



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Mir

Respondent: IQVIA Limited

Heard at: Bury St Edmunds (CVP) **On:** 6 May 2022

Before: Employment Judge Laidler (sitting alone)

Representation

Claimant: Mr B Toner, Counsel.

Respondent: Mr J Turners, Solicitor

JUDGMENT having been sent to the parties on 30 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:

REASONS

1. The parties were given an oral judgment in this matter and written the judgment sent to the parties on the 30 June 2022. It appears that the claimant made a request for written reasons on the 19 May and 13 July 2022. These requests were not referred to the judge until the 11 October 2022.

2. This hearing was listed to determine the issue of disability the claimant relying on medial epicondylitis and painful arc syndrome. At a preliminary hearing for case management held before Employment Judge Milner-Moore on the 13 July 2021 the hearing had been listed for the 7 January 2022. Employment Judge Michell was listed to hear the matter on that date but the hearing had to be adjourned by him as the claimant had not been able to attend. The full merits hearing remained listed for the 21 – 23 March 2022. That hearing was before Employment Judge Wyeth who heard but refused an application to strike out the claims due to the failure by the claimant to comply with orders and actively pursue her claim. The full merits hearing was relisted for the 5 & 6 December 2022 and this Open Preliminary Hearing listed.

3. The ET1 was received on the 3 August 2020. Despite there having been four previous case management hearings the claimant filed a supplemental

impact statement the day before this Hearing. It had attached to it a 3 page document containing a table with questions on one side and answers to those on the other. This was dated the 3 May 2022 and had the name of Micaella Cobbe pp for Lucy McDonald, described as 'Lead Musculoskeletal Outpatient Physiotherapist'. It was not signed. The tribunal was not to hear from the physiotherapist. Having heard submissions regarding its admissibility the tribunal refused to allow it to be relied upon.

The tribunal's conclusions on the up dated impact statement.

4. There have been 4 preliminary hearings in this matter. The claimant has been represented throughout. The impact statement was ordered at the 1st of those hearings and it could not have been clearer what was required. If the claimant was not advised as to what was required that is a matter between her and her representative.

5. It is not proportionate or in accordance with the overriding objective that this case to be postponed again. It was nearly struck out at the last hearing and now needs to proceed.

6. It is not just the matter of the amended impact statement but the physiotherapy statement attached to it. It is not known how that came about and what instructions were given to the physiotherapist. The case of De Keyser Ltd v Wilson [2001] IRLR 324 EAT gives guidelines on the preparation of joint reports and even though this does not purport to be a joint report the respondent had no input into the questions and the tribunal does not have any details of how the physiotherapist was instructed. It is even doubtful if the tribunal has the whole document.

7. The tribunal also needs to bear in mind that it is concerned with whether the claimant was disabled at the date of the acts complained of and not relevant what occurred after neither must it take that into account.

8. For these reasons the claimant's application to rely upon this amended statement was refused

9. The tribunal heard from the claimant who relied on her impact statement in the bundle at page 106 which is unsigned but it was advised that it was dated 5 January 2022.

10. The respondent had earlier conceded that the claimant had:

- a. an arm and shoulder injury which occurred at the end of December 2019 and
- b. that the injury had an adverse effect on her ability to carry out normal day-to-day activities

It did not however accept that the effect was substantial, that it had lasted or was likely to last more than 12 months.

11. The acts complained of were identified at an earlier case management hearing as being between January to 20 March 2020 the date of termination.

12. The claimant had commenced employment on 21 October 2019. Her last day of employment was the 20 March 2020.

13. In December 2019 having had to push her father around hospital in a wheelchair she suffered pain in her right arm.

14. It is documented that she saw her general practitioner on 13 January 2020 with right arm pain. It was noted she was right-handed. She was diagnosed with medial epicondylitis and painful arc syndrome and referred for physiotherapy which she engaged in. At the time the doctor suggested that she should consider reducing hours of work as it was felt that her arm symptoms plus her stress of caring for relatives could have an impact on her work. This was set out by Dr Harley (page 129) in a letter dated the 3 April 2020 which the claimant sent to the respondent at the appeal stage (after the end of her employment)

15. The claimant states at paragraph 13 of her impact statement that the suggestion that her hours be reduced was only related to work issues but this is not consistent with the doctors letter referred to above in which he stated that 'It was felt that her arm symptoms plus her stress with caring for her relatives would have an impact on her work'.

16. The claimant also referred to this at her probation review meeting (p117) which will be referred to in more detail below. The claimant is noted as stating that the doctor 'could see how much I've been doing caring for my elderly parents'

17. No sick notes were seen by the tribunal and the claimant did not give evidence of any period off work in relation to her arm injury. The claimant relies on a physiotherapist report dated 26 August 2021 (p98). It is not really in the form of a report but answers to questions. The tribunal did not hear from the physiotherapist. Of relevance are the answers to questions 4 and 7:

Q4 - If you do know the date of diagnosis has the condition lasted (or is likely to last) for 12 months or more.
The answer given was yes

Q7 Has this effect(s) lasted for or likely to last more than 12 months?
The answer was yes

having not heard from the physiotherapist the tribunal cannot be satisfied that she was considering these questions from the viewpoint of what would have been known in the period with which this tribunal is concerned mainly January to March 2020. Clearly by the time she did her report in August 2021 the condition had lasted for more than 12 months and that was known.

18. In the same report however at the end is set out what the claimant reported on 11 March 2020 when she attended her first physiotherapy appointment. She reported 'difficulties in using her arm with daily living such as cutting vegetables', also lying on her right side and carrying heavy objects. Her condition was eased by resting, massage and previously prescribed exercises. She did not report any difficulties with sleeping, numbness or specific time of day when pain was at its worse. The claimant was not on any medication that had been prescribed. She does make reference elsewhere to taking painkillers. On

examination the claimant had near full pain-free active range of movement of her cervical spine except reporting a stretch sensation on stretch to opposite side flexion. She was pain-free active range of movement shoulders elbows, wrists and thumbs. Muscle strength of right shoulder, elbow and wrist were observed as 5/5 on oxford scale. The right grip and opposition of thumb were noted as normal. Thoracic spine rotation was noted as stiff and was reduced bilateral (1/2 range of movement)

19. A diagnosis of myofascial tension was suggested and she was taught and issued a home exercise programme of upper limb, Thoracic and cervical stretches. Subsequent attendances referred to in that note are not relevant to this decision.

20. The tribunal accepts that the impact on the claimant's normal day-to-day activities was as set out in paragraphs 18 and 19 impact statement. These including brushing her hair, putting on make up, doing housework, preparing food, carrying her 2 year old grandson, driving, opening door and having a shower. Taken altogether those impacts was substantial at the time while she was still employed

21. At paragraph 24 of her impact statement the claimant states that the heavy pain had subsided by the time of her dismissal. That is consistent with what is contained in the notes of the probationary review meeting on 20 March 2020 (page 116) which led to the claimant's dismissal. The claimant is noted as saying 'my arm is much better now and I'm working normally, not a long term thing. Its been two months since the doctor said that to me and I think she was right' The claimant now says she did not say that. The tribunal finds it more likely than not that she did and that it reflected the position at that date.

22. When the claimant challenged the notes of the meeting on 24 April 2020 (page 130) she raised two specific matters but did not challenge the note stating that her arm was better she now. She relies on the sentence below in that email where she stated that "there may be other items" but she never did raise any others. The tribunal accepts that the notes were correct as far as the claimant was concerned save for the two matters that she did raise. This is particularly so as one of the grounds of appeal was that she had suffered an injury to her right arm earlier in the year. So the injury was a relevant point in the appeal. The claimant did not raise the issue of the notes being incorrect at the appeal hearing either. It is also consistent with what the claimant said at paragraph 34 of the ET1 namely that 'the pain in my arm went by March. I am still under physio treatment'. She was continuing her caring responsibilities but she did have difficulty she stated cutting vegetables.

Relevant law

23. Section 6 of the Equality Act 2010 provides:

Disability

- (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.

24. Schedule 1 Part 1 provides:

Long term

- (1) The effect of an impairment is long-term if—
- (a) it has lasted for at least 12 months,
 - (b) it is likely to last for at least 12 months, or
 - (c) it is likely to last for the rest of the life of the person affected.

25. Paragraph C4 of the Guidance on the definition of disability (2011) provides:

‘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 to assessing this likelihood...’

Conclusions

26. The burden is on the claimant to show that she satisfied the definition of disabled. There is no dispute that the claimant had suffered an arm and shoulder injury in or about December 2019.

27. It is also accepted that the injury had an adverse effect on the claimant's ability to lift and carry everyday objects, cut vegetables, sit in an office chair and work with her left hand for the period to March 2020.

28. The tribunal must then consider whether that effect was 'substantial'. The Tribunal accepts that for the period January to March 2020 the claimant was suffering substantial adverse effects from her arm injury. By the dismissal meeting on 20 March 2020 the pain had gone although the claimant continued physiotherapy. This was only a 3 month period. The condition had not lasted 12 months.

29. As has been made clear throughout the issue of whether the condition was 'likely to last 12 months' must be assessed at the date of the act complained of. The tribunal cannot find that to be the case on the evidence before it. It must make the decision from the facts and circumstances existing at the relevant time. The physiotherapist report relied upon from August 2021 is not conclusive enough to assist the Tribunal and it cannot be satisfied that the physiotherapist was considering the likely length of time by reference to the dates of the act complained of. The evidence is that in March 2020 the pain had gone or significantly diminished such as to enable the claimant to state that at the meeting on 20 March and repeat that in her ET1 claim form. On the evidence available at the time the condition was not likely to last 12 months.

30. It follows that the claimant did not satisfy the definition of disabled at the relevant time and her claims of disability discrimination must be and are dismissed

Employment Judge Laidler

Date: 31 October 2022

REASONS SENT TO THE PARTIES ON

3 November 2022

FOR THE TRIBUNAL OFFICE