



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

Mr S Collins

v

RDKI Ltd (t/a Ridgeway Interiors)

**Heard at:** Watford (CVP)

**On:** 29 June 2022

**Before:** Employment Judge Smeaton

**Appearances**

For the Claimant: In person

For the Respondent: Mr Collyer

**JUDGMENT** having been delivered to the parties orally on 29 June 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:

1. The Claimant was disabled within the meaning of s.6(1) Equality Act 2010 ("EqA 2010") at all material times.
2. All claims proceed to a final hearing on 8-10 August 2022.

## REASONS

Introduction

1. By a claim form dated 26 June 2020 the Claimant, Mr Collins, brings claims of direct disability discrimination, unlawful deductions from wages, failure to pay holiday pay and failure to provide a written statement of particulars of employment.
2. The claims are denied by the Respondent.

3. By an order dated 6 April 2022, Employment Judge Reindorf listed the matter for an open preliminary hearing to consider whether the Claimant was disabled within the meaning of s.6(1) EqA 2010 at the material time. The impairment relied on is an enlarged prostate.
4. The material time is said to be between February and March 2020.

#### Hearing and preliminary discussions

5. The preliminary hearing took place over three hours and was conducted remotely via the Cloud Video Platform (“CVP”). Mr Collins appeared unrepresented. The Respondent was represented by Mr Collyer.
6. At the outset of the hearing I confirmed that the parties could hear and see me. I was satisfied that everyone could participate effectively in the hearing and that it was suitable to be dealt with via CVP.
7. I was provided with an agreed bundle of 66 pages which contained a Disability Impact Statement provided by the Claimant on or around 12 May 2022.
8. I heard evidence from Mr Collins and oral submissions from both him and Mr Collyer.

#### The law

9. The burden of proof is on Mr Collins to demonstrate, on the balance of probabilities, that he was disabled within the meaning of the EqA 2010 at the material time.
10. Under s.6 EqA 2010:
  - (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.
11. In considering s.6(1) EqA 2010, the Tribunal should ask itself four questions (Goodwin v Patent Office [1999] ICR 302):
  - (i) Did the Claimant have an impairment (mental or physical) at the material time;
  - (ii) Did the impairment affect his ability to carry out normal day-to-day tasks;
  - (iii) Was the adverse effect substantial; and
  - (iv) Was it long-term (i.e. had it lasted, or was it likely to last, at least 12 months).

12. Schedule 1 to Part 1 EqA 2010 contains further provisions relevant to the assessment of whether a person is disabled. Further guidance is provided in the 'EqA 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability' ("the Guidance") and in Appendix 1 to the Code of Practice on Employment published by the Equality and Human Rights Commission ("EHRC") ("the Code of Practice").
13. Although the EqA 2010 does not contain a list of normal day-to-day activities, the Guidance (paragraph D3) provides that such activities are "*things people do on a regular or daily basis for example shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities*".
14. In Paterson v Comr of Police of the Metropolis [2007] IRLR 763, [2007] ICR 1522, EAT, the Claimant was a police officer who suffered from dyslexia. He was found to be a disabled person by the Employment Appeal Tribunal ("EAT") (reversing the decision of the Employment Tribunal below). An expert had recommended he be allowed additional time to undertake the examinations necessary to achieve promotion. The EAT found that the activities of carrying out assessments or doing examinations were 'normal day-to-day activities', as were reading and comprehension. The EAT had regard to the ECJ judgment in Chacón Navas v Eurest Colectividades SA C-13/05, [2006] IRLR 706, [2007] All ER (EC) 59 and considered how the Claimant's professional life was affected when assessing the question of whether normal day-to-day activities were impaired.
15. "Substantial" for this purpose means more than minor or trivial (s.212 EqA 2010). The focus must be on what a person cannot do, or can only do with difficulty, not what they are able to do.
16. An impairment may not directly prevent someone from carrying out normal day-to-day activities but may still have a substantial adverse effect on how the person carried out those activities. This is relevant to the issue of pain: "*where an impairment causes pain or fatigue, the person may have the ability to carry out a normal day-to-day activity, but may be restricted in the way that it is carried out because of experiencing pain in doing so*" (Guidance at paragraph D22).
17. "*Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person.*" (Guidance at paragraph B9).
18. For the purpose of determining whether an impairment has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities, the effect of ongoing medical treatment on the impairment is ignored (paragraph 5(1) schedule 1 EqA 2010).

19. The guidance, at paragraph B10 provides that, *“In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment.”*
20. When considering modification of behaviour, whilst it would be reasonable to expect an individual to avoid extreme activities (e.g. skiing for someone with chronic back pain) it would not be reasonable to expect the person to give up, or modify, more normal activities that might exacerbate the symptoms (Guidance at paragraph B7).
21. By paragraph 2(1) of Schedule 1 to the EqA 2010, the effect of an impairment will be 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 a person's life. This must be determined by reference to the date of the alleged discriminatory act, not with hindsight at the Tribunal hearing (paragraph C4 of the Guidance).
22. “Likely” means “could well happen” and is not to be equated with “more probable than not” (Guidance at paragraph C3 and Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) [2009] ICR 1056, HL).
23. By paragraph 2(3) of Schedule 1 to the EqA 2010, the impairment is treated as continuing if its substantial adverse effect on normal day-to-day activities is likely to recur.

### Findings

24. It is not in dispute that Mr Collins suffers from an enlarged prostate and that, at the material time, this amounted to an impairment. The first element of the Goodwin test is therefore satisfied.
25. The three other elements of the test are in dispute.
26. Mr Collins' evidence was that he first began to suffer with pain related to his enlarged prostate in December 2019 and that his symptoms have continued, relatively unchanged, since that date. His symptoms are described as extreme pain, pressure and discomfort and an increased frequency in his need to go to the toilet. At the relevant time, he was able to work but the pain he was suffering, and the need to go to the toilet so often, meant that he needed to slow down at work and had to take several painkillers in order to carry out his work duties.
27. Mr Collins maintained that the documentation before me did not fully reflect the severity of the symptoms he was experiencing. He accepted that he had not been to his GP very much in 2020. He said this was a result of two factors; firstly, as ex-military, he has always been distrustful of going to the doctors. They have never done him any good. He says this was drilled into him in the

1980s. Secondly, he found it impossible to get face-to-face (or any) GP appointments from March 2020 onwards as a result of the pandemic. Accordingly, he says, the reality of the situation he was dealing with in February/March 2020 was worse than the documents might suggest.

28. Mr Collyer, in response, relies primarily on the documentation before me which he says suggests that the effects of the impairment have never had the required substantial adverse effects. He emphasised that the symptoms had only been described by doctors as “*bothersome*” and that no medication had been prescribed to Mr Collins until December 2020. When Mr Collins was seen in May 2020, and it was confirmed that he did not have cancer, he was advised to try lifestyle changes such as limiting fluid intake in the evening and avoiding caffeine. That is not indicative, he says, of substantial adverse effects. Accordingly, at the period of time that I must consider matters (February/March 2020) there is insufficient evidence to show long-term, substantial adverse effects. Further, Mr Collyer maintains, the symptoms appear to have gone away by themselves.
29. Having heard the evidence of Mr Collins and having considered the documentation before me, I accept that, at the material time, the impairment was having a substantial adverse effect on Mr Collins’ ability to carry out normal day-to-day activities.
30. Mr Collins was a straightforward, credible witness and, save as in one respect detailed below, I accept his evidence in full. It was not undermined in any meaningful way.
31. The only element of his evidence which I do not accept is that that his symptoms have remained consistent throughout. A letter from his treating consultant in March 2021 says that his urinary symptoms have “*improved nicely in response to the new medication*” and I find that it is more likely than not that that reflects the reality. I accept, however, that Mr Collins had a tendency to downplay his symptoms to his doctors. Further, he has remained on medication since December 2020 and has now been put on an additional medication. That suggests that, whilst there was an element of improvement in 2021, his symptoms have nevertheless continued (and certainly continued at the relevant time). As above, for the purpose of determining whether an impairment has a substantial and long-term adverse effect on a person’s ability to carry out normal day-to-day activities, the effect of ongoing medical treatment on the impairment is ignored (paragraph 5(1) schedule 1 EqA 2010).
32. It is clear that Mr Collins’ symptoms were sufficient to justify a referral to the urology clinic in January 2020. They are described on 31 January 2020 as “*worsening lower urinary tract symptoms, particularly urgency, frequency, dysuria, increased pressure in the pelvis and pelvic discomfort, and some discomfort on sitting down...you are up 3 times during the night to pass urine*”.
33. I accept Mr Collins’ evidence that that pain and disturbance impacted on his ability to carry out day-to-day activities in a way that was more than minor or trivial. The test is not just about what Mr Collins could not do but also what he

could only do with difficulty. His pain levels are clearly relevant. His evidence, which I accept, is that doing his job which involved lifting, bending, carrying items and kneeling (all of which can be described as normal day-to-day activities) caused him severe pain. He had to slow down at work and take several painkillers in order to get through the working day. That is indicative of a substantial adverse effect.

34. Additionally, and distinctly, having to use the toilet so frequently, particularly being disturbed three times a night, every night, clearly had an impact on his ability to carry out normal day-to-day activities. Normal day-to-day activities include activities that are required to maintain personal well-being, e.g. basic functions such as sleeping (paragraph D6 of the Guidance).
35. I do not find that Mr Collins' evidence is undermined by the fact that he was not prescribed medication at the relevant time. Those treating him at that point did not know what was causing his symptoms. He was under investigation for possible cancer and/or infection.
36. I also reject the suggestion made by Mr Collyer that Mr Collins cannot be covered by the EqA 2010 because prostate problems are not at all uncommon in men of his age and it cannot have been the intention of parliament, when enacting the EqA 2010, to bring such a large proportion of the population under the protection of that act. I am not asked to look at whether the issue is common or how many people it affects. I am asked only to look at the tests laid down by section 6(1) EqA 2020.
37. I accept that the second and third limbs of the Goodwin test are satisfied.
38. Turning to the last limb of that test, although by February/March 2020 the symptoms had only lasted approximately four months, I accept that they were likely to last 12 months or more. The test is whether that could well happen, not whether it is more probable than not that it would. At the relevant time, when it was unclear whether Mr Collins had cancer or an infection, it is clear that the effects could well have continued for 12 months. The documents relating to the relevant period show that the effects were continuing at that point, with no clear diagnosis, treatment plan or indication that it was a short-lived issue.
39. I accept that the fourth limb of the Goodwin test is satisfied and, accordingly, that Mr Collins met the definition under section 6(1) EqA 2010 at the relevant time.

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Employment Judge Smeaton

Date: 19 July 2022

Sent to the parties on: 20 July 2022

For the Tribunal Office

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