



EMPLOYMENT TRIBUNALS

Claimant: Mrs G Owen

Respondent: Irvings Butchers Limited

HELD AT: Manchester

ON: 10 August 2022

BEFORE: Employment Judge Slater (by video conference)

REPRESENTATION:

Claimant: In person

Respondent: Mr S Walker, solicitor

JUDGMENT having been sent to the parties on 22 August 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

Issues

1. This was a hearing to determine whether the claimant was disabled at relevant times (April 2020 onwards) within the meaning in the Equality Act 2010 by reason of Chronic Kidney Disease (CKD).
2. The respondent concedes that the claimant had the condition, that this was diagnosed in February 2020 and that the condition was long term, in that it is likely to last the rest of the claimant's life.
3. The live issues for me to determine are whether the condition had a substantial adverse effect on the claimant's ability to carry out normal day to day activities or whether the provisions relating to a progressive condition are met, in which case the

progressive condition is taken to have a substantial adverse effect, so the test of disability would be met.

4. The provisions relating to progressive conditions are that the condition is a progressive condition, that it had some impact (but not a substantial one) on the claimant's ability to carry out normal day to day activities and the condition is likely to result in the claimant having such an impairment.

The evidence

5. I had an electronic bundle of documents. Both parties confirmed this included all the material they wanted me to look at. I had read this before the start of the hearing. Because this contained little information about CKD and because the claimant was not legally represented, I considered it appropriate to inform myself more about the condition by looking at the overview of CKD on the NHS website and the part of the UK Kidney Association's website on CKD Stage G3. I informed the parties what I had read and offered an adjournment for them to read the material but neither considered they needed this.

6. The claimant, in her answers to a request for further particulars, stated that her condition did not impact on her ability to carry out day to day tasks. In her disability witness statement, she wrote that "under normal circumstances this disability would not have impaired my day to day activities" before explaining about the impact of coronavirus.

7. The claimant's witness statement was very brief and her GP provided a one line letter confirming only the diagnosis of CKD. I accept the claimant understood her GP was refusing to provide any other medical evidence.

8. Since the claimant was not legally represented, I felt it appropriate, in accordance with the overriding objective, to ask the claimant some open questions, before cross examination, relevant to whether CKD had any impact on her ability to carry out normal day to day activities. Since this questioning brought out information not previously provided by the claimant, I offered Mr Walker time to consider his questions and/or take instructions before his cross examination and raised the possibility that he could make an application for a postponement if the respondent did not consider it could fairly proceed today. Mr Walker chose to start his cross examination without an adjournment, but we took a break after his questions for him to take instructions, after which he could ask further questions or make an application. After a 15 minute break, Mr Walker said he did not have any further questions and had no application to make.

Facts

9. The claimant was diagnosed with stage 3 CKD in Feb 2020.

10. The claimant had been suffering with back pain for several years before this, for which she had been prescribed non-steroidal anti-inflammatory painkillers. After routine blood tests, she was diagnosed with CKD and taken off those particular pain killers which could increase damage to her kidneys.

11. With the advent of the coronavirus pandemic, the claimant was advised by her GP that CKD would make her particularly at risk if she contracted coronavirus, and her GP signed her off work for 3 months on 26 March 2020. The claimant would have been fit to continue to work had it not been for the pandemic. The claimant was subsequently placed on furlough by the respondent in early April 2020.

12. The claimant is a nurse by training. She retired from working nursing shifts 3-4 years ago. She was used to working 12 hour shifts as a nurse. I accept the claimant's evidence that, after these shifts, prior to her health problems, she frequently walked, cycled or went to the gym.

13. The claimant worked in the respondent's butcher's shop. She worked shifts of 5-6 hours without a break, being on her feet all the time.

14. I accept the claimant's evidence that, by April 2020, the claimant was feeling very tired. After her shifts in the respondent's shop, she ate, then fell asleep. She did not have the energy to walk, cycle or go to the gym as she had in the past. She could not keep her house as clean and tidy as she would have done previously because of fatigue. The claimant did not attribute this tiredness to CKD until recently, when she has become more informed about the condition. She now believes it to be because of the condition.

15. The claimant is now employed in a nursery, although currently on sick leave because of back pain. She is not on her feet as much in this job. She still suffers from fatigue but has learned that it is important to keep as fit as she can to help manage the CKD. She has, therefore, started taking exercise again, forcing herself to do this, although she does not walk as far as she used to. She is still not able to keep her house as clean and tidy as she would like.

16. The claimant was diagnosed about a month ago with spinal stenosis. The claimant confirmed there is no link between this condition and CKD. She suffered back pain because of the stenosis, although of a different nature to the back pain which she had suffered for 3-4 years, in the kidney area. She is on painkillers which helps her to manage the back pain of both types. The stenosis also causes fatigue.

17. The claimant is on medication for high blood pressure and high cholesterol.

18. The NHS website notes that symptoms of CKD can include tiredness. It does not list high blood pressure or high cholesterol as symptoms of CKD. It does, however, list these as causes of CKD. The website states that there is no cure for CKD, but treatment can help relieve the symptoms and stop it getting worse. Treatments include lifestyle changes and medicine to control associated problems such as high blood pressure and high cholesterol.

19. The UK Kidney Association website states:

“Patients with CKD stage G3 have impaired kidney function. Only a minority of patients with CKD stage G3 go on to develop more serious kidney disease. Cardiovascular disease, the umbrella terms for diseases of the heart and circulation (e.g. heart attacks and strokes), is more common in patients with CKD. It is important to try and identify which patients may go on to develop

more serious kidney damage and to try and reduce the chances of patients developing cardiovascular disease.”

20. I accept the claimant has been told that 3-4% of patients with stage 3, go on to develop stage 4 CKD. The claimant’s sister is a retired GP and has told the claimant, after looking at information about CKD, that she thinks her risk of developing stage 4 CKD is higher than for other people because of the family history.

21. I accept the claimant’s evidence that she has a family history of CKD.

22. The claimant accepted that someone with stage 4 CKD has a 50% chance of a cardio-vascular episode.

23. The claimant no longer does the shopping because of difficulty carrying heavy bags, which she accepts is due to spinal stenosis, and because of fatigue. Her husband now does the shopping.

Submissions

24. Mr Walker made the following oral submissions on behalf of the respondent.

25. The respondent accepts that the claimant has stage 3 CKD, that it was diagnosed in February 2020 and that the condition will last for the rest of the claimant’s life. The issue was whether, at the time of the events complained of, back in April 2020, CKD had a substantial adverse impact on her ability to carry out normal day to day activities.

26. Mr Walker submitted that it was clear from the pleadings that the claimant’s position was that CKD does not have a substantial adverse impact; he referred to paragraphs 8.29 and 50. The position has changed today.

27. It was undoubtedly the case that the claimant was advised she was at risk because of CKD during the pandemic. That in itself is not a substantial adverse effect. The claimant did not identify day to day activities affected by her condition.

28. Mr Walker submitted that the claimant had still not demonstrated that CKD had a substantial adverse impact on her ability to carry out normal day to day activities. The claimant, in answer to the judge’s questions, referred to fatigue and back pain. There was no definite causal link between back pain and CKD. It was very unusual for a GP to say they would not provide evidence. The respondent did not dispute that the GP said this, but it left the position that there was no evidence about a causal link.

29. Three impacts were identified: on exercise, on home management and on shopping. The claimant was still able to do exercise. Her home was not as clean and tidy as she would like it, but she had high standards. This was not enough to be a substantial adverse effect, even if the link between CKD and fatigue could be made out (and there was no medical evidence to this effect). In relation to shopping, the problem with lifting was due to the lumbar condition rather than CKD.

30. There was no evidence to allow the Tribunal to form the view that there was substantial adverse impact and a causal link with CKD.

31. The respondent did not challenge that the information on the NHS website was accurate. High blood pressure and high cholesterol were causes, rather than consequences, of CKD.

32. It was unclear whether this condition is progressive. The best evidence is the claimant's assertion that 3-4% are likely to progress to stage 4. The claimant had received advice from her sister that she had a higher chance because of her family history. This was not evidence on which the Tribunal could rely.

33. If the condition went to stage 4, there was a 50% chance of a cardio-vascular episode. Mr Walker referred to *Mowat-Brown v University of Surrey* [2002] IRLR 235. He submitted that it was not enough simply to establish that there was a progressive condition; the claimant had to show that it was more likely than not that the condition would have a substantial adverse impact. It could not be said that the claimant's condition would turn into something which would have a substantial adverse impact.

34. The claimant said she had nothing to add. She said that the National Kidney Federation defined CKD as a disability and that was the basis on which she perceived herself to have a disability. She said she was not an expert and went on what she had been told by her GP and what she had read.

Law

35. Section 6 of the Equality Act 2010 (EqA) and Schedule 1 to that Act contain the relevant provisions relating to the determination of disability. Section 6(1) provides:

“(1) A person (P) has a disability if –

P has a physical or mental impairment, and

the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities.

36. Paragraph 1 of Schedule 1 provides that the effect of an impairment is long term if (a) it has lasted for at least 12 months, (b) it is likely to last at least 12 months, or (c) it is likely to last for the rest of the life of the person affected. It also provides: “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.”

37. Paragraph 5 of Schedule 1 relates to the effect of medical treatment. It provides:

“(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 –

measures are being taken to treat or correct it, and

but for that, it would be likely to have that effect.

(2) “Measures” includes, in particular, medical treatment and the use of prosthesis or other aid.”

38. Paragraph 8 of Schedule 1 relates to progressive conditions. It states:

“(1) This paragraph applies to a person (P) if –

(a) P has a progressive condition,

(b) As a result of that condition P has an impairment which has (or had) an effect on P’s ability to carry out normal day-to-day activities, but

(c) The effect is not (or was not) a substantial adverse effect.

(2) P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment.

(3) Regulations may make provision for a condition of a prescribed description to be treated as being, or as not being, progressive.”

39. “Substantial” is defined in section 212(1) EqA as meaning “more than minor or trivial.”

Conclusions

40. I conclude that the claimant has a physical impairment, being stage 3 CKD. This is a long term condition, likely to last the rest of her life.

41. I consider first whether the condition of CKD had a substantial adverse impact on her ability to carry out normal day to day activities, even with the medication the claimant was taking.

42. The three activities referred to by the claimant as adversely affected are exercise, housework and shopping.

43. A substantial adverse impact is one that is more than minor or trivial.

44. The claimant relies on tiredness, which she believes is due to CKD, as leading her to stop exercise and to not being able to keep her house as clean and tidy as she would previously have done. She cites tiredness as one of the factors stopping her doing the shopping, although inability to carry heavy bags, due to stenosis, rather than CKD, is the other factor preventing this. I have accepted the claimant’s evidence as to the tiredness she has suffered and the impact on her activities.

45. The NHS website confirms that tiredness can be a symptom of CKD. I consider that spinal stenosis is also likely to contribute to fatigue, but the claimant suffered from fatigue and CKD for some period prior to that condition being diagnosed. I acknowledge that the condition is likely to have existed for some time before diagnosis, but accept the claimant’s evidence that the type of pain associated with the stenosis is of a different nature and more recent than the back pain previously experienced, in the kidney area. I conclude that the claimant’s evidence, supported by the information

on the NHS website, is sufficient to establish that it is more likely than not that fatigue suffered by the claimant at relevant times for this claim was attributable to CKD. I conclude that, because of this tiredness, the condition of CKD had, at relevant times (April 2020 onwards), a more than minor or trivial adverse impact on her ability to carry out the normal day to day activities of exercise and housework. I consider the evidence in relation to shopping to be insufficient to find that CKD had a substantial adverse impact on her ability to carry out this normal day to day activity.

46. According to information on the NHS website, high blood pressure and high cholesterol are causes, rather than symptoms of CKD. However, that site also indicates that one of the main treatments for CKD is medicine to control associated problems such as high blood pressure and high cholesterol. I consider, therefore, in accordance with paragraph 5 of schedule 1, I need to consider the impact of the condition of CKD on the claimant's ability to carry out normal day to day activities if she had not been taking medication for high blood pressure and high cholesterol. I have no medical evidence to assist me in this exercise, but it appears to me to be more likely than not that there would be greater damage to the kidneys if the claimant had not been taking the medication and the impact of CKD on her ability to carry out normal day to day activities would be worse, rather than the same or better. Since I concluded that there was a substantial adverse impact on the claimant's ability to carry out normal day to day activities, even when taking the medication, it does not matter that I am unable, on the evidence before me, to assess the degree by which the impact would be worsened, if the claimant was not taking medication for high blood pressure and high cholesterol.

47. Because of my conclusion about substantial adverse impact, I do not need to go on to consider whether CKD is a progressive condition. Had I needed to do this, I would not have been persuaded, on the evidence before me, that CKD is a progressive condition. It can be, for a small minority of people, but I do not have medical evidence to assist me in assessing whether or not it is likely to be so for the claimant.

48. I conclude, for these reasons, that the claimant was disabled at relevant times by reason of a physical impairment, being CKD.

Employment Judge Slater
Date: 12 October 2022

REASONS SENT TO THE PARTIES ON
13 October 2022

FOR THE TRIBUNAL OFFICE

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