury, the claimant's surgeon, told the claimant's GP, six weeks after the arthroscopy, that most of the claimant's (left) knee was in excellent condition and that the claimant had simply torn a piece of cartilage, which Mr Maury had removed and the claimant had been discharged on 17 April 2018. The claimant told the Tribunal that after that he had recovered from his left knee injury, experiencing mild symptoms between March 2018 and October 2018.
- 4.5. On 25 October 2018 the claimant attended Selby Minor Injuries Unit, when he complained of a sprain ligament injury to his (right) knee joint. The claimant told the Tribunal that his left knee gave way and the right knee twisted. The claimant was given no treatment and there were no investigations carried out. No safeguarding concerns were recorded.
- 4.6. On 1 November 2018 Mr A J Gibbon, a consultant orthopaedic surgeon, wrote to the claimant's GP that he had consulted the claimant on 25 October 2018. The claimant described to Mr Gibbon some niggling left knee discomfort, with episodic "giving" but no pseudo locking or true instability. The claimant described discomfort in his right knee since twisting it. Mr Gibbon described a normal gait, painless free range of movement of both hips and no localising meniscal or ligamentous signs in either knee, neither of which showed any effusion or significant muscle wasting or other localising signs. Pain X-rays showed no cause for concern. On review of arthroscopic photographs of the left knee from March 2018 there was no obvious degenerative change and a complete resection of a degenerate medial tear. Mr Gibbon strongly reassured the claimant that Mr Gibbon would not consider any further investigation or intervention being warranted and that physiotherapy was arranged to strengthen the claimant's muscle bulk. He stated that should there be a deterioration he would be prepared to see the claimant again. The Tribunal received no evidence of a further such referral.
- 4.7. It appears that a course of physiotherapy did not commence until February 2019 and there is no evidence to suggest that physiotherapy did anything other than build up the claimant's muscle bulk. Neither did the claimant do anything other than attend his full physiotherapy course. Indeed the claimant says that the physiotherapy worked and that by January 2020 his knees were very good, good enough to start his own plastering business.
- 4.8. On 22 January 2019 the claimant attended the clinic of Dr Grant Jeffrey, an occupational health physician, who wrote to the respondent's HR adviser on 29 January 2019. The claimant was working full time, but not doing plastering, which required the claimant to kneel. The claimant confirmed to the Tribunal that he could do all his other tasks. The claimant told Dr Jeffrey that he experienced intermittent pain in his left knee, exacerbated by kneeling and that both knees were giving way. The claimant did

however say that he may go for weeks without his knees giving way. The claimant said there were no difficulties in lifting or with stairs but there were with prolonged driving and being stuck in traffic, which could exacerbate knee pain. When giving evidence, the claimant told us, the extent that he was not suffering pain in January 2019, that Dr Jeffrey's letter was incorrect and indeed while subject to adjustments, the claimant was fit to continue work and told the Tribunal he felt fit.

- 4.9. Paragraph 8 of DIS made reference to the claimant's driving. He confirmed that he could now drive his car, which he had since March 2020. The problem was with his previous car in that the peddles were "awkward" and the vehicle was lower to get into. The claimant also told us that he had a van which he never had trouble driving.
- 4.10. In so far as the taking of medication is relevant, the history of it is in DIS paragraph 12. The claimant described to the Tribunal that he took medication occasionally and none since October 2019 (as confirmed by DIS).
- 4.11. On 27 February 2019 the claimant saw Mr M Bowes, an extended scope practitioner. Mr Bowes wrote to the claimant's GP on 4 March 2019. This appointment appears to have been initiated by the claimant because his physiotherapy, as organised by Mr Gibbon, had not commenced. In his consultation Mr Bowes refers to the claimant's (right) knee giving way twice a week and that there were aggravating factors of going upstairs and walking one mile. On the other hand the claimant was reported to stand with neutral knee alignment, normal gait and well maintained range of movement in his hips bilaterally. His left knee had a full range of movement pain free. Range of movement of the right knee was full and pain free. His stability of the right knee was mentioned. Mr Bowes did not wish to see the claimant again unless the claimant required it. There is no evidence that this has happened. The claimant was curious about the reference to giving way twice a week, the stairs and walking. He put this down to the fact that on the day of the consultation "something jammed in my knee" which presumably was the right knee.
- 4.12. Paragraph 14 of DIS says the claimant started to see a vast improvement in his knees by October 2019 and the continual exercise helped the claimant to fully recover by December 2019. Paragraph 15 of DIS confirms that the claimant could walk for one to two hours without any pain at all. Paragraph 16 of DIS records "the best 3 weeks with my knees since January 2019". It should be noted that the claimant's discrimination complaints cover the period 18 December 2019 to 17 February 2020.
- 4.13. Now in the evidence came an anomaly as a result of a consultation with an occupational physician, Dr Harris, on 25 October 2019, which consultation was recorded in a letter dated 5 November 2019 by Dr F Hancock, a consultant occupational physician. The consultation seems to have related to a hand arm vibration syndrome (HAVS) assessment, which was not directly related to the condition of the claimant's knees. Dr Hancock's report discussed "other medical

conditions". The report records (on 25 October 2019) that the claimant's "symptoms are not improving" and that the claimant's pain then (25 October 2020) was worse than prior to the claimant's surgery in March 2019. Dr Harris examined the claimant who found a reasonable range of movement in both knees, but some tenderness and pain on squatting. The claimant was able to kneel on the floor but found getting up difficult. Dr Hancock's report, based on Dr Harris' examination, clearly conflicts with DIS and the claimant's manner of recovery was confirmed in the claimant's evidence before the Tribunal. The Tribunal has no reason to doubt that the claimant was telling the truth. He might have seen it very much to his advantage to rely on Dr Harris/Dr Hancock, but he did not and the Tribunal will rely on the claimant's evidence in that regard.

- 4.14. Paragraph 17 of DIS says that by the end of November 2019 the claimant had no problems with his knees whatsoever.

5. Matters occurring during the hearing

At the end of the evidence and before submissions Mr Morgan made an application to amend paragraph 25 of the claim, by adding the words "or had been in the past" after the words "relevant time". He said this was in the light of the evidence that had been given. It was clearly a very late application. At this time it was 12.40pm and the Tribunal adjourned until 2.00pm to enable the respondent to take instructions and make submissions on Mr Morgan's application. After 2.00pm the respondent made submissions (in respect of which in the circumstances there is no need to spell out) and the claimant replied but whilst doing so told the Tribunal that the application was not being continued with. It was clear that this application could have been made at any time, but if this was the case the Tribunal stated that another such application was dependant on the outcome of this disability hearing. In any event matters moved to submissions of substantive issue.

6. Determination of the issue

(After listening to the factual and legal submissions made by and on behalf of the respective parties):

- 6.1. **Did/does the claimant have a physical impairment, namely knee problems.** It is common ground between the parties that the two knee impairments which the claimant sustained amount to physical impairments.
- 6.2. **If so, did/does the impairment have a substantial adverse effect on the claimant's ability to carry out normal day to day activities?**
- 6.2.1. The Tribunal has had regard to paragraph B1 of the Guidance.
- 6.2.2. The claimant's left knee injury arises from an arthroscopy in March 2018, resulting in seven weeks off work.
- 6.2.3. In late October 2018 the claimant twisted his right knee.
- 6.2.4. The claimant did experience pain and the giving way of his knees and at some point or points this affected his walking, driving, doing domestic chores, shopping, showering, dressing and his sex life and social life.

- 6.2.5. Six weeks after the arthroscopy most of the claimant's left knee was in excellent condition and the claimant was discharged on 17 April 2018. The claimant experienced mild symptoms between March and October 2018.
- 6.2.6. On 25 October 2018 the claimant complained of a sprained ligament injury to his right knee. He received no treatment and underwent no investigations.
- 6.2.7. On 1 November 2018 the claimant described to the consultant, Mr Gibbon, some niggling left knee discomfort and episodic giving, but there was no pseudo locking or true instability. The claimant described some discomfort in his right knee (which impairment occurred eight days earlier). Mr Gibbon described a normal gait and painless free range of movement of both hips and no localising meniscal or ligamentous signs in either knee, neither of which showed any effusion or significant muscle wasting or other localising signs. Plain X-rays showed no cause for concern. In view of the arthroscopic photographs of the left knee from March 2018 there was no obvious degenerative change and a complete resection of a degenerate medial tear. Mr Gibbon strongly reassured the claimant that Mr Gibbon would not consider any further investigation or intervention that was warranted. Physiotherapy was arranged to strengthen the claimant's muscle bulk. Were there a deterioration Mr Gibbon would see the claimant again of which there was none. I have repeated the facts relating to this consultation because they are an important indicator of the state of the claimant's impairments at the beginning of November 2018 and consequently their effect on his ability to carry out normal day to day activities.
- 6.2.8. When physiotherapy eventually took place, owing to the compliant work of the claimant, there was success. The claimant even started his own plastering business.
- 6.2.9. Most evidence then moved from orthopaedic surgeons to occupational health and other physicians, whose remit was mainly to report to the respondent, not effectively to treat the claimant's impairments.
- 6.2.10. The visit to Dr Jeffrey on 22 January 2019 was one which was at a time where the claimant was working, doing everything except for plastering. Despite Dr Jeffrey reporting intermittent pain in the claimant's left knee, exacerbated by kneeling and both knees said to be giving way between periods of a week and Dr Jeffrey recording that prolonged or traffic driving could cause pain, the claimant told us that this pain had in fact ceased by January 2019. Dr Jeffrey pronounced the claimant fit, subject to adjustments and the claimant told us he felt fit.
- 6.2.11. So far as driving was concerned the claimant complained about the pedals in his own car. He was able to drive his van without difficulty throughout.

- 6.2.12. The claimant took occasional medication and none since October 2019.
- 6.2.13. On 27 February 2019 when the claimant saw Mr Bowes, Mr Bowes reported the right knee giving way twice a week and aggravating factors of going upstairs and walking a mile, with which the claimant disagreed at the hearing. Otherwise it was a positive report with no follow up required.
- 6.2.14. There then seems to be a long gap in the chronology until the claimant describes his vast improvement by October 2019 with a full recovery by December 2019, with good walking, without pain and his “best three weeks”.
- 6.2.15. So far as the conflict between the Harris/Hancock report and the claimant’s views about his recovery are concerned, about the same time, apart from DIS, the claimant gave oral evidence to the Tribunal and as such was subject to cross-examination, he did confirm the positive nature of his condition at the time he was seen by Dr Harris. So far as Harris/Hancock are concerned, whilst the Tribunal absolutely has no reason to doubt they believed what they were saying in the report and that they are professionals, neither gave evidence before the Tribunal and therefore the report was not tested by cross examination. The Tribunal will therefore adopt the evidence, where there are conflicts, of the claimant.
- 6.2.16. What is clear is that by the end of November 2019 the claimant had no problems with his knees whatsoever. So far as the claimant’s left knee is concerned it is not clear from the evidence in which periods there was an effect on the claimant’s ability to carry out normal day to day activities. Symptoms were described as mild between March and October 2018. Thereafter the visit to Mr Gibbon gives the impression of certainly no more symptoms. There was no description of prolonged symptoms. By the time the claimant saw Dr Jeffrey in January 2019 and at the time of the consultation with Mr Bowes in February 2019 the claimant disagreed that his right knee was giving way or that he had problems with stairs or walking.
- 6.2.17. Apart from the Harris/Hancock report, there was no evidence until the claimant pronounced himself fit, to suggest that there was an adverse effect on the claimant’s normal day to day activities nor that they were substantial. By reference to Guidance B1 was the limitation beyond the normal differences in ability which may exist among people? Was the substantial effect one that was more than minor or trivial? The use of the word “effect” creates a connection between the alleged disability on the one hand and the ability to carry out normal day to day activities on the other. The impairments, if more than minor or trivial, will have an effect on the claimant’s ability to carry out day to day activities. Having regard to all the circumstances the Tribunal finds that the claimant’s oral evidence and the medical evidence paint a picture of

impairments which caused some inability of the claimant to carry out normal day to day activities, for undefined times. However, on the facts, the requirement for the impairments to have a substantial adverse effect on the claimant's ability to carry out day to day activities is not made out.

6.2.18. In the circumstances the Tribunal does not think it necessary to adjudicate on whether kneeling at work was a specialist activity or whether kneeling could have impacted on the activities.

6.3. If so, is that effect long term, in particular when did it start and: has the impairment lasted for at least 12 months?

Is or was the impairment likely to last at least 12 months or the rest of the claimant's life, if less than 12 months?

Because the beginning of the issue is entitled "If so" that is dependant on Paragraph 6.2 above. The Paragraph 6.2 issue has not been made out, so there is no need for the Tribunal to make a finding under this Paragraph 6.3. However it is done here for the record and also to assist the parties.

6.3.1. The impairment to the left knee impacted in March 2018 and the right knee in October 2018. The claimant declared himself fit in December 2019. Therefore, the impairments lasted for at least 12 months, (even if the claimant did not satisfy the substantial adverse effect test).

6.3.2. As far as time is concerned, the last matter the Tribunal would have taken into account was the claimant's appeal against dismissal in February 2020, although there was a satisfactory MRI scan in March 2020.

6.3.3. The Tribunal does not need to take into account anything occurring after February 2020. There was no evidence that the impairments were likely to reoccur.

6.3.4. Whilst it is not necessary for the effect to be the same throughout the period under consideration and it is clear that during the defined time the impairments showed gradual recovery, this does not impinge upon long term nature of the impairments or otherwise.

6.4. Because of the claimant's failure, and the onus is on him, to prove that impairments had a substantial adverse effect on the claimant's ability to carry out normal day to day activities, the Tribunal finds that the claimant did not at the relevant times have a disability within the

meaning of section 6(1) Equality Act 2010. Therefore, his claims for failure to make reasonable adjustments and discrimination arising from disability fail. The unfair dismissal claim remains and case management orders have been made accordingly.

Employment Judge Shulman
Date: 31 August 2021