



EMPLOYMENT TRIBUNALS

Claimant: Mr A George

Respondent: Peter Cox Ltd

Heard at: Southampton **On:** 18 November 2021

Before: Employment Judge Matthews

Representation:

Claimant: In Person supported by Mrs D George

Respondent: Ms S Younis – Litigation Consultant

RESERVED JUDGMENT

Mr George was, from 6 August 2019 until 13 October 2020, a disabled person within the meaning of section 6(2) of the Equality Act 2010 by reason of a right shoulder injury.

REASONS

INTRODUCTION

1. Mr Ashley George brought various claims against the Respondent Company including claims of disability discrimination.
2. The Company does not accept that Mr George has a disability and otherwise defends the claims.
3. This is a Preliminary Hearing listed by Order of Employment Judge Bax sent to the parties on 10 August 2021 (the "Order"). The Order can be seen in the bundle at 43-61.
4. The Order sets out the matters for determination at this hearing as:

“4.1 Whether at times material to the claim the Claimant was a disabled person within the meaning of section 6 and schedule 1 of the Equality Act 2010 by reason of a shoulder/arm condition/injury and/or a back and/or knee condition.

4.2 Any application to amend the claims as required by the Respondent.

4.3 Any further case management.”

5. The issue of disability is dealt with in this Judgment. In relation to matter 4.2, the Respondent has lodged an amended response. As far as matter 4.3 is concerned, there was some informal case management at the hearing but no formal case management arises as a result of this Judgment.
6. The Tribunal heard from Mr George by reference to a written *“Disability Impact Statement”* (84-85). There was an “electronic” bundle of documentation consisting of 358 pages. References in this Judgment are to pages in the bundle unless otherwise specified. There had been a dispute about the bundle and other case management issues. That is dealt with in a separate Order.
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. Judgment on the issue of disability was reserved.

FACTS

9. Mr George had two spells of employment with the Company. The Tribunal is concerned with the second of those between 15 December 2018 and 13 October 2020.
10. Mr George worked for the Company as a surveyor. A typical working day consisted of three pre-booked visits to different properties in Devon, Cornwall and beyond. Mr George drove a vehicle with an automatic gear box, supplied by the Company to address Mr George’s discomfort when driving a vehicle with a manual gear box. Mr George would use his training and experience to assess damp problems in buildings. He would take photographs and sometimes used specialist hand held measuring instruments. On his return home, Mr George would type up his report at his desk and email it to the Company for onward transmission to the customer. On the back

of the report the Company would hope to be commissioned to do any necessary repair work.

11. Amongst the medical evidence Mr George has produced, is an occupational health report from a Dr Laura Crawford addressed to a Ms Allen, Rentokil's HR Manager (102-104) dated 8 November 2016. From the bundle, the Tribunal understands that the Respondent and Rentokil are associated companies. The report was prepared for the Respondent Company in relation to Mr George's first period of employment.

12. The report includes this:

"...in 2011 Mr George reports an injury to his left knee resulting in a torn cartilage which required keyhole surgery and partial cartilage removal. He also describes a back injury some nine years ago resulting in two prolapsed discs and a damaged tailbone which required manipulation under anaesthetic, nerve block injections into his back. He reports that following these injuries he has driven an automatic car ever since.

He has noted that when attempting to drive a manual vehicle the left knee becomes painful, hot and swollen by the end of the day and he takes medication of painkillers and anti-inflammatories for this condition. He describes that as part of his role as a Sales Surveyor he drives up to 200 miles per day and can do a lot of physical activity going into attics and down into cellars to check timbers. He is very careful during his work activities in managing his back and knee conditions."....

"Mr George has musculoskeletal conditions affecting his back and knee and while these have been successfully treated such that I do not expect a substantial impact on day to day activities some work adjustments may be relevant which I have detailed below. I did not identify an impairment such that disability provisions within the Equality Act 2010 are likely to apply however as you are aware this is ultimately a legal rather than a medical decision."....

"Assuming Mr George continues to take care regarding physical work and work in confined spaces and if you are able to accommodate him with an automatic vehicle this should assist him in managing his conditions effectively such that he is able to continue to provide reliable service going forward."

13. On 6 August 2019 Mr George was involved in a road traffic accident. Mr George's vehicle was hit by another vehicle and suffered a sideways impact. An expert's report was prepared in relation to this by Dr Simon Wearne following an examination on 4 October 2019 (109-114).
14. Mr George's medical notes are at 184-328. An entry for 18 May 2020 records a telephone "encounter". It includes (217):

"Car accident last July 2019. Ongoing shoulder problem, mostly lying on it. Has been doing everything physio recommended. Mostly at night when lying on it. Had some tramadol from before and using them at night – requesting some more. Naproxen not helpful. Uses also prn co-codamol."

15. There was a further medical report prepared in connection with the accident. This was on 13 August 2020, following an examination on 22 July 2020 by a Consultant Orthopaedic Surgeon, Mr Rakesh Kumar (115-128). Mr Kumar recorded the following:

"No relevant past medical history was reported by the claimant."

"In my opinion on the balance of probabilities the injuries are consistent with the history given by the claimant."

"Claimant reports severe right shoulder pain immediately following the accident. Claimant reports this condition has worsened over time, especially over the last six months. He reports difficulty in sleep posture, prolonged driving or overhead activities of the right shoulder. The claimant states that the shoulder pain is relieved by rest and pain killers. The claimant describes good and bad days with pain."

"The claimant found it difficult in doing housework/care activities following the accident.

The claimant found it difficult to do the activities like running the vacuum, lifting and carrying shopping etc as it aggravated shoulder pain.

Claimant reports impact on leisure and social activities following the accident. Claimant reports impact on activities including cycling, walking the dog, motorcycling, DIY and gardening since the accident.

Claimant has resumed some activities but reports reduced intensity.”

“PROGNOSIS

I have carefully weighed all the available evidence from the claimant’s account, the available medical records, my examination findings and my observations during the assessment.

In my opinion on the balance of probabilities, the claimant had sustained right shoulder pain following the accident. Claimant reports this condition has worsened over time, especially over the last six months. He reports difficulty in sleep posture, prolonged driving or overhead activities of the right shoulder. On examination claimant was of heavy build. He had 10% painless restriction of neck movements which appear consistent with age. Examination of the right shoulder showed evidence of a painful arc between 30 to 80 degrees of abduction. Impingement test was strongly positive. There was 10% restriction of rotations. In my opinion the claimant has probably exacerbated and accelerated impingement condition of the right shoulder. I have considered the claimant’s age, mechanism of the accident, evidence in records, examination findings and as well as natural history of whiplash injury. An ultrasound with provision of steroid injection is recommended for the right shoulder. This should be followed by physiotherapy.”

16. On 15 September 2020 Mr George was given a fit note recording a painful right shoulder and that he might be fit for work with amended duties and “no prolonged driving” (105). The note was effective until 14 October 2020. On the same day Dr Gaeten Lin referred Mr George for an ultrasound examination (129-130). The relevant doctor’s notes are at 220. They include these comments:

“Report re shoulder – recommendation is US and physio – to arrange. is a QS and work involves drinking” [obviously, “driving”] “hundred of miles which he would struggle with. Happy to issue fit note with condition to avoid prolonged driving”.

17. On 22 September a further fit note was issued through until 12 October 2020. Mr George was not fit for work because of a dental problem (221).

18. There is an ultrasound report dated 8 October 2020 in the bundle (131). It records:

“Restricted anterior raise and internal rotation, however no restriction to abduction – otherwise normal shoulder ultrasound examination.

Impingement syndrome cannot be excluded by ultrasound examination.

Referral for steroid injection should be made with RCH Treliske Radiology.”

19. Dr Lin was unable to contact Mr George to discuss the result of the ultrasound scan on 9 October 2020 (221).

20. On 13 October Mr George’s “not fit for work” fit note was extended until 9 November 2020 by reason of ongoing dental pain (221).

21. The ultrasound scan was the subject of a letter to Dr Lin from Mr Iain Brown, Consultant, on 17 November 2020, outside the time period relevant for the Tribunal’s purposes (132-133).

22. Mr George says that these injuries caused *“significant reduced mobility, constant pain, fatigue, low mood/depression, poor concentration and curtailment of daily activities.”*

23. Specifically, Mr George says that the 2006 back and knee injuries resulted in (84):

“requirement for an automatic car as unable to use a manual clutch vehicle for any long period;

limited mobility in use of bend/stretch with spine/knees which also limits safe levels of lifting and ways of completing these tasks;

need for specialist mattress to be able to achieve comfortable sleep;

lack of mobility of the arm and shoulder due to extreme pain issues;”

The 2019 shoulder/arm injuries exacerbated the position and resulted in (84):

“lack of mobility of the arm and shoulder due to extreme pain issues;

inability to drive safely as unable to use right arm fully;”

The overall result, Mr George says, is that he is unable to (85):

“wash and dress myself fully, handle cooking utensils or prepare a meal;

cut my food;

prepare medication;

walk the dogs; or

take exercise without assistance.”

24. Mr George explained that he made his own adjustments to his working practices. Often, he would put back appointments, as he found it a struggle to get up, wash and dress. On visits, he was limited in what he could do physically. For example, he was unable to move furniture or gain access, or move obstructions to gain access, to lofts and would have to rely on customers’ help in these respects.

25. Mr George’s doctors’ notes show that, at various relevant times, he was prescribed Tramadol (a strong opioid painkiller), Co-codamol (a painkiller) and Naproxen (an anti-inflammatory).

APPLICABLE LAW

26. 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.”

27. 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.

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

“(1) In this Act-”

““substantial” means more than minor or trivial”

29. 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.”

30. 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

31. Mr George’s case is that, during his second period of employment with the Company from 15 December 2018 to 13 October 2020, he had physical impairments as a result of the injury he had suffered to his back in the early 2000s, the injury he had suffered to his left knee around 2011 and the injury he sustained to his right shoulder on 6 August 2019. Mr George says that these had substantial and long-term adverse effects on his ability to carry out normal day to day activities. It is for Mr George to show that he satisfies the statutory definition.

32. Did Mr George have a physical or mental impairment?

33. It appears that Mr George’s injuries in the early 2000s and around 2011, to his back and left knee respectively, were impairments in the

period 15 December 2018 to 13 October 2020. This follows from the fact that Mr George continued to be confined to driving a vehicle with an automatic gear box in that period as a result of those injuries. (From 6 August 2019, the injury to Mr George's right shoulder may have contributed to this.) That conclusion may be open to some debate. However, there is no question, on the evidence, that, from 6 August 2019 until 13 October 2020, Mr George had a physical impairment for the purposes of section 6 EA as a result of the injury to his right shoulder.

34. Did any of those impairments have a substantial adverse effect on Mr George's ability to carry out normal day-to-day activities?
35. Having identified that Mr George had physical impairments in the period 15 December 2018 to 13 October 2020, the Tribunal must now consider whether or not one or more of them 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 George could not do, rather than on what he could do.
36. Mr George 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 George's ability to carry out normal day-to-day activities.
37. As far as the back and left knee impairments are concerned, the evidence does not support that these adversely affected Mr George's ability to carry out normal day-to-day activities or that any effect was substantial in the period in question. The doctor's notes show nothing of this sort. Mr Kumar's report specifically discounted Mr George's medical history as a cause of the adverse effects that Mr George reported to him. The only effect that is evidenced (and that is only corroborated by extrapolation from Dr Crawford's report dated 8 November 2016) was the need to drive a vehicle with an automatic gear box to avoid Mr George's left knee becoming "*painful, hot and swollen by the end of the day*" after some 200 miles of driving. Driving is a normal day to day activity but driving 200 miles is not. Nor is it clear that any adverse effect was substantial. In reaching this conclusion, the Tribunal has taken account of Mr George's use of painkillers as described above.
38. The Tribunal turns to the third impairment, the right shoulder injury. This, of course, can only have been a disability after it was incurred on 6 August 2019. In respect of this, Mr George told Mr Kumar about a number of effects which Mr Kumar thought consistent with the right shoulder injury. These included difficulty "*in doing housework/care activities*" and "*running the vacuum, lifting and carrying shopping etc*".

39. The Guidance includes this:

Section D:

“Meaning of “normal day-to-day activities”

“D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include” “shopping,” “carrying out household tasks”

In the Appendix to the Guidance –

*“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.”*

“Difficulty picking up and carrying objects of moderate weight, such as a bag of shopping or a small piece of luggage, with one hand.”

40. On the evidence, Mr George had difficulty lifting and carrying shopping and doing household tasks such as vacuuming. These are normal day to day activities and the effect was substantial. No doubt the effect would have been even more substantial had Mr George not been taking strong prescription painkillers.

41. 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.”

42. Was that effect long-term?

43. As far as Mr George’s right shoulder injury is concerned, the period in question is from 6 August 2019 until 13 October 2020. The right shoulder injury was sustained on 6 August 2019 and the effects continued throughout the period. Clearly it had lasted for at least 12 months.

44. For these reasons, Mr George was a disabled person within the meaning of that term in the EA, by reference to the effects associated with his right shoulder injury. Mr George had that disability from 6 August 2019 until he was dismissed by the Company on 13 October 2020.

Employment Judge Matthews
Date: 25 November 2021

Judgment & reasons sent to parties: 15 December 2021

FOR THE TRIBUNAL OFFICE