



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr David Schroder  
**Respondent:** Tesco Stores Ltd

## RECORD OF AN OPEN PRELIMINARY HEARING

**Heard at:** Watford **On:** 16 January 2023  
**Before:** Employment Judge Alliott (sitting alone)

### Appearances

For the claimant: In person  
For the respondent: Ms Charlotte Goodman (counsel)

## JUDGMENT

The judgment of the tribunal is that:

1. The claimant was at all material times from 6 September to early November 2020 disabled within the meaning of the Equality Act 2010.

## REASONS

1. This open preliminary hearing was ordered by Employment Judge Postle on 9 August 2022 to determine:-

- “1. Whether or not the claimant has a disability; namely right arm and shoulder [injury]; and
2. Whether any of the claims arising out of any of the claim forms have little reasonable prospect of success and whether a deposit order should be made.”

### Disability

2. Section 6 of the Equality Act defines disability as follows:-

“6 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.”

3. Schedule 1 to the Equality Act provides as follows in relation to long-term effects:-

“Long-term effects

2 (1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months.”

4. Turing to the guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) at A4:

“Whether a person is disabled for the purposes of the Act is generally determined by reference to the effect that an impairment has on that person’s ability to carry out normal day to day activities.”

5. Further at A5:

“A disability can arise from a wide range of impairments which can be:

“...• Impairments with fluctuating or recurring effects...”

6. Further, at B1:

“The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.”

7. And at B3:

“Another factor to be considered when assessing whether the effect of an impairment is substantial is the way in which a person with that impairment carries out a normal day-to-day activity. The comparison should be with the way that the person might be expected to carry out the activity compared with someone who does not have the impairment.”

### **The evidence**

8. I had a bundle running to 268 pages and heard oral evidence from the claimant.

9. As with any assessment of disability I start with the medical evidence. I observe that notwithstanding orders of the tribunal the claimant has not disclosed his GP records which would undoubtedly have been of assistance.

10. On 8 March 2018 the claimant had an ultrasound scan on his right shoulder. I have the sonographer’s report which states:-

“A full thickness tear is noted in the supraspinatus tendon measuring 6.4mm in the anteromedial dimension and 9.3mm in the anteroposterior dimension.”

11. The only other medical evidence I have is from the claimant’s GP. This is a letter dated 7 November 2022 which states as follows:-

“I confirm that David sustained a right shoulder injury in 2018 which was confirmed as a full thickness tear in parts of the supraspinatus tendon as well as some arthritis in the acromioclavicular joint. Although he has had physio the strength in his R upper arm remains limited. He has pain if working above shoulder height or pushes moderate weights including activities such as mopping or using a vacuum cleaner. He has pain if he holds some positions for any length of time. This limits his ability to manage manual aspects of work or drive for even moderate periods of time.”

12. In his disability impact statement the claimant states that he sustained the injury to his shoulder in June 2016. It is quite clear from the documents I have seen that throughout 2017 he had protracted periods off work due to problems with his right shoulder. Consequently, the GP’s reference to sustaining the injury in 2018 must be a reference to the ultrasound scan which confirmed the diagnosis. The claimant told me that initially his GP diagnosed his shoulder as a frozen shoulder.
13. Accordingly, I find that the claimant sustained physical impairment to his right shoulder in 2016.
14. As already mentioned, I have fit notes submitted by the claimant throughout 2017 and into early 2018 relating to problems with his right shoulder. Ms Goodman accepted that at that time he qualified as disabled within the meaning of the Equality Act. In my judgment, that must plainly be right for at that time the impact on the claimant’s work was substantial and it had lasted in excess of 12 months.
15. During the course of 2017 and 2018 it would appear that the claimant was assigned to light duties, namely working on aisles concerned with crisps and sweets. The fit note suggested not only light duties but also to avoid heavy lifting.
16. The claimant told me that following the ultrasound in March 2018 he had one session of physiotherapy. He was given advice on exercises and some elastic band equipment to exercise with. Apart from that the claimant did not seek any further medical treatment.
17. The claimant told me that he probably had a consultation with his GP following the ultrasound report but that no further treatment was recommended. The claimant told me that he researched the issue himself and discovered that operative treatment would not necessarily be successful and could result in the matter getting worse. Further, the claimant told me that he self-medicated with over the counter pain killers where necessary but generally disliked taking pain killers on a long-term basis.
18. The last fit note that has been shown to me is dated 23 March 2018.

19. The next relevant document is an absence review meeting on 9 November 2018 which followed a period of five days off sick from 14 October 2018. In those notes the claimant refers to tennis elbow (in his left arm) and his injury in the right shoulder. He is recorded as saying:-

“Since then when I finish my shift and on my days off there’s pain and inflaming up and now tennis elbow in my left arm. It has started to hurt while at work. My arm was going numb in pain.”

20. It is then noticeable that there is a gap in employment and/or medical evidence until December 2019. The claimant told me that during this period he was “coping”. He told me that he was never pain free and that he invariably needed the day after working to recover.

21. The next contemporaneous document of relevance is a record of the claimant going home on 8 December 2019 due to pain in his arm.

22. I have seen a text message dated 10 December 2019 wherein the claimant requests a job change to 16 hours on the basis that:-

“This would give the break in days that I need for my arm to recover...”

23. In the return to work meeting document dated 13 December 2019 the reason for his absence is given as pain in the right shoulder which is described as being an on-going issue. Reference is made to the claimant taking paracetamol.

24. The next relevant contemporaneous document is dated 8 January 2020. This is an interview with the claimant which refers back to a job application he had made at the end of 2019. As regards the claimant’s disability the following is referred to within that document.

“...he has no health issues only a severed tendon which is under control.”

25. The job that the claimant had applied for was within the dotcom delivery service. In late 2019 the claimant had applied for a role as a delivery driver in the dotcom service. The claimant told me that the role involved collecting trays of pre-ordered goods from one part of Tesco, loading it on to a van, driving it a couple of hundred yards to the “Pod”, placing the trays on racks and then, when customers attended to collect their trays, carrying them to the customer’s cars. When I asked the claimant about the implications of carrying a relatively heavy tray, he told me “Weight was not the problem”. He suggested his difficulties at work were the repetitive nature of the asks he was required to do. If that is correct, then that would suggest that whether or not he was placed on light duties he would suffer the same difficulties. Further, the claimant stated that he was able to drive, albeit with short distances.

26. The next document is dated 5 September 2020, ie a day before the period with which we are dealing. This was just before he began work in the household aisle. The claimant told me that his move to the household aisle was due to a request to swap shifts with another colleague so that the claimant could work on Tuesdays. The claimant told me that he had had experience of working in the

Enfield branch in the household aisle and had been able to cope. The interview notes state as follows:-

“My concern is that you got a repetitive and a severed tendon (arm gets sore)?

Claimant: I am coping at the moment and can do beans if I work constantly I get pain.”

27. I have placed considerable reliance on that contemporaneous record of the claimant referring to experiencing pain if he works constantly.

28. I have an Occupational Health Report dated 15 February 2021 which states:-

“David also advised he as an old right sided arm/shoulder injury which flares up from time-to-time with repetitive use.

... David’s flare up of right sided arm pain can be minimised and managed by him avoiding triggers to it occurring.”

29. I have to consider whether the claimant’s physical impairment had a substantial adverse effect on his ability to undertake day-to-day activities. In this context the claimant has provided a disability impact statement. In my judgment, there are aspects of this statement that are unsatisfactory and unreliable. For example, the claimant has referred to being unable to cook as lifting heavy pots “is impossible with my arm”. Quite apart from the fact that the claimant told me that lifting heavy weights was not an issue, I would expect an individual in the claimant’s position to indicate that he was limited in the ability to cook in that he was restricted to using his left arm. Further, the claimant says that driving is a problem and refers to his wife having to pick him up after work as it was not possible for him to drive home due to the limited mobility left in his arm. That does not sit easily with the claimant applying for a driving job at the back end of 2019.

30. Further, the claimant states as follows:-

“After work I rest my arm for a minimum of one day sometimes more due to pain and mobility in the shoulder after use.

Prior to work I rest my arm for a further day.”

31. The claimant told me that that was a necessity on a weekly basis and would arise even when he was undertaking light duties.

32. Taken at face value, if what the claimant says is entirely correct, then he is, in my judgment, very substantially restricted in the activities that he is able to do both at home and at work.

33. However, I have serious doubts as to whether all that the claimant says is entirely accurate. I prefer the evidence of the Occupational Health to the effect that the claimant would suffer flare ups from time to time that were, nevertheless, debilitating such that he had problems both at home and at work. The claimant has told me that ordinary household tasks such as cleaning his windows, washing and getting dressed and undertaking DIY tasks are either difficult or took him longer. I do accept that the claimant was restricted in the range of tasks that

he was able to do with his right arm and that consequently those day to day activities took him longer than it would take someone not disabled.

34. Consequently, I have concluded that the claimant's disability did cause him substantial difficulties in some day-to-day activities and that accordingly he is disabled within the meaning of the Equality Act 2010.

### **Deposit orders**

#### Indirect Age Discrimination

35. In the limited time available to me I have looked at the claims as defined in the list of issues.
36. In my assessment of the prospects of success I have taken the claimant's claim at its highest.
37. As regards the indirect age discrimination claim I have assumed that the claimant will establish the PCPs contended for, Further, I have assumed that the claimant will establish that those PCPs were applied to both the claimant and younger employees.
38. In order to succeed under this head the claimant will have to establish that those PCPs put older employees at a particular disadvantage when compared with younger employees. In the list of issues it is suggested that the claimant contends that it was difficult for older employees to carry out the more arduous work and at the same pace as younger employees.
39. In my judgment, the claimant stands little reasonable prospect of establishing that essential component in establishing this claim. The nature of the tasks that we are talking about are work in a supermarket moving produce to various aisles and unpacking it and placing it on the shelves. In my judgment, I consider that the claimant faces an uphill struggle in establishing that those tasks put older people at a particular disadvantage compared with younger people.
40. Consequently, In my judgment, the claimant has little reasonable prospect of succeeding on his indirect age discrimination claims and he will be ordered to pay a deposit of £50 to continue with these claims.

#### Reasonable adjustments.

41. In evidence the claimant told me that he came to be working in the household aisle in the following circumstances. He requested a shift swap with another colleague so that he could work on Tuesdays. The claimant had worked at the Enfield store in the household aisle previously and considered that he would not have any difficulties so working. The claimant told me that when he was working in the household aisle he thought he was coping. It was only when, according to the claimant, he was accused of working slowly on 9 October 2010, that it came to his attention that there may be a problem with his working in that aisle. Thereafter, the claimant had some time off, and on his pleaded case, he moved from the household aisle on 16 October 2020. I have assumed again that the PCPs contended for applied to the claimant and that he may establish that he

was put at a substantial disadvantage. However, in my judgment, he stands little reasonable prospect of success of establishing that the respondent knew or could reasonably have been expected to know that the claimant was likely to be placed at any such disadvantage. This is because the claimant was interviewed prior to moving to the job, moved to the job voluntarily and thought he was coping.

42. Consequently, in my judgment, the claimant stands little reasonable prospect of succeeding and will be ordered to pay a deposit of £50.
43. In arriving at the amount of the deposit order I have to take into account the claimant's means. The claimant told me he is on benefits of £117 per week and receives a pension of £400 per month. The claimant told me he has no savings. The claimant is able to run a car and has a mobile phone. The claimant told me he pays his housing rent out of his and his wife's benefits.
44. It is obvious to me that the claimant is of very limited means and I have no doubt that his disposable income rises to meet his expenditure in full. Nevertheless, in my judgment, the claimant should pay something towards advancing these claims and the claimant thought that a sum of £100 was not unreasonable for him to raise in the next four weeks. Consequently, I make those orders.

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**Employment Judge Alliott**

Date:2/3/2023

Sent to the parties on:

9/3/2023

For the Tribunal:

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