



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111986/2021

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Held via Cloud Video Platform (CVP) on 24 June 2022

Employment Judge L Wiseman

10 **Ms S Cameron**

**Claimant
In Person**

15 **Dumfries and Galloway Health Board
Emergency Dental Services
Dental Clinic**

**Respondent
Represented by:
Mr G Fletcher -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided the claimant was a disabled person in terms of section 6 of the Equality Act, at the relevant time of the alleged discrimination.

REASONS

- 25 1. The claimant presented a claim to the Employment Tribunal in which she claimed unfair constructive dismissal and discrimination because of the protected characteristic of disability.
2. The respondent denied the claims and disputed the claimant was a disabled person in terms of the Equality Act.
- 30 3. The preliminary hearing today was arranged to determine whether the claimant was a disabled person, at the relevant time, in terms of section 6 of the Equality Act.
4. I heard evidence from the claimant and I was also referred to documents produced by the respondent. I, on the basis of the evidence before me, made
- 35 the following material findings of fact.

Findings of fact

5. The claimant commenced employment with the respondent in March 2005. She was employed as a dental nurse supporting emergency dental clinics one weekend per month.
- 5 6. The claimant was also employed by Cumbria Health Board in a substantive post as a Health and Safety Advisor.
7. The claimant had an accident at work on the 16 November 2019 when the lid of a clinical waste bin sprung open and caught her inner thigh. The claimant suffered bruising on her leg and some lower back and leg pain.
- 10 8. The claimant attended for physiotherapy but ultimately visited her GP when things did not get better, and was referred for an MRI scan.
9. The MRI scan, which took place in mid-2020, showed a significant herniated spinal disc, which was compressing nerves.
10. The claimant continued to work for the respondent during January, February and March 2020. She took annual leave in April 2020 and was told not to attend for work in May and June because of Covid.
- 15 11. The claimant had an accident at work with Cumbria Health Board in July 2020 and was signed off as unfit for work due to ankle pain in July and August 2020.
12. The claimant took annual leave in September 2020 and returned to work with the respondent in October, November and December 2020. The claimant was off on sickness absence in late December 2020 and did not return to work before she resigned on the 14 September 2021. The claimant was unable to do certain clinical aspects of her role with the respondent.
- 20 13. The claimant continued to attend for work/work from home with NHS Cumbria during this period.
- 25 14. The claimant, during 2020, suffered on/off hip pain, leg pain, lower back pain and had problems with loss of feeling/numbness in her foot. She suffered pain

which was, at times, acute and she was prescribed Gabapentin for acute pain relief.

15. The claimant occasionally has to get out of bed early if her hip or back is sore. The pain and initial stiffness ease with movement. The claimant can shower and get dressed, but has to sit down to put on underwear or tights because she has difficulty lifting her left leg. The claimant now wears slip on shoes.
16. The claimant can cook on the hob, but does not lift things out of the oven. Similarly, she does not take washing out of the machine, but she is able to hang it out.
17. The claimant gets family assistance with weekly shopping tasks because she cannot lift a heavy shopping basket.
18. The claimant does little housework and cannot Hoover. She cannot stand, or sit, for long periods of time without getting up to stretch. The claimant uses an ergonomically adaptable and adjustable chair when working from home to assist with comfort when sitting.
19. The claimant is able to walk between half a mile to a mile although she no longer runs or does aerobics classes.
20. The claimant's situation is ongoing and she is still having problems, but she has feeling in her foot more often than not. The claimant is careful about what she does and has bought an automatic car.
21. The claimant has had periods of time where she was prescribed drugs for acute pain relief, but that has reduced and she now takes Naproxen on a daily basis. She has been referred to a pain management clinic for assistance.

Credibility and notes on the evidence

22. The claimant told the tribunal that in July 2020 she had had an accident whilst at work with NHS Cumbria. The claimant stumbled on stairs because of a dropped foot, and had twisted her right ankle. The claimant accepted the Fit Notes issued for July and August (page 65) referred to the reason for absence as being ankle pain.

23. The claimant accepted she had been referred to an Orthopaedic Consultant whose report was produced at page 70. The claimant also accepted there was no reference to a dropped foot in that report. The claimant recalled it had definitely been discussed and she could not explain why it had not been referred to in the report.
24. I could not accept the respondent's submission that this undermined the claimant's reliability. The cause of the claimant's accident is not the issue being considered: the claimant may well have thought a dropped foot caused the accident but the Consultant may have thought otherwise, or may have thought that information irrelevant to the treatment of the condition presented.
25. The claimant also accepted that it was the clinical aspects of the role with the respondent which she could not carry out, but she was fit to work generally.

Respondent's submissions

26. Mr Fletcher submitted the issues for the tribunal to determine were: (i) did the claimant have a physical or mental impairment; (ii) did that impairment have an adverse effect on her ability to carry out normal day to day activities; (iii) if so, was the adverse effect substantial; (iv) if so, was the substantial adverse effect long term and (v) if the long term substantial adverse effect had ceased, was it likely to recur? The burden of proof was on the claimant.
27. Mr Fletcher acknowledged the claimant had had an injury at work on the 16 November 2019, but she had returned to work in December, and had continued to work until March 2020, with both employers. The claimant had been on annual leave in April and was not requested to work during May and June. Thereafter the claimant had had an accident whilst employed with Cumbria NHS and had been off work. Mr Fletcher invited the tribunal to note there had been no reference in the Neurosurgeon's report to a dropped foot. The claimant had returned to work with the respondent during October, November and December. The claimant had, at the point of resignation, been fit to return to work with adjustments.

28. The relevant period for determining whether the claimant was a disabled person was the 14 September 2021 (the date of resignation) and the preceding 9 month period. The claimant told the tribunal she had been fit to attend her substantive role in this period although she could not do the clinical aspects of her role with the respondent. Mr Fletcher submitted the specialist nature of the role with the respondent was not a day to day activity.
29. The claimant is able to walk up to a mile and to drive. Her condition has been improving and there had been an Occupational Health recommendation to return to work. Mr Fletcher submitted the claimant was at a point where a return to work was possible, but she had resigned without attempting to return.
30. Mr Fletcher invited the tribunal to look at things in the round because there are accommodations people have to make in their daily lives, for example, sitting down to put on underwear is not unusual with age. Mr Fletcher submitted it was not enough to point to small things the claimant could not do and the fact she could not undertake the clinical duties of the role was outside the ambit of the Act.
31. Mr Fletcher invited the tribunal to find the claimant was not a disabled person at the relevant time.

Claimant's submissions

32. Mrs Cameron submitted the respondent knew she had issues: they had been told this by the GP fit notes. She had only been sent to occupational health after she had submitted a grievance. Mrs Cameron thought it unfair and inaccurate to say that because she went to work she did not have a disability.
33. The medical information demonstrated her condition was long term and that it impacted on her daily life – if it did not, then she would not have had to buy an automatic car.

Discussion and Decision

34. I firstly had regard to the relevant statutory provisions in section 6 of the Equality Act, which provides:

“A person (P) has a disability if

(a) P has a physical or mental impairment, and

5 *(b) The impairment has a substantial and long term adverse effect on P’s ability to carry out normal day to day activities...”*

35. The burden of proof is on the claimant to show that she satisfies this definition, and that she did so at the time when the alleged discriminatory acts occurred. In this case the relevant time is December 2020 to September 2021.

10 36. I next had regard to the case of ***Goodwin v Patent Office 1999 ICR 302*** where the EAT said the words used to define disability require a tribunal to look at the evidence by reference to four different questions:

- did the claimant have a mental and/or physical impairment;
- did the impairment affect the claimant’s ability to carry out normal day
15 to day activities;
- was the adverse effect substantial and
- was the adverse effect long term.

37. I also had regard to the Guidance on Matters to be taken into account in Determining Questions Relating to the Definition of Disability.

20 38. The claimant in this case had a physical impairment insofar as she had a herniated spinal disc which was impacting on nerves. This caused the claimant to have pain in her back and/or hip and/or left leg with numbness in her foot. The claimant has difficulty lifting her left leg.

39. I next asked whether the impairment affected the claimant’s ability to carry out
25 normal day to day activities. I had regard to the claimant’s evidence that she had to stop partaking in certain activities which she enjoyed prior to the accident: for example, running and aerobics. I also accepted the claimant’s

evidence that she can no longer undertake the normal day to day activities of unloading the washing machine, taking things out of the oven, carrying shopping, doing housework such as hoovering and she cannot sit or stand for long periods of time.

5 40. I next considered whether the adverse effect on normal day to day activities was substantial. The term “substantial” means more than minor or trivial. I considered the effect on the normal day to day activities of the claimant was substantial and I say that because the claimant is effectively reliant on others to help her in her day to day activities. The claimant can do aspects of laundry
10 such as putting the washing in the machine, but she needs someone to do the heavier task of taking it out of the machine before she can hang it out. Similarly, the claimant can cook on the hob, but she needs someone to take heavy, hot items out of the oven. The claimant does not go out by herself: she has someone accompany her when she goes shopping because she cannot
15 carry the shopping. I was satisfied the cumulative effect of this resulted in a substantial adverse effect on the ability to carry out normal day to day activities.

41. I acknowledged the claimant was able to walk up to a mile, but the fact the claimant was able to do this did not detract from the impact the impairment
20 had on normal day to day activities. I also acknowledged the claimant had modified her behaviour to prevent or reduce certain effects of the impairment. The claimant for example spoke of having to sit down to put on underwear or tights because she cannot stand on one leg. She also spoke of wearing slip on shoes and having purchased an automatic car because she could not use
25 the clutch with her left leg. I considered it reasonable to expect a person with back/hip pain and who cannot lift their left leg to sit down to get dressed and to choose to wear slip on shoes and drive an automatic car. I considered the modifications reduced the effects of the impairment on those normal day to day activities.

30 42. I lastly considered whether the substantial adverse effect was long term. “Long term” means an effect of an impairment which has lasted at least 12 months, or where the total period for which it lasts, from the time of the first

onset, is likely to be at least 12 months, or which is likely to last for the rest of the life of the person affected.

43. The claimant's evidence was not entirely clear regarding the timeframe when her impairment had been very painful and when it had been improving. I did not find the medical records clarified this: for example, in the medical records it was noted on the 4 October 2020 the claimant had "lower back pain, bit of a niggle, today pain got worse though was able to walk around went to Argos but struggled getting out of the car. No red flag symptoms". On the 8 December 2020 it was noted "Orthopaedic report. She has been experiencing severe lower back pain and going down her left leg which is numb, struggling with daily activities". On the 19 December 2020 it was noted "no back pain, leg numbness".
44. I reached the conclusion, based on the claimant's evidence and the medical records, that the claimant's condition fluctuated during 2020 before settling down in 2021. The Occupational Health report in September 2021 concluded the claimant was fit to return to work, with adjustments.
45. I have recognised the claimant's condition improved, but this is not to suggest the claimant was "better". The improvement was from acute pain and leg numbness, to pain which could be treated with much weaker painkillers. The substantial adverse effects of the impairment (as set out above) reflect the position once the claimant's pain had improved. This was the position the claimant was in during 2021.
46. The claimant's accident occurred on the 16 November 2019. The effects of that impairment lasted at least 12 months, which is long term.
47. The claimant takes Naproxen, which is a painkiller. There was no evidence to suggest what impact there would be on the claimant if she stopped taking this medication. I assumed there must be some benefit to the claimant in taking the medication otherwise it would not be prescribed for her. I was accordingly satisfied that if the claimant stopped taking the medication, the substantial adverse effect of the impairment would be worse.

48. The respondent argued the claimant had only been off for 9 months prior to her resignation and accordingly the effects of the impairment were not long term. I could not accept that submission because it was clear from the evidence that the substantial adverse effects on the claimant's ability to carry out normal day to day activities had been present during 2020 and 2021 up to the termination of her employment, and ongoing. I acknowledge the claimant's condition improved and stabilised during 2021, and that her GP confirmed she was fit to return to work with adjustments, but this did not undermine or detract from the fact the impairment still had a substantial and ongoing adverse effect on her ability to carry out normal day to day activities (as above).

49. I decided, having had regard to all of the above points, that the claimant was a disabled person in terms of section 6 of the Equality Act, at the relevant time of the alleged discrimination.

50. The case will now be listed for a final hearing.

Employment Judge: Lucy Wiseman
Date of Judgement: 13th July 2022
Entered in register: 15th July 2022
and copied to parties