



EMPLOYMENT TRIBUNALS

Claimant: Julie Miller

Respondent: Tesco Stores Limited

Heard at: London South **On:** 20 August 2021

Before: Employment Judge Khalil sitting with members
Ms G Mitchell
Mr C Mardner

Appearances

For the claimant: in person

For the respondent: Mr Nicholls, Counsel

JUDGMENT ON A PRELIMINARY ISSUE WITH REASONS

Unanimous decision:

The claimant was not a disabled person under S. 6 Equality Act 2010.

Reasons were given at the time and written reasons will not be provided unless they are asked for by a written request presented by any party within 14 days of the sending of this written record of the decision.

Reasons

1. This is the Tribunal's unanimous decision on whether the claimant was a disabled person at the material time within the meaning of S.6 Equality Act 2010 ('EqA').
2. The claimant represented herself. She had been supported by her union and their Solicitors (Slater and Gordon) throughout the litigation until a matter of weeks before this trial. The respondent appeared by Mr Nichols, Counsel.

3. The Tribunal had a bundle of documents running to 1228 pages in respect of the Full Merits Hearing.
4. In order to determine the question of disability, the Tribunal was directed to read some of the medical reports between pages 1178 and 1228, in particular pages 1183, 1185, 1207 and 1219. In addition, the Tribunal was directed to the Occupational Health reports at pages 213-214, 230-231, 232-233 and 284-285.
5. The claimant had a witness statement drafted by herself and another witness statement, un-served but drafted by her former Solicitors. Surprisingly, neither version contained any evidence on the question of disability, especially as it was an agreed issue in the case. There was some reference in the claimant's further information document on the impact of the claimant's carpal tunnel syndrome ('CTS') but it was not clear or specific, it did not refer to dates or documents in the bundle.
6. Accordingly, the claimant was ordered to serve and file a disability impact statement limited to 2/2.5 pages to deal the question of disability. The Tribunal explained and directed the claimant to the statutory definition and broke it down in to its components. The claimant was also provided with a hard copy of the Guidance to be taken into account in determining questions relating to the definition of disability.
7. The claimant, after submitting her impact statement requested to delete the first 2 paragraphs and consistent with that, said she was not asserting disability status prior to December 2015.

Findings of fact

8. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence/documentation during the hearing, including the documents referred to by the parties, and taking into account the Tribunal's assessment of the evidence.
9. Only findings of fact relevant to the issue, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence or submissions.
10. The claimant was a driver whose job was to deliver on-line grocery orders to customers' homes. The claimant was diagnosed with CTS on 16 August 2011 or 24 October 2012 (page 1178) on her right hand.

11. On 13 November 2015, the claimant was referred for surgery for CTS (page 1181). On 16 November 2015, Dr Chougulo, Locum Consultant Hand Surgeon, saw the claimant and confirmed that she wished to proceed with the surgery. It was noted that the claimant had used a splint and had had injections which had not helped her. It was stated that despite there being no motor weakness, the claimant did have sensory hypothesis in the median nerve distribution.
12. The surgery took place on 11 December 2015. The claimant was released on the same day as the procedure.
13. The claimant did not have any time off for her CTS by way of sickness absence at any time during her employment.
14. The claimant, in oral testimony, said that she experienced symptoms of pins and needles on a regular basis and stiffness in her fingers during winter months. Also, the claimant said the sensation of pins and needles and numbness caused her to shake her hand at night which affected her ability to sleep every night. The Tribunal had regard to the claimant's multiple GP records for the period leading up to the operation and noted that there were no recorded or reported concerns about the claimant's sleep/sleep deprivation or any requested or issued medication or in relation to the other symptoms. There was no other evidence on the impact on any normal day to day activities in the period from diagnosis up to the operation. The claimant's oral testimony was rejected in respect of the frequency and degree of symptoms as it was not plausible, in the Tribunal's view, for such daily impact as alleged without any contemporaneous evidence.
15. A management referral was made to Occupational Health ('OH') to ascertain the claimant's recovery from her operation on 13 May 2016 (214).
16. Before then, the claimant confirmed that she had returned to work in February 2016 and whilst she continued to work as a driver, she was assigned an assistant to do the loading and unloading of her van.
17. In oral testimony, the claimant explained that for a period of 6 weeks or so, she struggled to recover much from her surgery. She said she struggled with tasks such as washing her hair, making tea, holding (washing) pegs in her right hand and hoovering.
18. The claimant added however, that whilst her recovery was slow, from March 2016 she was able to undertake these activities herself and improved, without any regression and estimated her post operation recovery as 70% by September 2016.
19. In testimony, the claimant said whilst she was not able to lift heavy loads, she was able to lift 5-6 KGs around this time (September 2016) rising to about 10 KGs by December 2016/January 2017. Whilst the claimant had been deployed

into the respondent's clothing business in store from June 2016 onwards, the claimant was pushing for a return to her driving and delivery role. This was apparent from the Occupational Health report dated 15 September 2016 (284-285).

20. In the September OH report, regarding the claimant's recovery/prognosis, it was stated that the claimant was making progress and the outlook was good. Further, the claimant said there was improvement in her hand strength and grip and in performing day to day activities. The recommendation was still to avoid heavy lifting. In relation to 'substantial', OH advised that it would be classed as substantial, *but* the claimant reported an improvement in her symptoms.

Applicable Law

21. The law on the definition of "disability" is provided by S.6 EqA 2010 and further assistance is provided in Schedule 1 of the same Act.

22. S.6(1) of the EqA defines disability as follows:

"A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities"

23. The above definition poses four essential questions:

- Does the person have a physical or mental impairment?
- Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
- Is that effect substantial?
- Is that effect long-term?

24. Under paragraph 2(1) of Schedule 1 to the EqA, the effect of an impairment is long term if it:

- has lasted for at least 12 months
- is likely to last for at least 12 months, or
- is likely to last for the rest of the life of the person affected.

25. 'Likely' means could well happen (C3 of the guidance (see below)).

26. The term "substantial" is defined in S.212(1) EqA as meaning 'more than minor or trivial'.

27. EqA Guidance on the definition of “disability” is also contained in a document called “Guidance on matters to be taken into account in determining questions relating to the definition of disability” (‘the Guidance’).
28. In relation to long-term effect, the Tribunal needed to consider the substantial adverse long-term effect at the material time. The material time is the date of the alleged discriminatory act (***Cruickshank v VAW Motorcast Ltd 2002 ICR 729 EAT.***)
29. Under paragraph 5 of Schedule 1 EqA, 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.
30. However, in ***Woodrup v London Borough of Southwark 2003 IRLR 111***, the Court of Appeal stated:

“In any deduced effects of the present sort, the claimant should be required to prove his or her alleged disability with some particularity. Ordinarily one would expect clear medical evidence to be necessary, those seeking to invoke the peculiarly benign doctrine [under paragraph 6] should not readily expect to be indulged by the Tribunal of fact... in the present case, no medical evidence whatsoever was called to support the applicant’s case under paragraph 6. Instead, the applicant’s case was confined to what the applicant herself surmised would have happened. The EAT were right to conclude that the medical documents which the applicant produced in evidence, coupled with her own evidence, were bound to have been regarded as insufficient to establish her case fell within paragraph 6 (1). “

Conclusions and analysis

31. The Tribunal was asked to focus on the period from the claimant’s operation on 11 December 2015 to May 2017 in assessing whether or not the claimant was a disabled person within the meaning of S.6. This was made express by the claimant when she deleted paragraphs 1 and 2 of her disability impact statement. She also confirmed this in oral testimony, under cross examination.
32. The claimant also confirmed in response to Tribunal questions that the material date for her reasonable adjustments claim in relation to the alleged requirement for loading her van was a period before February 2016, but she was unable to be more specific.

33. In relation to the alleged requirement to work without a proper workplace assessment, the claimant said this was an on-going failure or state of affairs from 2009 onwards, which practically ceased when the claimant was assigned an assistant to load and unload her van in February 2016.
34. The unfavourable treatment/detriment allegations (in connection with discrimination arising from disability, harassment and victimisation), were with two exceptions for the period September 2017 to September 2018. The exceptions were in relation to being placed on the customer service desk for 6 hours without relief (said to have occurred in 2014) and being moved to clothing in June 2016.
35. The Tribunal resolved that essentially it was necessary to determine first, if the claimant had a long-term impairment, in this case, one which had lasted for 12 months or more in the period leading up to the claimant's operation, or, was likely to last for 12 months at that time.
36. In this regard, the Tribunal observed that the claimant had been at work, without interruption leading up to the operation. She had been carrying out her work, which included the full range of duties without restriction. There had been no intimation of a lighter or lesser load. The claimant had no time off or sickness. The claimant did give evidence of pins and needles, some sensation and impact on her sleep. However, all of those intimations and the regularity of occurrence, were unsupported by any medical evidence. She had seen her GP on multiple occasions between 2011 and 2015. The Tribunal also concluded that the claimant's referral for CTS surgery would likely have made some reference to the impact on the claimant in this regard or her normal day to day activities (page 1204) if they were prevalent. It did not. The claimant had produced no less than 3 statements, one in advance of the Hearing, one from her former Solicitors and one specifically as guided and instructed by the Tribunal (disability impact statement) and in none of those was there any evidence in relation to the substantial and long-term impact on the claimant's ability to carry out normal day to day activities. This was quite surprising.
37. Second, the Tribunal looked at the post-operation period. It is right that from February 2016, the claimant was doing lighter duties as the loading and unloading was being done for her. The claimant was aided until June 2016 when she was moved to the clothing department. During that period the claimant gave evidence that after a 6-week post operation recovery period, by about March 2016, she could perform activities such as hoovering, washing her hair, making a cup of tea and carrying clothing pegs in her hand. Even though her 'speed' of activity was slower, she improved without regression thereafter. The Tribunal also took notice that following her return to work, the claimant was bothered about and had asked for her job description as she did not believe loading the van was a part of her role. The OH report of 15 September 2016 supported her improvement and progress. By the autumn she was able to lifts

loads of 5-6 KGS and by the end of the year 10 KGS. The claimant said she was about 70% improved by September 2016.

38. The Tribunal had regard to the example in the appendix in the guidance about difficulty picking up and carrying objects of moderate weight such as a bag of shopping or a small piece of luggage *with one hand*, but concluded that this was of little practical assistance where there was no evidence of any one handed lifting difficulties being experienced by the claimant. Furthermore, the Tribunal was not satisfied that the claimant's lifting difficulty was substantial and/or was likely to last for 12 months or more from the operation or had lasted for 12 months or more before then or from then.
39. The Tribunal also had regard to B16 of the guidance. The Tribunal concluded that the effect of the operation was not to permanently improve or cure the claimant's CTS. In so far as it was corrective, pursuant to **Woodrup**, the Tribunal had no evidence before it at all as to what the effect on the claimant would be without the operation or indeed physiotherapy. There was no evidence of the clinical necessity or the alternative impact of not having the surgery. It was, in the Tribunal's conclusion, an elective procedure and an informed decision.
40. It was agreed before the Tribunal that the claimant carried the burden of proof (**Mutombo Mpania v Angard Staffing Solutions Ltd 2018 UK EATS /002/18/JW**). The Tribunal concluded, in pursuance of the foregoing, that the claimant had not discharged this in relation to the material date or in relation to the asserted period of December 2015 to May 2017 or in relation to the period September 2017 to September 2018 (based on a past disability or otherwise) which was the entire period of the other 9 detriments as, the evidence of substantial and long term adverse impact on normal day to day activities was simply not present or was inadequate. At its highest, it represented a period of 3 months and there was no way of the Tribunal assessing the impact on the claimant without the operation. The claimant made reference to dropping items on occasions when she was in the clothing department, but this was not considered to be substantial, rather anecdotal. This does not mean the claimant does not have the impairment of CTS, but simply that she was unable to discharge the burden of proof evidentially on her to come within S.6 of the EqA, despite multiple opportunities to be able to do so.

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Employment Judge Khalil

14 September 2021