



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: S/4104650/15 Held at Aberdeen on 17 August 2015

Employment Judge: R G Christie (sitting alone)

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Mrs Marion Findlay

CLAIMANT
Represented by:
Ms L Murray -
Solicitor

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Aberdeen City Council

RESPONDENT
Represented by:
Ms S Douglas -
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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It is the judgment of the tribunal that at the relevant time the claimant had a disability within the meaning of section 6(1) of the Equality Act 2010.

REASONS

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Introduction

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1. The claimant brought complaints of unfair dismissal and disability discrimination. In regard to the latter, the claimant said that the relevant impairment was arthritis. The respondent's position was that the claimant was not a 'disabled person' within the definition provided by the Equality Act 2010. The matter therefore came before me at this preliminary stage solely so that issue could be determined.

2. I heard evidence from the claimant herself and for the respondent from Ms Dawn Ramsey, a Team Leader in the respondent's Planning Department. She was the claimant's Line Manager at the relevant time.
- 5 3. A number of documentary productions were lodged and I shall refer to them by page number with the prefix "p.".
4. When the claim was first presented to the Employment Tribunal in February 2015 the claimant complained of discrimination on the basis that she was disabled by
10 reason of having three distinct impairments, namely, stress and depression, Scleritis/Uveitis (affecting vision) and arthritis. However on 10 August (a week before this hearing) she amended the claim in order to rely only upon the condition of arthritis.
- 15 5. The alleged act of discrimination is the claimant's dismissal which took place on 23 October 2014. That is therefore the relevant point in time for the purposes of the issue in this hearing.

Facts

- 20 The Tribunal found the following salient facts to be admitted or proved.
6. The respondent is the local authority responsible for the provision of various public services for the City of Aberdeen, one of which is the control of planning development. For this purpose the respondent has a planning department the
25 purpose of which is to receive and administer applications for planning permission for development.
7. At the time with which I am concerned the claimant was 60 years of age. She had been employed by the respondent for 21 years, the last 14 of which were as
30 an Administrative Assistant in the planning department. In that function she carried out a variety of tasks involving the handling of documents and plans, lifting boxes of documents and keyboard work at a computer all as part of general office work.

8. Over a number of years the claimant has not enjoyed the best of health, the original problem being depression. She also contracted Scleritis which affected her vision and ability to read and for which there were numerous medical interventions (see G.P. medical records at p.35-49).

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9. However in early 2012, the claimant began to experience pain in her joints, particularly in her hands, feet and ankles.

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10. The first medical reference to this condition was made when the claimant was seen at the Eye Outpatient Department at Aberdeen Royal Infirmary on or about 10 August 2012. In reporting to the claimant's General Practitioner (Dr W Reed) about her scleritis, (p.107), Dr Charles Lim-Fat included the following:

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"She also mentioned today having intermittent sore joints in her ankles and fingers and I would be grateful if you could kindly organise a review in that regard too"

The claimant then saw her General Practitioner on 20 August 2012 after which a Dr Graham Brown recorded in her notes (p.38):

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"Patient reviewed rheum clinic recently – told needs blood tests for arthritis and diabetes ... symptoms – sore, stiff joints, fleeting pain L foot"

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11. On a number of occasions over the following six months, the claimant presented at her General Practitioner resulting in the following notes being made to her medical records (p.38):

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- 24/8/2012 – *"pain L foot"*;
- 4/9/2012 – *"patient reviewed bloods ok, still significant pain in hands/wrists and feet"*;
- 26/10/2012 – *"patient reviewed, ongoing pain L foot, intermittent, sharp, disturbs sleep base of first MTxr night cramps mainly L leg"*;
- 1/11/2012 – *"..... pain often wakens her as well"*;
- 3/01/2013 – *"patient reviewed identical pain now affecting R foot, 'like a firework' bloods, question RV? Neuropathy?"*; and
- 1/02/2013 – *"patient reviewed, ongoing progressive pain in both feet, now walks slower than her elderly mother, brief sharp pains around ankle and constant dull ache front of both forefeet see previous"*

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12. During that period the claimant had begun to experience significant pain and problems in walking, for example having to walk on one side of the foot to avoid pain. She arranged for a chiropodist to insert material in the sides of her shoes to help to alleviate the problem.
13. The claimant had been seen again by Dr Lim-Fat at the Eye Outpatient Department in November 2012 after which, in relation to a diagnosis of 'joint pains', he reported (p.94): *"I understand her rheumatoid factor checked recently was negative."*
14. The claimant also found that when walking the pain would travel from her foot into the ankle, sometimes quite sharply.
15. By early 2013 the claimant found that the condition was affecting both feet and also found that she was walking slower, indeed to the point where her speed of walk was slower than that of her mother who was 88 years' old. Eventually, in April 2013 she was examined by an Orthopaedic Surgeon (Mr J P Bidwell) who reported (p.99) *inter alia*:
- "There was no significant bony tenderness today, however provoking any movement at the 1st metatarsal base seemed to reproduce some of her symptoms. X-ray are unremarkable in particular with no evidence of any OA (osteoarthritis) change. There was no evidence of any tendonopathy. The response to Prednisolone would suggest an inflammatory condition however there is nothing discrete to contemplate steroid injection therapy for instance"*
16. However the Claimant was finding the condition, both in her hands and feet, gradually getting worse. In January 2014, due principally to other medical conditions, the Claimant was signed off work. Indeed she remained absent and did not return before her eventual dismissal on 23 October 2014. Because during 2014 her experience was that the condition was deteriorating, she saw her GP again in June 2014. In her medical notes for that date (p.36) it is recorded:
- "Patient reviewed, awaiting works medical, feeling a little better psychologically though still under considerable stress and ongoing pain in joints, especially L hand/thumb, would like to try stronger analgesiac ..."*

17. On 25 June, due to her continued absence from work, the Respondent arranged for the Claimant to be referred for assessment by an Occupational Health Specialist. The referral documentation (p.79-82) was prepared by the Claimant's Line Manager Ms Dawn Ramsey who narrated *inter alia*:

5 *"Marion has complained that she suffers from considerable pain in her feet and hands, the cause of which is unknown, she can often be seen walking around the office in her stockinged feet to alleviate the pain, she has also indicated that folding plans, which is another key part of her duties, is very painful on her hands.*

10 *She has been provided with a foot support and wrist support which she uses. Data entry is another key duty of an Application Support Assistant (ASA) meaning using a PC for much of the day, I have advised her not to do PC work for long periods without taking a break, and that she manages her duties in a way which means she doesn't spend too long doing one particular task that might makes (sic) her symptoms worse.*

15 *..... The other key duties of an ASA involve walking back and forth to Reception, some distance away, to deal with visitors/customers, carrying files, plans and workload, which are often heavy/bulky, standing filing and scanning plans, none of which would be good for the*

20 *pain in her feet and/or hands*"

18. In his report of 7 July 2014 (p.77-78) Dr Roger Doherty, Consultant Occupational Physician, advised Ms Ramsay *inter alia*:

25 *"She also suffers from arthritis affecting her hands, wrists and feet. It is likely that this is of the wear and tear variety and she uses a gel to help with this. She suffers from migraine headaches*

30 *She has found work increasingly difficult and did wish to reduce her hours on a permanent basis. The elements of her job she finds difficult are the folding of plans and the prolonged keyboard work. She also suffers if she has to be on her feet and moving around a lot as this tends to exacerbate arthritis.*

....."

19. With regard to the Claimant's work capability, Dr Doherty added:

35 *"... I think it is unlikely that she will be able to continue in her job other than on reduced hours*

40 *It is possible that she could be redeployed to a job with less repetitive use of her hands. I could envisage her doing a job which would be a mixture of telephone work, computer work, filing and general administrative duties. What she cannot do is prolonged work with her hands."*

20. On 9 October 2014 the Claimant again visited her GP. On this occasion it was reported in her notes (p.35):

“Patient reviewed reports not doing so well, tearful in session, struggling with pain in joints and work that has been discussed not suitable for her. Discussed what might be the options and she feels that she may be retired; discussed what she would do then”

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21. Throughout 2013 and 2014 the claimant was taking a variety of different medication. This included taking a gel to be applied to the affected areas of feet, ankles, hands and fingers. She did not achieve much in the way of relief from this as she found the effect to wear off quickly.

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22. For her eye condition the Claimant was taking steroids (Prednisolone). She found however that this medication could have the side effect of assisting to reduce the pain in her joints, depending on what the particular dose was. There was some relief if the dose was high but not very much when it was low. She also obtained
15 some relief when taking analgesics.

23. The various symptoms of this particular condition had an effect on the claimant's ability to carry out a variety of day-to-day activities, including:

- she could not lift a kettle full of water and thus began to fill the kettle
20 using a jug;
- she could not lift or manipulate the controls of a blow dryer to do her hair;
- she could no longer use an upright vacuum cleaner because of the pushing and pulling motion and so used a different one;
- she had great difficulty in opening and closing clothes pegs when
25 hanging out her washing, and also carrying it;
- if she went down on the floor to dust or pick up things and was on her knees, she was unable to put her weight on one foot in order to rise up again; her husband required to assist her;
- in the preparation of food, she could not chop vegetables, open jars or
30 tins, pull apart a packet of crisps to open it or peel potatoes or other vegetables;
- she had difficulty manipulating a fork and knife in eating and also in holding the handle of a cup;

- in dressing herself, she found manipulating zips and buttons particularly difficult and pulling on a pair of trousers;
- when shopping, she could not spend too long walking about, or standing for periods in excess of 20 or 30 minutes; and could only carry lightweight shopping;
- in the household she was much slower in doing cleaning; could not climb up a ladder or make a bed; she was unable to lift off the bottom of the budgie's cage;
- in washing herself she could not operate the tap in the shower;
- she had been unable to continue to drive a manual-change motor car, and so changed to an automatic because of the pain in her left foot;
- there were a number of items she had difficulty in holding or lifting and required to have a gadget to assist her to push tablets and pills out of blister packs;
- she had had to stop or limit severely her hobby activities; she could now do very little knitting; she had been accustomed to doing a lot of gardening but found that if she was down on her knees she could not get up; she could not continue with needlework because of the requirement of hand and finger movement;
- she had been accustomed to playing the piano but could do so latterly only for a short time because of the pain in her hands and wrists.

24. At work, as referred to above, there were tasks which she found she could only with some difficulty and there were some tasks, involving different hand or finger movements, which did not appear to be affected so much. She was able to continue to use a keyboard, unless it was for a sustained period. She had difficulty with the folding of plans which was a frequent task within her place of work. There was also difficulty in lifting and moving boxes and she sometimes asked the men in the office to lift them for her.

25. Some activities which involved different types of manual dexterity did not cause a problem; for example, she did not have difficulty in manipulating a pair of scissors. However the above effects on a variety of activities continued up to and beyond her dismissal in October 2014.

Relevant Law

26. The legal protection against disability discrimination, whatever its form, applies only to a person who is disabled, i.e. where that person has a ‘disability’. Meeting the definition of ‘disability’, as to which the burden is on a claimant, is therefore crucial and is contained in Section 6(1) of the Equality Act 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.”

27. As regards a precise meaning of ‘physical impairment’ the act is silent, but there is no requirement on a person to establish a particular named medical condition or diagnosis, provided “*he or she has something wrong with them physically*” (***College of Ripon and York St John v Hobbs*** 2002 IRLR 185).

28. The remainder of the definition shows distinct elements, all of which must be shown to have been present in the impairment, namely:

- (a) that it has an adverse effect on the ability to carry out normal day-to-day activities;
- (b) that such adverse effect is ‘substantial’; and
- (c) such effect was ‘long-term’.

29. The definition in Section 6 is supplemented by Schedule 1 of the Act in which paragraph 2 deals with the meaning of an impairment being ‘long-term’. That is to be treated as such if it has lasted or is likely to last for at least 12 months or for the rest of the claimant’s life.

30. In s.212(1) of the 2010 Act we are told: “*substantial’ means more than minor or trivial.*”

31. The somewhat tricky issue of the effect of medical treatment on a person’s ability to deal with day-to-day activities is dealt with in paragraph 5 of Schedule 1 to the Act:

“Effect of medical treatment

5(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 –

- (a) measures are being taken to treat or correct it, and*
- (b) but for that, it would be likely to have that effect*

32. In determining the whole issue the Tribunal is required to take into account any guidance issued by the government (Schedule 1 to the Act at para.12). After the passing of the Act such “guidance” was issued and took effect on 1 May 2011.

Submissions of Parties

Submissions for Claimant

33. For the claimant Ms Murray submitted in general terms that the claimant’s condition and effects of her impairment caused her to fall within the statutory definition of ‘disabled’. The effect of the claimant’s impairment required to be judged at the date of the alleged discrimination i.e. her dismissal. There was however no absolute need for a medically-named diagnosis.

34. The test is a functional one focussing on what the claimant cannot do as distinct from what she can do. Further, in terms of Schedule 1 to the Act the effects of the medication being taken by the claimant required to be discounted.

35. Ms Murray submitted that the evidence showed that the claimant’s condition had lasted for around 22 months up to the point of dismissal. The impairment was therefore “long-term” within the meaning of the legislation. Periods when the effect was sporadic should still count in that calculation since it was a condition which was “likely to recur”.

36. Ms Murray then listed all the matters in the claimant’s evidence which were things she could either no longer do or could only do with difficulty. Many of these were daily household activities all of which caused the claimant pain. In addition, the claimant had to give up many of her hobbies and social activities as a direct result of the joint pain in her hands and feet.

37. Ms Murray added that although the claimant had developed some “coping strategies”, these still had an adverse effect on her attempts to carry out these activities; and in any event the fact that a person is able to mitigate some of these effects does not mean they are not disabled within the meaning of the legislation
5 (*Vicary v British Telecommunications plc* 1999 IRLR 680).

38. Furthermore, the Claimant’s evidence was supported by the Occupational Health report (p.77) to the effect that at work she was unable to be on her feet and move around a lot and could not do prolonged work with her hands such as operating a
10 keyboard and folding plans.

39. Finally, Ms Murray submitted that the effects experienced by the claimant could not be described as “minor or trivial” so that by reference to the statutory definition they should be regarded as “substantial”. It should be found therefore
15 that at the relevant time the claimant was ‘disabled’.

Submissions for Respondent

40. For the respondent Ms Douglas also began by referring to the statutory definition of ‘disability’ in Section 6 of the 2010 Act. Of the four parts of that definition Ms
20 Douglas confirmed that it was not in dispute that the claimant suffered from some form of physical impairment and that, as can be seen from the medical records, she suffered for a period of more than 12 months.

41. However what was disputed was that the claimant suffered from the condition
25 known as arthritis. Contrary to what is stated in her claim form, there was no formal diagnosis of that condition made in 2012.

42. Ms Douglas said that what was in dispute was that the claimant’s impairment affected her ability to carry out normal day-to-day activities and that any such
30 effect was substantial. The Occupational Health report of July 2014 does not assist as supporting the claimant’s evidence since it merely contains what the Doctor was told by her. Indeed there is limited medical evidence which supports the claimant’s assertion that the pain substantially affected her ability to carry out normal activities. It is noted that the pain was not subject to any specific

treatment or correction and accordingly the Tribunal should not have regard to the “deduced effect” referring to in paragraph 5(1) of Schedule 1 to the Act. The claimant was taking medication but it was not prescribed for the pain in her hands and feet. Again the claimant has produced no medical evidence concerning the effect of that medication.

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43. The GP’s report of 9 December gave no description of the effect and merely repeated the claimant’s own oral evidence. Indeed in general the claimant’s evidence was inadequate. No witness was called to provide any corroboration as presumably her husband or mother would have been able to do.

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44. Further, Ms Douglas submitted that the claimant’s own evidence was suspect. She had claimed to be unable to deal with food preparations but plainly had indeed done so as she prepared meals for her mother.

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45. Further, the claimant had given examples, such as referring to the filling of a kettle, indicating therefore that it was her grip which was the issue. However she had conceded in evidence that she cut her mother’s hair and also did her mother’s ironing. Whilst the test of the matter is to focus on what a claimant cannot do, the evidence which the claimant herself gave as to particular activities which she could apparently do was quite inconsistent with her list of such things which she claimed she could not do. Her evidence should not be accepted.

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46. Accordingly Ms Douglas submitted that the claimant had failed to establish what was required by the statutory definition that her assertions about difficulties being “substantial” is not credible. It was false for the claimant to claim that she had been ‘diagnosed’ with arthritis. She had not been.

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47. In the absence of proper medical evidence, the claimant’s own evidence would have required to reach a much higher standard than it actually did. The complaint of disability discrimination should accordingly be dismissed.

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Conclusions

48. As regards to the various parts of the definition of 'disability' in Section 6(1) of the 2010 Act, two aspects were not in dispute: firstly that the claimant's condition was a physical impairment, and secondly, that it was long-term. I am required therefore to consider only firstly, whether there was an effect on the claimant's day-to-day activities and secondly if so, whether the degree of the effect could be described as 'substantial'.
49. I have set out above all the particular activities about which the claimant gave evidence and there is no need for me to repeat them all here. Suffice it to say that they comprehended various subjects: household work, gardening, shopping, hobbies and work.
50. The respondent's main attack on the claimant's case was essentially two-fold and related to the evidence provided to the Tribunal. Firstly it was said that the evidence was insufficient; and secondly that in some aspects it was inconsistent and therefore unreliable.
51. On the first of these Ms Douglas emphasised a number of aspects in regard to which there was no actual medical evidence. It was said that there was no clear diagnosis of arthritis so that the claimant's averment that there was a diagnosis of that condition in 2012 was false. Further, there was insufficient medical evidence which supported the assertions of the claimant's inability to do a number of things, nor of what the position would be without medication. Further, the claimant could have brought either her husband or her mother, or both, as witnesses, but did not do so.
52. In considering this criticism I reflected that the issue of whether the claimant was 'disabled' requires a legal conclusion, not a medical one; and further that I am simply to make a finding on the balance of probabilities thrown up by the evidence which was led.
53. There are some aspects of the issue of disability in cases of this nature for which medical evidence might be said to be of more importance than others. As to the

factors remaining for this Tribunal to consider, I do not regard its absence in relation to the degree of any effect on day-to-day activities as being significant. As Ms Douglas herself pointed out the respondent's Occupational Health report regarding that factor simply reiterates what the claimant herself told the doctor. I find that that is almost always so in these cases.

54. I regard the evidence of the claimant herself as being more important for the obvious reason that it provides directly the experience of the person with the impairment and the nature and degree of any effect on daily activities.

55. In any event it is not the case that there was no medical evidence. I can infer from the respondent's own Occupational Health report that the doctor was persuaded that the claimant was experiencing effects on her activities to a degree sufficient for him to make a number of recommendations to the respondent for various adjustments that should be made to her work. There were also quite a number of references in the GP's records.

56. As to the so-called "deduced effect" I am not persuaded that this plays any significant part in this case. Some of the things taken by the claimant – for example the gel – were said by her to provide little or no relief. Rather strangely, the one item which did cause her symptoms to reduce was the prednisolone medication which had been prescribed for her eye condition; but this reduced effect depended on the size of the dosage being prescribed. She explained that when the dosage was reduced then the symptoms from the condition affecting her hands and feet became worse again. I was not persuaded by the evidence that the claimant received any significant degree of relief from any medication.

57. As to the suggestion of the claimant's evidence being inconsistent and thus unreliable, this was based largely on the evidence from her Line Manager Ms Ramsey. She said she recalled the claimant telling her about caring for her elderly mother, including helping with her household work and doing gardening. On one occasion (she did not say when) she had phoned the claimant at home and was told she was cutting her mother's hair. On another occasion she told Ms Ramsey she had been cleaning windows. When some of these matters were put

to the claimant in cross examination, she agreed that she could indeed do some of these things to some degree. Thus, went the submission, the claimant's evidence could not be relied upon.

5 58. I have considered this point closely. Whilst some of that evidence caused me
some doubt about the degree to which the claimant's abilities were impaired in
respect of certain activities, my assessment overall was one of general
acceptance of what the claimant said. It was plain from her own evidence that
she was not totally disabled in the sense of being unable to do anything with her
10 hands or being unable to walk at all. She explained, for example in relation to the
use of a pair of scissors to cut her mother's hair, that some types of manual
dexterity were unaffected by the condition but others were. It depended on what
the particular activity was and what objects required to be manipulated and how. I
deduced that that was the actual position in this case, not that her admitted ability
15 to cut her mother's hair or clean windows meant that she was being untruthful in
relation to other matters.

59. In any event as Ms Douglas herself said, I am not to look at what the claimant
could do, but rather what she could *not* do, or could do but only with difficulty.

20 60. I have no reason to doubt the accuracy of Ms Ramsey's evidence, but I
respectfully disagree with the conclusion which Ms Douglas draws from it. In any
event Ms Ramsey was not of course in a position to gainsay what the claimant
said about her difficulties with the vast majority of the activities and small jobs
25 mentioned by her.

61. In reviewing again all the matters spoken to by the claimant, and in accepting her
evidence generally, I found it clear that there was plainly an effect on a variety of
day-to-day activities. Further, and taking into account the definition of 'substantial'
30 at Section 212(2) of the 2010 Act, I cannot describe that effect as 'minor or trivial'.
Looking at the matter in the round, perhaps particularly having regard to the width
of the range of activities which were affected, I conclude that that effect was
indeed substantial.

62. I find therefore that the statutory definition of 'disability' is met in this case, i.e. that at the relevant time the claimant was a 'disabled person'. Accordingly both complaints (unfair dismissal and disability discrimination) should now proceed to a final hearing.

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Employment Judge Christie

Date of Judgment: 30 November 2015

10 **Entered in Register and Copied to Parties: 30 November 2015**