



EMPLOYMENT TRIBUNALS

Claimant: Mr M Jeffers

Respondent: The Secretary of State for Justice

OPEN PRELIMINARY HEARING

Heard at: Bristol (by video) **On:** 12 August 2022

Before: Employment Judge C H O'Rourke

Representation

Claimant: Mr G Graham - counsel

Respondent: Ms K Loraine - counsel

JUDGMENT

The Claimant was, at all relevant times, disabled, subject to the terms of s.6 of the Equality Act 2010.

REASONS

Background and Issues

1. The Claimant is employed by the Respondent as a prison officer, since May 1992.
2. He has brought claims of disability and age discrimination, which are set out in detail in a case management order of Employment Judge Gray, of 12 May 2022 [50].
3. That Order directed that there be this one-day open preliminary hearing, to determine whether or not the Claimant was disabled at the material time, by reason of his back injury, subject to s.6 of the Equality Act 2010 (EqA). It was agreed between the parties that the Claimant did have the physical impairment of lower back pain and that it was long-term. The Respondent did not dispute the description of the activities listed by the Claimant in his disability impact statement as being 'normal day-to-day activities'. Accordingly, therefore, the only issue for me to decide was whether or not

that impairment had a substantial adverse effect on his ability to carry out such activities.

The Law

4. Section 6(1) EqA states:
 - (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.*
5. Section 212(1) of the Act defines 'substantial' as '*more than minor or trivial.*'
6. The case of **Aderemi v London and South Eastern Railway Ltd [2013] ICR 591, UKEAT** commented on the definition of 'substantial' in s.212(1) EqA, stating that '*the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.*'

The Facts

7. I heard evidence from the Claimant, who had provided two witness statements and heard submissions from both counsel.
8. The Claimant's evidence was as follows:
 - a. '*He has a long-standing history of issues with his lower back*', as described in his consultant neurosurgeon's letter of June 2018 [126]. He is now aged sixty-one.
 - b. That condition had a '*significant exacerbation*' in February 2018, due to the Claimant having a bicycle-related accident. However, by June 2018, the injuries he sustained had largely resolved themselves and no surgery was necessary. His ongoing lower back pain was described by the Consultant as '*multifactorial*' and it was stated that the Claimant was '*aware of general measures to protect his lumbar spine like avoiding heavy lifting and I encouraged him to stay active with cycling or swimming and focusing on strengthening his core muscles*'.
 - c. That was the last medical intervention the Claimant has had for this condition.

- d. He said that his lower back pain had continued and worsened after the accident, to the extent that it has had a significant effect on his ability to carry out normal day-to-day activities, such as:
- i. Going to the gym;
 - ii. Playing sports such as badminton;
 - iii. Running;
 - iv. While he still cycles, he does less than before;
 - v. Being unable to stand up or sit down for long periods;
 - vi. Being unable to twist or bend without pain;
 - vii. Experiencing pain levels '*on good days*' of 3 (out of 10), but going up to 8 or 9 if he overdid things [his first statement 128]. His second statement, provided this morning, described the pain levels as '*4 or 5 out of 10 on a daily basis, worse in the mornings – around a 6/6.5 ...*';
 - viii. He finds walking up and down stairs tiring and painful, both at work and (prior to him moving to a bungalow), also at home;
 - ix. He needs to lie down and relax if he suffers muscle spasms;
 - x. He takes non-prescription pain killers and anti-inflammatories;
 - xi. He cannot pick up his grandchildren;
 - xii. He no longer does bricklaying and carpentry, which used to be a sideline/hobby of his.

9. He was challenged on the following issues:

- a. Why had he not sought further medical treatment, if his condition was as poor as he described? He said that he didn't wish to be medically downgraded at work, or to take time off, but agreed that further medical treatment might be beneficial. He also said that the squashing of his lumbar disc was a constant factor and that he simply managed the pain.
- b. How he'd been able, since 2018, to continue at work (to include participating in Control and Restraint (C&R) training), without taking any sick leave and seeking to do overtime? He said that he managed his condition and provided he didn't have to climb too many stairs, he could cope at work, to include passing his C&R training and participating in two 'live' C&Rs in those years.
- c. That he'd not (he agreed) previously raised concerns with the Respondent about his ability to climb stairs or stand for long periods, until he brought this claim (July 2021).
- d. That he misquoted the Consultant's advice, as a reason for not having further treatment, as '*my doctor told me at that time that any further treatment would make no difference to my injury and would not lead to any improvement in my symptoms.*' (WS4), when that is not what the Consultant said. He said that he '*knew my limits*'.

- e. That he had exaggerated his pain levels in his most recent statement, from what he had said in his original one, which he denied.
- f. He denied that he was saying in his second statement that he had moved to a bungalow because of his injury and said that there were other reasons for the move, but that it helped him not to have to climb stairs.

Conclusions

- 10. I was invited by Ms Loraine not to accept the Claimant's evidence on these points, due to the lack of corroborating medical evidence, alleged inconsistencies in his evidence and the fact of his continuing at work, carrying out C&R, not taking sick leave and even seeking overtime and that therefore he had failed to show substantial adverse effect on his activities.
- 11. I am unwilling, however, to do so, for the following reasons:
 - a. Many persons with a long-term back injury will simply 'muddle-on', coping as best they can, with or without medical intervention, which is, I find, what the Claimant was doing. He manages his pain and copes with the restrictions it places on his lifestyle. He stated that he can do his job (to include C&R) and provided he didn't have to climb too many stairs, could cope at work. I accept his evidence that he was, until relatively recently, reluctant to raise these matters with the Respondent, or to seek further medical treatment, fearing downgrading of his role.
 - b. I don't consider that the alleged inconsistencies in his evidence are such as to discredit it. The differences stated in pain levels is marginal and in fact, in part, played down in the second statement and such levels must be inherently difficult to gauge, in any event. He didn't say in his second witness statement that he moved to a bungalow because of his back injury, but simply that, as he had now done so, he didn't have to suffer the pain that followed from climbing stairs.
 - c. He was not challenged on the bulk of his evidence as to the substantial adverse effect on his normal day-to-day activities, such as in exercising, standing or sitting, or in picking up his grandchildren and I therefore see no reason to dismiss such evidence.
- 12. That evidence, I find, clearly indicates that his impairment results in him meeting the relatively low bar of it having a more than trivial adverse effect on those day-to-day activities he described. Accordingly, the Claimant is disabled, subject to s.6 of the Act.

Judgment

13. For these reasons, therefore, the Claimant is disabled, subject to s.6 EqA, both now and at the relevant time (April to June 2021).

Employment Judge O'Rourke
Date: 12 August 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
25 August 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE