



EMPLOYMENT TRIBUNALS

Claimant: Mr M Chowdhury

Respondent: Wembley Towers Ltd

Heard at: Watford, by CVP

On: 31 March 2023

Before: Employment Judge Maxwell

Appearances

For the claimant: in person

For the respondent: Mr Smith, Consultant

JUDGMENT

The Claimant was a disabled person at material times (6 March to 7 April 2022) by reason of a physical impairment (knee problem, comprising the ongoing symptoms or complications following a patella tendon rupture repair in 2015).

REASONS

1. A letter from the Tribunal of 17 July 2022 ordered the Claimant to provide:
 - 1.1 a list in date order of the matters he relied upon as amounting to direct discrimination;
 - 1.2 a disability impact statement;
 - 1.3 medical evidence.
2. The Claimant provided what he described as his “impact statement” by way of an email of 15 August 2022. This included very little information about the matters he relied upon for being a disabled person and did not address the specific questions he had been asked. The material part said:

I hereby confirm that I have a long term disability that effects my ability to walk, stand and use the stairs. Please see attached images of hospital letters and GP letter to confirm this.

3. Unfortunately, the images he sent, which appeared to be photos and screenshots taken with a mobile phone, were of very poor quality and in many respects illegible. Their appearance had the characteristics of images sent by email where the quality is reduced so as to limit the file size and amount of data required.
4. The Claimant's assertion that he did not know of this legibility problem is contradicted by correspondence from the Respondent. On 30 August 2022, the Respondent wrote to the Tribunal and copied to the Claimant its position on disability, setting out why it did not accept the Claimant was a disabled person at material times and saying, repeatedly, the medical evidence he had provided was illegible. The Claimant did not respond to this, whether by sending better copies of the medical evidence or otherwise. The Respondent wrote to the Tribunal on 4 October 2022, again copied to the Claimant, asking whether the Tribunal had now received better quality copies in response to its own letter. The Tribunal not having received any better quality copies, EJ Bedeau directed that the Claimant would be able to rely **only** upon that which he had already provided on the question of disability and was not permitted to serve anything further.
5. Given the Claimant had several opportunities to remedy the position with respect to his medical evidence and another judge had already ruled upon the issue, it was not open to me to adjourn the case today and give him further time in which to do this.

Facts

6. The Claimant was somewhat defensive in his approach to giving evidence. Having been ordered to provide a witness statement detailing the impact of his disability and, separately, to provide medical evidence in support, when asked questions in cross examination by the Respondent about his failure to answer the questions he had been ordered to in his impact statement, he replied the answers were in the medical evidence. The Claimant struggled considerably when asked to agree that a page of what appeared to be GP notes did not have his name on them, when plainly this was so. Having responded to an earlier question about his failure to specify what his impairment was by saying it had no name, later he referred to this repeatedly as patellar tendon rupture complications. Notwithstanding these unattractive features of his evidence, I came to the conclusion the Claimant was not seeking to exaggerate the extent of his impairment and his evidence in this regard was, generally, reliable.
7. The Claimant has suffered with left knee patellar tendon rupture repair complications since at least 6 November 2015. He has received ongoing treatment for this including physiotherapy and pain relief when required. The continuing nature of this problem is confirmed in a letter of 2 November 2020 from the Earls Court Medical Centre.
8. Whilst a letter to the Claimant's GP from an Orthopaedic Registrar of 23 June 2020, following the Claimant having attended a clinic on 12 May 2020, is in many respects illegible, in the last paragraph he is noted as having difficulties walking more than 15 metres and to experience discomfort on standing. This is consistent with what the Claimant told me in his evidence about difficulties with

walking and standing. I note the Registrar's letter also refers to the Claimant experiencing a feeling as though his knee may buckle.

9. The Claimant suffered an exacerbation of his knee problem in June 2021, when he sustained a minor injury. At that time the Claimant reported being unable "to put weight on it fully and support himself". Whilst a possible re-rupture of the left patella tendon was feared, following further investigation this proved not to be the case and the exacerbation was dealt with by conservative treatment, including splints.
10. Notwithstanding the Claimant's unduly defensive response on it being pointed out the GP notes did not bear his name - this was after all his failing not anyone else's - I accept this is part of his medical record. The notes include that on 21 March 2022, the Claimant fell down the stairs and hurt his left knee. At this time it was swollen, painful and he could not really walk. A Med3 was issued, stating he was not fit for work. I accept the Claimant's evidence about this, namely he was using the communal stairs (being something he normally avoids) where he lives because the lift was out of order. Unfortunately, his knee gave way and he fell.
11. I find that the Claimant has suffered with ongoing symptoms following a patella tendon rupture repair in 2015. There have been short periods of acute limitation following further accidents. The general position is as follows. The Claimant begins to experience discomfort after walking or standing for more than 5 minutes. He has a particular problem with using stairs. Not only is it painful for the Claimant to ascend or descend stairs, there is a real risk of his knee buckling and him falling, as happened in March 2022, when the Claimant was on his way to work and had to use the stairs at his flats.

Law

12. Section 6(1) of the **Equality Act 2010** ("EqA") provides:

(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.

13. Pursuant to EqA section 6(4), a person who was a disabled person in the past, prior to the matters complained of, is treated a disabled person at that later time also.

Generally

14. Guidance on the correct approach to determining whether a person is disabled within the meaning of EqA was provided by the EAT in **Goodwin v Patent Office [1999] ICR 302**, per Morrison P:

[...] The words of the section require a tribunal to look at the evidence by reference to four different conditions. (1) The impairment condition. Does the applicant have an impairment which is either mental or physical? (2) The adverse effect condition. Does the impairment affect the applicant's

ability to carry out normal day-to-day activities [...] and does it have an adverse effect? (3) The substantial condition. Is the adverse effect (upon the applicant's ability) substantial? (4) The long-term condition. Is the adverse effect (upon the applicant's ability) long-term?

Impairment

15. In relation to “impairment” the question for the Employment Tribunal is a functional one, what the Claimant cannot do practically. It is unnecessary to consider the cause of such limitation; see **MOD v Hay [2008] IRLR 928 EAT**.

Substantial Adverse Effect

16. “Substantial” is defined at EqA section 212(1) as “more than minor or trivial”. In this context a substantial adverse effect means a limitation going beyond the normal differences in ability which may exist amongst people; see the Guidance paragraphs B1. Relevant factors may include:

- 16.1 the time taken to carry out an activity (B2);
- 16.2 the way an activity is carried out (B3);
- 16.3 effect of reasonably modifying behaviour (B7-B10);
- 16.4 effect of environment (B11);

17. In determining whether a person satisfies the definition of disability the Employment Tribunal must focus on what the person cannot do or can only do with difficulty, as opposed to what they can; see **Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19 EAT**.

Normal Day to Day Activities

18. Normal day to day activities can include work activities where they are found across a range of employment situations; see **Chief Constable of Dumfries & Galloway v Adams [2009] IRLR 613 EAT**.

Long Term

19. The definition at section 6 is supplemented by Schedule 1 to EqA, which includes:

Long-term effects

2(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.**

(2) 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.

Dates

20. The question of disability must be determined as at the date of the alleged discriminatory act, as opposed to the date of hearing; see **Cruickshank v VAW Motorcast [2002] IRLR 24 EAT** and **Richmond Adult Community College v McDougall [2008] IRLR 227 CA**.

Conclusion

21. The Claimant has a physical impairment, namely a knee problem, in the ongoing symptoms or complications following a patella tendon rupture repair in 2015.
22. As set out above, the impairment causes pain and discomfort on walking or standing for more than 5 minutes. Whilst this does not prevent the Claimant from walking or standing it does act as a limiting factor, in that the Claimant will need to sit intermittently to reduce the pain. The more substantial limitation is with respect to using stairs. The Claimant is also at greater risk of short-term exacerbation of his knee symptoms, as a result of injury.
23. Walking and standing are normal day-to-day activities. The use of stairs, whether going up or down, is a normal day-to-day activity. Whilst many large modern buildings have lifts, as the evidence in this case reminds us, they do not always work. Other buildings, especially smaller or older ones, often have no lift at all, in which case it will only be possible to move between floors using the stairs. The Claimant was also required to use stairs at work and notwithstanding this was an occupational setting, it is a common feature of many or most workplaces.
24. Accordingly, therefore, the adverse effect on the Claimant's ability to carry out normal day-to-day activities consists of:
 - 24.1 only being able to walk or stand for 5 minutes before experiencing pain and needing to sit;
 - 24.2 being unable to use stairs without immediate pain and a real risk of injury;
 - 24.3 occasional exacerbation caused by injury.
25. Whilst the adverse effect of the Claimant's impairment on his ability to carry out normal day-to-day activities is a relatively narrow one, I am satisfied that it is more than minor or trivial. Being unable to walk or stand otherwise than relatively briefly before experiencing pain is a significant limitation. Being unable to use stairs otherwise than as a last resort, with both pain and a real risk of injury, is a substantial limitation.
26. The adverse effect is long-term. It had lasted from November 2015 through to the Claimant's employment by the Respondent in 2022.

Case Number: 3304372/2022

Date: 31 March 2023

Sent to the parties on:

11.4.2023

For the Tribunal Office:

GDJ