EMPLOYMENT TRIBUNALS

Claimant: Mrs V Ellidge

Respondents: 1. Make Jesus Known
2. Mr T Cooke

HELD AT: Liverpool **ON:** 28 April 2022

BEFORE: Employment Judge Horne

REPRESENTATION:

Claimant: Ms L Ingram, Solicitor
Respondents: Mr J Lewis-Bale, Counsel

JUDGMENT having been sent to the parties on 14 May 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. These are reasons for a judgment at a preliminary hearing. The purpose of the preliminary hearing was prescribed in a case management order sent to the parties on 26 January 2022.
2. As stated in that order, the hearing was to determine whether or not the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 ("EqA") by reason of the physical impairments of:
   2.1. mobile caecum syndrome and
   2.2. prolapsed caecum.
3. It was common ground that the claimant had those two physical impairments.
4. The parties also took a common approach as to the period of time for which the question of the claimant's disability would be relevant to the claim. Because I will need to keep returning to this concept, I have cut down on wordage by using the

phrase "period of discrimination". (This abbreviation is convenient, but will not necessarily be accurate in every case. Take, for example, a common complaint of discrimination arising from disability: an employee is given an attendance warning following a series of occasions of sickness absence. The unfavourable treatment – the warning – may have occurred many weeks after the first sickness absence, which was the reason for the unfavourable treatment. In this case, however, the events are so compressed in time that the "period of discrimination" aptly encompasses both the date of the unfavourable treatment and the date of the motivating "something" that is said to have arisen in consequence of the claimant's disability. I also recognise, of course, that it is still very much in dispute that any discrimination actually occurred.)

5. The parties agreed that the period of discrimination was the period 10 to 13 March 2021. If the claimant was not disabled during those four days, her disability discrimination complaints would fail.

6. What I had to decide was:

   6.1. Whether or not, during the period of discrimination, the admitted physical impairments had an adverse effect on the claimant's ability to carry out normal day-to-day activities;

   6.2. Whether or not that adverse effect was substantial during the period of discrimination; and

   6.3. Whether or not, during the period of discrimination, the substantial adverse effect was long-term. It was not the claimant's case that she had already had the substantial adverse effect for 12 months by the end of the period of discrimination. I had to decide whether or not it could be said, at that time, that it could well happen that the substantial adverse effect could last for 12 months.

Evidence and submissions

7. The claimant gave oral evidence. She confirmed the truth of two witness statements and answered questions.

8. I also had regard to documents in an agreed bundle running to 110 pages. Amongst the documents in the bundle were letters from her treating consultant colorectal surgeon, Mr Khurram Siddique and a consultant radiologist, Dr Bende. Those letters provided a helpful contemporaneous record of the history given by the claimant and the advice given to her at the time of consultation. The letters did not take the form of an expert's report and I did not give the status of expert evidence to any opinion expressed in those letters.

9. During her closing submissions, the claimant's solicitor invited me to make findings of fact based on assertions made by the claimant in her claim form. The claimant had not confirmed the truth of those assertions in her oral evidence and had not been questioned about them. For those reasons, I did not think it safe to base any findings on assertions in the claim form unless they were admitted in the response.

10. Both the claimant's solicitor and the respondent's counsel made helpful oral submissions. I was particularly assisted by a well-structured skeleton argument from the respondent's counsel.

Facts

11. Prior to January 2021 the claimant was fit and healthy.

12. In January 2021, she started to experience abdominal pain. By 27 January 2021 that pain had become extreme. At the time, she was working mainly from home because of the pandemic. She tried to get on with her job as best she could.

13. From 27 January 2021 to 13 March 2021 and beyond, the claimant experienced constant nuisance-level pain and intermittent severe pain. She could not sleep comfortably. Each night, she would stand by the side of the bed because she was too uncomfortable lying down. Typically, though not every night, her sleep was limited to two hours.

14. When the claimant's pain was severe, she was unable to dress herself properly, she could not concentrate on reading more than a couple of lines and she could not hold a normal conversation.

15. From 27 January 2021, the claimant found it difficult to travel by car. She limited her car use to essential journeys such as medical appointments. She stopped using the car to take the children to and from school. This continued to 13 March 2021 and beyond.

16. The claimant's symptoms had some effect on her bowel movements, but did not significantly affect her toilet habits. This finding is supported by what the claimant told Mr Siddiq on 16 March 2021. This statement is more likely to have been reliable than what she stated in her impact statement nine months later.

17. On 4 February 2021 the claimant took a day's sick leave because of abdominal pain. She had a further two days' sick leave on 15 February 2021 for the same reason. There is some dispute about the extent of claimant's ability to work during those intervening periods. The respondent contends that she was able to work, otherwise she would have been on sick leave. Whilst I accept that the claimant was not totally incapable of working, I also accept the claimant's evidence that she found work difficult throughout this period. The relatively brief spells of sick leave are explained by the fact that the claimant was trying to get on with her work when she could.

18. On 19 February 2021 the claimant sent a message to Mr Cooke using Microsoft Teams. In her message, the claimant stated that she had spoken to her doctor and that she had been prescribed stronger painkilling medication. I find that her message was truthful.

19. On 1 March 2021 the claimant went for an MRI scan which resulted in a report on 5 March 2021 from Dr Bende. In her report, Dr Bende confirmed that the claimant had mobile caecum syndrome and a prolapsed caecum into the right iliac fossa.

20. I pause at this stage to record some findings about the nature of these two medical conditions. Before I do so, I remind myself of the need for evidence. Some medical conditions are so well known that I can take judicial notice of what

the organic cause is and what the usual symptoms are. For example, I know that an organ is "prolapsed" if it becomes displaced from its normal position in the body. Other than that, I cannot make any findings about mobile caecum syndrome or prolapsed caecum without evidence. It is not appropriate for me to conduct my own internet research.

21. Evidence about a medical condition does not necessarily have to take the form of an expert medical opinion. The claimant has described mobile caecum syndrome in her witness statement. Her description is based on what she has been told by Mr Siddique and other medical professionals. The respondent has not challenged her account of what she has been told. I find that, in her statement, the claimant was relaying what Mr Siddique told her with honesty and reasonable accuracy. She has been advised:

    21.1. That the caecum is the first part of the colon;

    21.2. In a health person, the caecum is fixed in place;

    21.3. Her own caecum had come free and was able to move around her body;

    21.4. Movement of her caecum caused pressure and pain, and carried risks of twisting and blockage.

22. The fact that the claimant received this advice does not, of course, necessarily mean that the advice was *correct.* But the details are fairly basic and, I am sure, difficult for a consultant colorectal surgeon to get wrong. Having found that Mr Siddique gave the claimant that advice, I can confidently find, on the balance of probabilities, that the advice does explain with reasonable accuracy what mobile caecum syndrome and prolapsed caecum are, and how they affect the body.

23. I now return to the timeline of events and, in particular, the start of the four-day period where disability status is critical to the claim. On 10 March 2021, the claimant spoke to her General Practitioner. She was informed that she would be unfit for work until 7 April 2021, that her fit note might have to be extended until she had surgery, and that the recuperation time for her operation would be about five weeks, "similar to an appendectomy". The same day, the claimant sent an email to Mr Cooke, passing on the advice that she had just received.

24. A point has arisen about the significance of the five-week recuperation period. Was the claimant being advised that she could expect a full recovery, so that she would be symptom-free five weeks after surgery? Or was the advice more conservative than that, to the effect that it would take five weeks to recover from the effects of the operation itself? I think it more likely that the claimant received the latter advice. The claimant's GP could not, on 10 March 2021, have been confident of the overall prognosis. At that time it still was not clear exactly what surgery the claimant was going to need.

25. After the period of discrimination, the claimant continued to have consultations with Mr Siddiq and to explore options for treatment. During the course of those

consultations Mr Siddiq expressed the view that the pain could have been caused by the mobile cecum syndrome. They explored the option of a caecopexy (that is a resetting of the bowel). The claimant was advised on 6 October 2021 that that procedure had no guarantee of success and might actually result in a worsening of symptoms.

Relevant law

26. Section 6 of EqA provides, relevantly:

> (1) A person (P) has a disability if- (a) P has a physical … 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.
>
> …
>
> (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).

27. According to section 212(1) EqA, "substantial" means "more than minor or trivial".

28. Schedule 1 to EqA supplements section 6. Relevant extracts are:

> 2. Long-term effects
>
> (1) The effect of an impairment is long-term if … (b) it is likely to last for at least 12 months…
>
> (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.
>
> …
>
> 5. (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.
>
> (2) "Measures" includes, in particular, medical treatment…
>
> PART 2 - GUIDANCE
>
> 10. Preliminary
>
> This Part of this Schedule applies in relation to guidance referred to in section 6(5).
>
> …
>
> 12. Adjudicating bodies
>
> (1) In determining whether a person is a disabled person, [a tribunal] must take account of such guidance as it thinks is relevant.

29. The relevant guidance is to be found in the Secretary of State's *Guidance on Matters to be Taken Into Account in Determining Questions Relating to the Definition of Disability (2011).* The following passages appear to be helpful:

…

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...

…

Effects of treatment

B12. 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"…

B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent…

…

B16. Account shoul 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. For example, a person who develops pneumonia may be admitted to hospital for treatment including a course of antibiotics. This cures the impairment an no substantial effects remain…

…

Meaning of "likely"

C3. The meaning of "likely" is relevant when determining

- whether an impairment has a long-term effect …
- whether an impairment has a recurring effect…

In these contexts, 'likely', should be interpreted as meaning that it could well happen.

C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood…

…

Likelihood of recurrence

…

C11. 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.
>
> …

30. The tribunal must focus on what the claimant cannot do, or can do only with difficulty, rather than the things that she can do: *Goodwin v. Patent Office* [1999] IRLR 4. That is not to say, however, that the things that the claimant can do are completely irrelevant; they may shed some light on the extent of any difficulty in carrying out the activities upon which the claimant relies.

31. In assessing whether an impairment has an effect on a person's normal day-to-day activities, it is appropriate for a tribunal to consider the effect on the person's ability to cope in his or her job: *Paterson v. Commissioner of Police for the Metropolis* [2007] ICR 1522.

32. An adverse effect which is more than minor or trivial satisfies the definition of "substantial", even if the person's ability to do the activity in question is still within the range of normal differences amongst ordinary people. To the extent that paragraph B1 of the Guidance is inconsistent with section 212 of EqA, it is the statutory definition that must prevail: *Elliott v. Dorset County Council* UKEAT 0197/20.

33. When considering whether or not the effects of an impairment were likely (at any given point in time) to last for 12 months, the tribunal must decide that issue in the light of the circumstances as they were at the time in question. It is not open to the tribunal to take account of events that have taken place subsequently: *SCA Packaging v. Boyle* [2009] UKHL 1056, applied in *All Answers Ltd v. W* [2021] EWCA Civ 606.

34. None of these propositions are controversial.

Legal disputes

35. There were, however, some areas of law upon which the parties disagreed. I can distil them into these two questions:

    35.1. Does paragraph 5 of Schedule 1 (effects of medical treatment) apply when considering the question of whether or not a substantial adverse effect is long-term?

    35.2. When assessing the likelihood (during the relevant period) of an adverse effect lasting 12 months, can the tribunal have regard to evidence of opinions expressed after the period of discrimination ended? Or does the *All Answers* rule require such evidence to be disregarded*?*

Long-term adverse effect and the effects of medical treatment

36. The respondent contends that, when assessing the likely duration of a substantial adverse effect, the tribunal should take into account the likely beneficial effects of such medical treatment as the claimant was likely to have. This, says the respondent, is because paragraph 5 of Schedule 1 applies only to the question of

whether an impairment has a substantial adverse effect on normal day-to-day activities. The question of whether or not the effect is "long-term" is a distinct element of the section 6 definition, and on that question, paragraph 5 of Schedule 1 has no bearing.

37. The claimant's position is that the beneficial effects of medical treatment should never be taken into account. Corrective treatment must always be ignored. On the claimant's analysis, it does not matter which element of the statutory test is under consideration, nor what the likely effect might be. So, for example, where there was a good prospect of recovery within 12 months following surgery, the tribunal should determine the "long-term" issue as if that surgery never happened, and was never going to happen.

38. In my view, the correct legal position lies between those two extremes.

39. Contrary to the respondent's argument, my view is that, generally, the beneficial effect of medication must be disregarded when considering all elements of the statutory test, including the "long-term" element. Corrective treatment must generally be ignored, not only when deciding whether a person had a substantial adverse effect, but also when deciding how long that substantial adverse effect was likely to last.

40. Here are my reasons:

    40.1. The wording of paragraph 5 of Schedule 1 is clear. It requires that an impairment must be treated as having a substantial adverse effect in defined circumstances. (Those circumstances are that, but for the effect of medical treatment, the impairment would have a substantial adverse effect.) For as long as those circumstances exist, so does the deemed substantial adverse effect. If those circumstances are likely to last for 12 months, the substantial adverse effect is long-term.

    40.2. It is unlikely that Parliament would have intended Schedule 1 to have the meaning for which the respondent contends. People with well-managed diabetes are routinely regarded as disabled, because their diabetes would have a substantial adverse effect if they did not take regular insulin. If the respondent's argument were correct, they would not be disabled. They would not be able to satisfy the "long term" element of the test. Their history of insulin dependence would not count, because (on the respondent's interpretation) the tribunal would assess the effect of their diabetes with the benefit of the insulin. For the same reason, the likely future insulin dependence would not count towards the likelihood of 12 months' future duration. Further examples abound. One is given in the Guidance: a person with depression who is being treated by counselling. Another might be a person who is likely to require prescription painkillers for the rest of their life.

    40.3. The likelihood of recurrence is an integral part of the test for whether a substantial adverse effect is long-term. The Guidance makes it clear that medical treatment must be disregarded when assessing the likelihood of recurrence (see paragraph C11). It makes no sense to disregard likely medical treatment when assessing likelihood of recurrence, but to have regard to such treatment when assessing the likely duration.

41. There is, however, an exception. Here I disagree with the claimant. The exception relates to treatment which would result in a permanent cessation of the substantial adverse effect. Paragraph C11 of the Guidance makes quite clear that such treatment should be taken into account in deciding whether or not a substantial adverse effect is long-term. In my view, the best example is actually to be found in paragraph B16. The patient with pneumnonia, on admission to hospital, has a substantial adverse effect on his ability to carry out normal day-to-day activities. That effect is not long-term, because it is highly likely that the patient will recover fully and permanently within a few days or weeks of receiving antibiotics.

42. The test, in my view, is whether or not, during the period of discrimination, it was so likely that future medical treatment would result in a permanent cure that one could not say that the substantial adverse effect "could well" last for 12 months.

Evidence of opinions expressed after the relevant period

43. Just to recap: everyone agrees that the assessment of the likely duration of a substantial adverse effect must be based on the circumstances prevailing during the period of discrimination. A tribunal cannot say, "We know that the claimant's symptoms lasted for two years after the period of discrimination, therefore it was likely that the symptoms would last for 12 months."

44. The respondent goes further. It is the respondent's position that any opinion expressed by a doctor, no matter how relevant to the disability issue, must be discounted if that opinion was expressed after the end of the period of discrimination.

45. In support of this proposition, the respondent relies on the following passage of Lewis LJ's judgment in *All Answers* at paragraph 26:

> "The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in *McDougall v Richmond Adult Community College*: see per Pill LJ (with whom Sedley LJ agreed) at paras [22]-[25] and Rimer LJ at paras [30]-[35]. That case involved the question as to whether the effect of an impairment was likely to recur within the meaning of the predecessor to para 2(2) of Sch 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase 'likely to last at least 12 months' in para 2(1)(b) of the Schedule. I note that that interpretation is consistent with para C4 of the guidance issued by the Secretary of State under s 6(5) of the 2010 Act which states that in assessing the likelihood of an effect lasting for 12 months, 'account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood'.

46. This passage is a clear and authoritative re-statement of the agreed position. The things that have to be ignored are "events" and "anything which occurs" after the period of discrimination. But that is as far as it goes. In *All Answers,* Lewis LJ was not considering the point now raised by the respondent. The point on appeal was about the irrelevance of post-discrimination events, not about the admissibility or weight of post-discrimination statements.

47. In my view, it is open to a tribunal to take account of any evidence that is relevant to the circumstances as they existed during the period of discrimination, notwithstanding that that evidence may consist of a statement made at some later time. Common examples of such evidence include a claimant's disability impact statement prepared long after the discrimination ended, or an expert's retrospective opinion attributing symptoms to an impairment.

Conclusions

Substantial adverse effect during the period of discrimination

48. Every day between 27 January 2021 and 13 March 2021, including the whole of the period of discrimination, the claimant had difficulty in carrying out the normal day-to-day activity of sleeping. This caused a knock-on difficulty in her ability to concentrate on normal day-to-day activities the following day. She also experienced continuous difficulty in travelling by car between those dates.

49. The effect on the claimant's ability to sleep, concentrate and travel by car was, in my view, more than minor or trivial.

50. Between 27 January 2021 and 13 March 2021, the claimant had intermittent episodes of severe pain, and when she did, she had difficulty dressing herself, holding a conversation and reading. It is not clear how often these severe pain episodes occurred. In my view, however, that does not matter. Even when a flare-up had eased, such that the claimant was able to resume activities of dressing, talking and reading, it would only be a matter of time before the next episode of severe pain, and the claimant would once again struggle with these normal day-to-day activities. During intervening periods, when recurrence was likely, the substantial adverse effect must be treated as having been continuous. That is the effect of paragraph 2(2) of Schedule 1.

51. I am satisfied that the difficulties mentioned above were the effects of the two physical impairments. Here are my reasons for coming to that conclusion:

    51.1. Mr Siddiq expressed the opinion that the pain could have been caused by the mobile caecum syndrome. That opinion was expressed after the period of discrimination had ended, but, for the reasons I have given, that does not mean that his opinion has to be discounted.

    51.2. The claimant has described mobile caecum syndrome and the mechanism by which it causes pain. I have found as a fact that her description was an honest recollection of what she has been told by Mr Siddiq and that it is likely to be broadly accurate.

    51.3. Before January 2021, the claimant was fit and healthy. There is no other obvious cause for the claimant's pain other than mobile caecum syndrome.

Was the substantial adverse effect long-term?

52. The next question is whether or not the substantial adverse effect was long-term. Could it be said, during the period of discrimination, that the substantial adverse effect "could well" last for 12 months?

53. The respondent says no. Essentially, the respondent's argument is two-fold:

    53.1. The first argument discounts the possibility of surgery. Even with no prospect of surgery, the claimant has not proved that it could well happen that the effects would last beyond 12 months.

    53.2. The second argument is that, whatever the prognosis might have been without surgery, the likelihood was that the claimant would have a successful operation well within the 12 month period, and could expect a full recovery within a few weeks, and so it could not be said that the substantial adverse effect could well last for 12 months.

54. I disagree with both of those arguments.

55. Without surgery, the substantial adverse effect of the mobile caecum syndrome was likely to last for more than 12 months. I reach this view because:

    55.1. By the start of the period of discrimination, the symptoms had already lasted for 6-7 weeks.

    55.2. The nature of the condition, as described by the claimant, is such that it would be unlikely to reverse itself naturally without some sort of medical intervention.

    55.3. The claimant's GP told her that her fit note may have to be extended until after she had had surgery. Here was a doctor saying, in effect, "your impairment could well have a substantial adverse effect on your ability to work until after your operation".

56. That leaves the question then of what the likely effect of the surgery was going to be. In my view, it was not likely that the surgery would result in a disappearance of the substantial adverse effect within 12 months. To put it another way, the substantial adverse effect could well continue for 12 months despite the surgery. In coming to this conclusion I placed reliance on what Mr Siddiq warned the claimant on 6 October 2021. Mr Siddiq's view at that time was that he could not guarantee that the caecopexy procedure would be successful and that it might make the claimant's symptoms worse. As I have held, that opinion can be taken into account if it is relevant to the circumstances that existed during the discrimination period. In my view, it is relevant to those circumstances. It is an opinion about the potential outcomes of a particular form of surgery. I cannot see why a doctor's view of those outcomes would have been any different in March 2021 than it was in October 2021. If Mr Siddiq thought in October 2021 that the surgery could well fail to cure the symptoms of mobile caecum syndrome, he is highly likely to held the same view during the period of discrimination.

57. I conclude that, during the period of discrimination, the substantial adverse effect of the physical impairments was long-term, in that it could well have lasted for 12 months.

58. The claimant did, therefore, have a disability within the statutory meaning.

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Employment Judge Horne

Date: 4 June 2022

REASONS SENT TO THE PARTIES ON

30 June 2022

FOR THE TRIBUNAL OFFICE

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