



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs T Toth

**Respondent:** Great Bear Distribution Ltd

**HELD AT:** Mold **on:** 10<sup>th</sup> July 2023

**BEFORE:** Employment Judge T. Vincent Ryan

## REPRESENTATION:

**Claimant:** Mr A Toth, the claimant's husband

**Respondent:** Ms K Anderson, Counsel

**Interpreter:** Ms. Moray (Hungarian/English translation)

# RESERVED JUDGMENT

## On the issue of Disability s.6 Equality Act 2010

The judgment of the Tribunal is:

1. The claimant was not a disabled person within the definition in s.6 Equality Act 2010 at the material time, being January to June 2022.
2. In consequence of the above, the Tribunal does not have jurisdiction to consider the claimant's claims of disability discrimination.
3. The claimant's claims of direct disability discrimination and harassment in relation to the protected characteristic of disability are dismissed.

## REASONS

### The Issues:

1. In a situation where the claimant says that she is disabled by three conditions I had to decide whether she satisfied the definition of a disabled person in s.6 Equality Act 2010 (EqA) at the material time of her claims (January to June 2022), namely whether she had a physical or mental impairment(s) having a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities.

2. The claimant says that the disabling conditions are:
  - 2.1. post-traumatic stress disorder
  - 2.2. lower abdomen pain (resulting from gynaecological surgery)
  - 2.3. “nerve pinch left hip”, recently diagnosed as necrosis of the left hip.

**The Facts:**

3. The claimant did not attend the hearing to give evidence. She chose not to attend a listed preliminary hearing in March 2023, and not to attend today’s hearing. The claimant did not produce any medical evidence in respect of her non-attendance today but it was said on her behalf by her representative that she was in an emotional state and that she cannot deal with the hearing.
4. I was told that the claimant continues to be fit to work and has been attending work on a regular basis, where she is employed by the respondent as a warehouse operative.
5. I am content that due notice of both the March hearing and this hearing have been given to the claimant. She was represented today by her husband on her instruction, and he was accompanied by the claimant’s son. Mr Toth made oral submissions on the claimant’s behalf.
6. The claimant provided a disability impact statement dated 15 November 2022. This statement comprises two pages and three numbered paragraphs and it appears at pages 66 to 67 of the preliminary hearing bundle (as opposed to the additional bundle provided for today’s hearing). It is written in English, notwithstanding submissions that the claimant lacks proficiency in English and English language skills in a situation where I expected (but perhaps unreasonably as there was no such order) a personal statement written in Hungarian with a translation. In any event, the statement is unsigned. Obviously in the circumstances the claimant has not given evidence under oath or affirmation; she has not allowed the opportunity for cross-examination or even questioning by way of clarification from the Tribunal; I have not had the opportunity to consider her credibility. I was reminded of a previous occasion in other litigation when the claimant gave evidence which I found in my judgment to be exaggerated. I have discounted the previous occasion from my consideration as it is not strictly relevant, but nevertheless for all the other reasons stated in this paragraph I attach little weight to the statement of 15 November 2022.
7. I have been directed to medical records by both Mr Toth and by Counsel. In respect of those records I can only find as fact that they record as they do and on the basis of statements made to the respective clinicians by the claimant, and that they reflect diagnoses and prognoses based on those statements, and the examination of the claimant using diagnostic tools, the experience and knowledge of the clinician.
8. The claimant commenced employment with the respondent on 22<sup>nd</sup> of November 2021. She previously worked in a warehouse and in a “chicken factory”. The claimant alleges that she was bullied in both places in consequence of which she suffered PTSD.

9. The material time for my consideration of the claimant's contention that she is a disabled person is 24 January 2022 (when she says that she was dismissed) and the period 26 January 2022 (her return to work) to 17 June 2022 (the date of the last allegation amounting to a claim in these proceedings).

10. PTSD:

- 10.1. I was reminded of my reserved preliminary hearing judgement on the issue of disability in relation to PTSD during the period 26 June to 1 July 2019; that judgment is dated 12 February 2021 and was sent to the parties on 15 February 2021 (following a hearing on first and 2 February 2021).
- 10.2. I was taken to a referral outcome report dated 3 August 2021 at page 76 – 79 of the PH bundle. This refers to the claimant's history of PTSD said to result from an "attack" upon her in 2014. It recounts what the claimant reported regarding counselling, which was incomplete, and her report that she was incapable of leaving home without being accompanied by a family member. She was not at this point on any medication. In her disability impact statement at page 66 there is reference to the claimant not being able to go shopping or to work or to the doctor alone, and needing support for any activities outside the house. I note my previous finding that the claimant exaggerated her symptoms and while I am unable to conclude the same here without hearing from her, all that said I cannot make a positive finding of fact in relation to those symptoms without hearing her evidence under oath and subject to examination.
- 10.3. I was taken to a statement of fitness to work where the claimant was assessed on 19 August 2021; it identifies two conditions affecting the claimant, namely PTSD and pelvic pain. There is a recommendation of amended duties, "lighter duties as unable to heavy lift reduced capacity to perform duties to work with husband for support" (sic). This recommendation is in the section for the provision of comments including on the functional effects of the condition, and nothing further is said as to the functional effects on the claimant's day-to-day activities of PTSD.( p80).
- 10.4. I was taken to an outpatient summary prepared by the primary care mental health team on 7 March 2023 at pages 28 to 30 of the additional bundle. The summary refers to the claimant saying that she had been bullied in previous employment and that she was experiencing similar difficulties in her employment with the respondent. In the summary the claimant is cited as saying that she felt stressed and that her problem is only about work. It reports that she had completed treatment and been discharged from NHS Talking Therapies (referred to as IAPT, that is Improving Access to Psychological Therapies). The report does not provide information as to the effects at the material time of PTSD on the claimant's day-to-day activities.
- 10.5. At pages 38 and 39 of the additional bundle provided today there is a letter from an occupational health advisor dated 27 June 2023 that refers to a diagnosis of PTSD relating to alleged bullying at work "historically", before the claimant commenced employment with the respondent. In the letter the adviser says that "recent events at work are the trigger" for concern over the

return of PTSD (and I note that the letter is written over 12 months after the material period for my consideration); it suggests that this would afford the claimant the protection of the EqA. It does not give any details of the effect of PTSD on the claimant's day-to-day activities, let alone during the material period of time.

10.6. In the circumstances I find that the claimant has been diagnosed with PTSD on and off over a period of time. The initial diagnosis was prior to the material time of my consideration and any significant subsequent mention of this condition post-dates the material time. I am unable to find that the claimant lived with this condition during the material time and I am unable to make a finding of fact, even if it was a continuing condition, that it had a substantial adverse effect on her ability to carry out normal day-to-day activities.

#### 11. Abdominal pain:

11.1. Mr Toth referred me to pages 72 and 73 of the PH bundle which shows that the claimant was admitted to hospital between 5 December and 11 December 2012 for "interventions" including an hysterectomy. In the claimant's disability impact statement she relates her alleged continuing abdominal pains to this surgery. She says that it has caused her pain from "heavy lifting" and in her statement she refers to requiring assistance carrying laundry, heavy dishes and shopping bags. The statement does not identify dates or a period of time when the claimant was so affected. I have already made my observations as to what weight can be attached to the impact statement.

11.2. I was taken to a referral outcome report dated 3 August 2021 at page 76 – 79 of the PH bundle. In this report, and contrary to the paragraph above, it is reported that the claimant stated "the pain only occurs when she lifts heavy items at work". The suggested future management would be to allow her to work at a slower pace and that she may be better suited to less physically demanding tasks, such as handling small packages. The report and recommendation is limited to work-related activity and therefore "heavy items at work".

11.3. I accept that the claimant had a hysterectomy in 2012 following which she will have suffered pain and may have continuing discomfort and at times pain. I have insufficient evidence before me to make a positive finding that the abdominal pain has a substantial adverse effect on her ability to carry out normal day-to-day activities, let alone that it did so ten years after the surgery and during the material period.

#### 12. Necrotic hip:

12.1. Mr Toth took me through various reports and forms from pages 81 to 92 of the preliminary hearing bundle and pages 31 to 39 of the additional bundle. It is evident from this that the claimant made mention of pain, other than the abdominal pain referred to above, from 30 September 2021 to 26 May 2023 (being the date range for all the documents to which Mr Toth

referred). The material time for my consideration being January to June 2022 falls within this period.

- 12.2. In January 2022 she described low back pain, not hip pain. Low back pain is again shown in later fit note in April 2022 but not hip pain (page 89) and May 2022 (page 90).
- 12.3. In a letter dated 18 February 2022 an occupational health advisor relates that the claimant told her that she had started to suffer left hip pain in the middle of September 2021 and “at times pain has been significant”. Again there is reference to avoiding heavy lifting (such as required at work). At that stage the occupational health advisor did not consider that the claimant was a disabled person and there are no details of the impact of the hip pain on her day-to-day activities. (Page 86 to 87)
- 12.4. In a letter I am told is from 7 March 2022 from the claimant’s GP at page 88, she is said to be making good progress “with a low back pain and hip pain”. There is reference to her symptoms having improved considerably. There is reference to avoiding “prolonged walking”.
- 12.5. On 24<sup>th</sup> of June 2022 the claimant again saw an occupational health advisor, who reported (page 91) that the claimant had not lost any time off work, that she was continuing “to have problems with a nerve impingement in her hip” although “some days are better than others”. She reported to the occupational health advisor that she was “managing really well with adjustments at work”, but again the adviser did not consider that the claimant was a disabled person with the protection of EqA.
- 12.6. On 26 August 2022 the claimant was assessed for a fitness for work certificate, page 92, in relation to hip pain. She was certified as fit to work with amended duties namely that she be able to sit down for regular breaks every 90 minutes.
- 12.7. Mr Toth also took me to a letter dated 22 May 2023 from a consultant orthopaedic surgeon that appears at page 33 of the additional bundle. I note that this report is dated some 11 months after the material period has expired. It refers to a “relatively short history of rapidly deteriorating left hip pain and stiffness..... It sounds like it was around 18 months ago”. 18 months previously would be the commencement of the material period. The letter goes on to relate what the claimant told the consultant. This includes effects on activities should such as putting on shoes and socks. She was seen to struggle to mobilise and with straight leg raising but it was also noted that movement exacerbated her pain. X-rays shown “significant degenerative change in the left hip with what appeared to be avascular necrosis of the femoral head”; she also had an MRI scan with a consistent result. The consultant considered that “things will deteriorate over time and she will have further disability”. The claimant opted for a hip replacement and that appointment has subsequently been postponed indefinitely through no fault of her own and not by her choice.
- 12.8. On 27 June 2023 (p38-39) the OH advisor reported that the claimant would be protected by EqA because of her hip condition, that is some 12 months after the material period.

12.9. In the claimant's disability impact statement there is reference to not being able to attend a car boot sale, and it states that pain disturbs her sleep; it says that she cannot do tasks involving "walking at work" and that "prolonged standing" is painful. Other than saying that her hip pain started at a previous workplace in September 2021 the claimant does not identify the effect of hip pain on her day-to-day activities at any particular time let alone during the material period.

**The Law:**

13. I have set out in paragraph 1 above the definition of disability taken from EqA. In applying that definition the Tribunal is also assisted by Guidance on the Definition of Disability (2011), which guidance was issued by the Secretary of State under EqA.

14. It is established that "substantial" means more than minor or trivial. "Long term" means 12 months or likely to last for that time. Day-to-day activities are those activities that one could expect to undertake going about one's normal life, and whilst they do not include highly technical specific work-related activities, they can include activities which would be undertaken also at work and even in being able to attend at work.

15. The period of time for my analysis is at the time of the alleged discrimination which I refer to above is the material time, 24 January to 17 June 2022.

**Application of law to facts:**

16. The claimant has chosen for her own reasons to absent herself from today's hearing. She has chosen not to give evidence as to how the impairments upon which she relies have affected her ability to carry out day-to-day activities.

17. I have been left with consideration of medical reports and the like and the submissions made by respective parties upon them. Not surprisingly Mr Toth considers that the documents prove disability at the material time an Counsel submits the opposite. I must decide upon the documents and in consideration of the claimant's statement to which I give little weight.

18. I have to be mindful that to a large degree that medical records and reports are self-serving for the claimant in that they rely upon her account of symptoms and the effects of those symptoms on a daily activities as she related them to her various doctors and occupational health advisers, and for her own purposes on each occasion. Her rationale each time for explaining what she did to each medic may have differed, such as to obtain advice, justify absence from work, ensure being allowed return or remain at work, to access treatment, to contend for adjustments at work etc.

19. Whenever a doctor or adviser uses a word such as "disability" or comments on whether or not the claimant would have protection under EqA I have to remind myself that disability for our purposes is a legal and not a medical question. Medical opinion may be informative but is not binding upon me.

20. In the absence of oral evidence from the claimant to supplement her unsigned and un-sworn impact statement, I am unable to find that the claimant was a disabled person at the material time. There is just not sufficient evidence in the documentation before me to establish substantial adverse effect on day-to-day activities in the period January to June 2022.
21. At various times the claimant has reported to doctors and occupational health advisers that she has had symptoms, but there is a gap in the chronology and there is a lack of specific detail regarding the effects on day-to-day activities. It does not appear from the documentation that the claimant even has maintained that the effects upon her have been “substantial” throughout the period in question.
22. It is unfortunate that I am in this position. Of the three conditions relied upon it seems to be most likely that at some date before today the claimant could have been considered disabled by virtue of necrosis of the left hip. My difficulty though is with regard to the date at which that condition had a long-term adverse effect to a substantial degree on day-to-day activities, or when it could be said that the effect was likely to be long-term. The orthopaedic report of May 2023 would indicate that at that stage there may well have been a disability in terms of EqA, but even it refers to a “relatively short history of rapidly deteriorating left hip pain and stiffness”. While it says that there was no clear event that preceded this, “it sounds like it was around 18 months ago” and this is rather vague. The gaps in the chronology and the deficiencies in respect of details regarding the claimant’s ability to carry out day-to-day activities and the effect upon her of the conditions that she relies upon could have been filled by her oral evidence; absent persuasive evidence I am unable to find that the claimant was a disabled person at the material time. I would be required to speculate and engage in conjecture if I were to risk making such a judgment. There are circumstances when it is appropriate for a Tribunal to draw inferences and to speculate, but I do not consider that this is one. It would not be in the interests of justice to base a judgment in reliance on what the claimant told any particular doctor or occupational health advisor for the purposes of obtaining certificates, pursuing a request for reasonable adjustments, or with a view to treatment when she has chosen not to put herself forward for examination before the Tribunal on those points. As I have already said her accounts to her medical advisers are self-serving. It would not be fair to allow her to rely upon them in these proceedings when she has had ample opportunity to attend to give evidence.
23. For the above reasons I find that the claimant was not a disabled person at the material time. It follows that the Tribunal does not have jurisdiction to consider the claimant’s claims disability discrimination. Those claims are dismissed.

Employment Judge T.V. Ryan  
Date - 11 July 2023

JUDGMENT SENT TO THE PARTIES ON 12 July 2023

FOR THE TRIBUNAL OFFICE Mr N Roche