



EMPLOYMENT TRIBUNALS

Claimant: Miss T Walton

Respondent: Vetpartners Practices Limited

Heard at: Watford via CVP

On: 21st June 2023

Before: Employment Judge Krepski

Representation:

Claimant: In person

Respondent: Mr Webster – Counsel

JUDGMENT

The Claimant was, at all material times, a disabled person for the purposes of section 6 of the Equality Act 2010 by virtue of her knee injury.

REASONS

Preamble

1. The purpose of this hearing was to address the question of whether the Claimant was, at the material times, disabled for the purposes of section 6 of the Equality Act 2010 (“the EqA 2010”).
2. I had the benefit of hearing live evidence from the Claimant, a witness statement from the Claimant, a 196-page bundle of documents within which was a disability impact statement from the Claimant (page 124), as well as submissions from the Claimant and Mr Webster. References to page numbers in this judgment are references to the bundle.
3. For the avoidance of doubt, I have considered all the documents I was presented with, the oral evidence, and the submissions made, even if I do not make specific reference to them in my judgment.
4. Findings are made based on the balance of probabilities and on the evidence before me.

Findings – Background

5. The Respondent is made up of a network of veterinary practices across the UK, including practices specialising in small animal, equine, mixed and farm practices.
6. The Claimant was employed by the Respondent as a Night Registered Veterinary Nurse from 4th February 2020 until her dismissal by reason of redundancy from 31st May 2022.
7. On 12th December 2021, the Claimant was attacked and sustained injuries to the ligaments in her right knee.
8. The Respondent has conceded, as per an email of 14th April 2023 (page 64), that the Claimant was a disabled person by reason of depression and anxiety, it did not concede, however, that the Claimant was a disabled person by reason of her knee injury.
9. The Respondent helpfully indicated what it saw as the point of contention in relation to the question of disability.
10. It was conceded that the Claimant still had symptoms in relation to her right knee injury in May 2022. The question for the Tribunal was one of longevity and whether the impairment fulfilled the long-term condition.

Findings – January 2022 Trauma & Orthopaedics Clinic

11. On 6th January 2022, the Claimant was assessed by a Speciality Registrar in Trauma & Orthopaedics.
12. In a letter to the Claimant's GP (page 141), the registrar described the Claimant as a "fit and healthy" lady, which I find a strange choice of words given the circumstances, and that she was still having a lot of pain.
13. It describes her as being anxious about stability issues, and mobilising using a split and crutches, but that she was partially weight-bearing without much discomfort.
14. It went on to say the doctor believed her injury could be treated non-operatively. It asked to see her again in four weeks' time to assess her range of movement and to mobilise out of the splint.

Findings – March 2022 Trauma & Orthopaedics Clinic

15. On 17th March 2022, the Claimant was again assessed by a Speciality Registrar in Trauma & Orthopaedics.
16. The letter sent by the doctor conducting the clinical meeting (page 143) states that the Claimant was "*making good progress*" and had "*very minimal pain in her right leg [...]*". It goes on to say "*She is mobilising without a brace at home without any issues and is only using the brace for walking her dog outdoors*".
17. It goes on to say that although the Claimant was using regular analgesia, had cut down the codeine and was only using ibuprofen and paracetamol.
18. It concludes with the following:

"I informed her that she is recovering quite well and that she should press on with physiotherapy with typical strengthening exercises to account for ACL tear. She can commence sports such as swimming and cycling but avoid direction change activities like football and tennis.

"I have told her that she can now wean herself out of the DonJoy brace and I would advise using a Velcro slip-on brace instead to provide her with some stability and confidence. Once this lady is walking comfortably out of the brace then she can commence jogging which will probably be in another 6-8 weeks' time by the time wereview [sic] her."

Findings – March 2022 Occupational Health Report

19. On 22nd March 2022, the Claimant was assessed by Occupational Health, and that same day a report was prepared and sent to the Respondent (page 101).
20. The report starts by saying that *“Information available at the time of the assessment included the management referral and consultation with the employee. [The Claimant] was assessed over the telephone [...]”*.
21. It continues:

“[The Claimant] states that she continues to wear a brace to support the stability of her knee, on the advice of the orthopaedic surgeon, and is using two crutches to mobilise. She is experiencing significant ongoing pain for which she is prescribed strong pain killers and the pain is also having a negative impact on her sleep. She has been prescribed medication to help her sleep but it can make her feel drowsy during the day and can impair her concentration levels. [The Claimant] is undertaking exercises prescribed by the physiotherapist to support her recovery and continues to have physiotherapy appointments every two to three weeks.

“On a personal level [the Claimant] is unable to participate in the activities she previously enjoyed, such as walking, swimming and yoga, due to her injuries.

[...]

“At a recent review with the orthopaedic surgeon he felt that [the Claimant’s] medial collateral ligament is showing signs of repair but her anterior cruciate ligament is not improving. He has decided to continue with conservative treatment for the moment but this will be reviewed at her next appointment with him on 12th May. Further treatment options may include surgery.”
22. It also states: *“[The Claimant] is likely to make a full recovery in the coming months but she will have a better idea of the timescales for her recovery and treatment options once she has been reviewed by the orthopaedic surgeon in May.”*
23. And: *“I cannot currently predict when [the Claimant] will be fit to return to work. However, I would expect her to make a full recovery in the coming months.”*

24. There is no readily apparent basis for this “prognosis” expressed by the report’s author.

Findings – April 2022 Occupational Health Report

25. On 25th April 2022, the Claimant was again assessed by Occupational Health, and that same day a report was prepared and sent to the Respondent (page 177).
26. The report starts by saying: “*Information available at the time of the assessment included the management referral and previous Occupational Health notes and report.*”
27. It continues: “*[The Claimant] is having physio every 2 weeks and is doing home exercises. She is in the process of moving from the large supportive brace to an easier to wear and lighter knee brace. This transition is going well.*”
28. It goes on to state:

“Practically she can weight bear a little on the right knee but cannot walk unassisted. She tells me last week she managed to do 100 yards walking (50 yards there and 50 back) with her knee supported and using 1 crutch. [The Claimant] can do stairs but they exhaust her and she does avoid going up and down stairs if she can.”

“[The Claimant] has pain in her right injured knee (she scores it as being 8 out of 10 – 10 being the worse [sic] pain). She is also getting pain in her left knee and her back because of her injury (her altered posture and walking gait). Both knees swell and when she sits, she needs to elevate both knees and use ice packs to manage the swelling. [The Claimant] has a history of back pain, it was becoming much more manageable pre injury. Since her injury her back pain has increased. This means that it is hard for [the Claimant] to find a comfortable position to be in.”

29. The report also mentions the Claimant’s mental health:

“In addition to this [the Claimant’s] mental health is not good at the moment. She has a history of mental ill health and is usually proactive in managing her symptoms (she does yoga and swimming). But with the injury to her knee she has been unable to do these things. On assessment today her symptoms of anxiety and low mood fell into the severe category. I note [the Claimant] has been quick to seek

NHS support and has also recently contacted Health Shield too. She has some counselling / CBT treatment scheduled now.”

30. In respect of a return to work, the report author wrote, *inter alia*, the following:

“Until her recovery has progressed I am not able to predict when she will be able to return to her usual duties. [The Claimant] will need to be crutch free and able to stand and walk about with ease for a number of hours before coming back in some way to her usual role.

“Being off work is causing her worry and financial pressure however she is under consultant expert care and is doing everything I would expect her to do to help promote a recovery. Her recovery is taking longer than expected. Ligament injuries often take a lot longer than other injuries such as bone fracture to heal.”

31. When asked if a return to work is possible in the foreseeable future, the author wrote:

“Answer I do not expect a return to work within 1 month. Depending on her recovery and the availability of adjusted duties a return to work in the next 3 months may be possible.”

32. Again, there is no readily apparent basis for this “prognosis” expressed by the report’s author.

Findings – May 2022 Trauma & Orthopaedics Clinic

33. On 12th May 2022, the Claimant was again assessed by a Speciality Registrar in Trauma & Orthopaedics.

34. The letter sent by the doctor conducting the clinical meeting (page 175) states that the Claimant “*still has some problems with the right knee*”.

35. It continues:

“She is extremely anxious about re-injuring the knee, and worried about the structural damage in the knee. Therefore she has been using braces and is still walking with a crutch, six months after the initial injury. On top of that she uses the Donjoy brace when she goes out.”

“[...] There is a significant loss of muscle in her right upper leg.”

"I explained to [the Claimant] that she had a injury on the right knee about six months ago and that by now things should have settled down as far as ligament injury is concerned. I think the main issue is that she is very scared and very anxious of doing another injury to her knee. I tried to reassure and tried to convince her that she is allowed to do some intensive physio in order to get the strength back in her knee. I told her she needs to get rid of all the braces and the crutches and that she needs to speak to her physio in order to intensify the rehab. We will see her back in two months' time to assess her progress and hopefully by then she will have improved significantly. We will see back in two months' time."

36. The "Management Plan" section of the letter gives the following three recommended actions:

- 36.1 Wean out of DonJoy brace
- 36.2 Continue strengthening exercises with physiotherapy; and
- 36.3 Follow up in 2 months' time to assess progress.

Findings – Claimant's evidence

37. Although the Claimant initially had the benefit of physiotherapy, she stated that by April/May the physiotherapy had ended as the staff were not available, which hindered the Claimant's recovery.
38. The Claimant gave evidence to say that her mental health, including her anxiety, was stopping her from fully participating in the physical therapy being suggested by her doctors. She described that in May 2022, it was a combination of the pain and anxiety about the instability of the knee that caused her to continue using braces.
39. The Claimant stated that, in May 2022, she was still using knee braces, hot and cold therapy, sleeping therapies and medication. She was barely eating because she did not want to have to stand in the kitchen to make herself food. She was only just able to go down to the lower level of her house to let her dog go onto the front driveway to go to the toilet. She was also continuing to take the highest dose of co-codamol (30mg/500mg).
40. The Claimant also described having significant muscle loss by the time she started mobilising without her knee brace, which caused her body to tire quickly, from which she suffered daily fatigue and was in a "lot of pain".
41. Getting in and out of a bathtub was difficult and required a bath board. She also used a perching stool to sit in the kitchen. To avoid having to stand for more than a few minutes, to avoid inflammation and swelling of her knees (she described how her left knee had become troublesome as a result of

the injury to her right knee). She also described difficulties in moving up and down stairs, and needing to rest on the stairs for a few minutes mid-way.

42. She had to wear pyjamas, tracksuits or dresses to avoid putting pressure on her leg or brace which would result in pain, had difficulties sleeping, was unable to swim or walk her dog, and was unable to practise yoga.
43. I found the Claimant to be a credible witness and I accepted her evidence in respect of the above.

Law

44. Section 6 of the EqA 2010 defines disability as follows:

(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.

45. As per the case of Goodwin v Patent Office [1999] IRLR (EAT), the Tribunal should ask itself the following questions when determining whether a person has a disability for the purposes of the EqA 2010.

45.1 Was there an impairment?

45.2 What were its adverse effects on normal day-to-day activities?

45.3 Were they substantial (more than minor or trivial)?

45.4 Is that effect long term?

46. The EqA 2010 Guidance states:

46.1 *"D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities."*

47. Substantial is defined in section 212 of the EqA 2010 (and B2 of the Guidance) as *"more than minor or trivial"*.

48. Long-term is defined in paragraph 2 of schedule 1 to the EqA 2010 which provides, so far as relevant:

(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.

49. Paragraph 5 of schedule 1 to the EqA 2010 instructs the tribunal on the effect of medical assistance/treatment:

(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.

(2) “Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.

50. As per SCA Packaging Ltd v Boyle [2009] ICR 1056 HL and C3 of the Guidance, “likely” means it is a “real possibility” and “could well happen” rather than something that is probably or more likely than not.

51. As per Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT and C4 of the Guidance, the question of how long a condition is likely to last should be assessed as at the date of the alleged discrimination, not the date of the hearing. Anything which took place after will not be relevant in assessing likelihood.

52. In relation to the cumulative effect of impairments, the Guidance provides the following:

52.1 “B6. A person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments together have a substantial effect overall on the person’s ability to carry out normal day-to-day activities. [...] The cumulative effect of more than one impairment

should also be taken into account when determining whether the effect is long-term [...]"

52.2 "C2. The cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect for the purposes of meeting the definition of a disabled person. The substantial adverse effect of an impairment which has developed from, or is likely to develop from, another impairment should be taken into account when determining whether the effect has lasted, or is likely to last at least twelve months, or for the rest of the life of the person affected."

53. Finally, the burden of proof is on the Claimant to show she satisfied the definition of being a disabled person.

Discussion

54. I am satisfied that from the day of the attack on 12th December 2021 until 31st May 2022 the Claimant had an impairment in the form of a knee injury. I find that this had an adverse effect on the Claimant's normal day to day activities of preparing food, sleeping, moving around her house, bathing, getting dressed, and exercising.
55. In coming to this conclusion I take into account that the threshold of what is substantial is low; more than minor or trivial. Having accepted the Claimant's evidence that it was affecting her as above, I am satisfied that the impairment had a substantial adverse impact on the Claimant's day to day activities for that period.
56. I must then turn to whether those substantial adverse effects on day to day activities were long term.
57. Neither party sought to argue that the impairment had lasted for 12 months or that it was likely to last the rest of the person's life, and I find that neither of these conditions are satisfied in this case.
58. Rather, the only possibility is that the impairment could be said at the relevant time to be *likely* to last 12 months.
59. First I turn to the Occupational Health Reports, which I approach with some caution. The assessments which led to the reports were conducted via telephone without an in-person examination. Additionally, it does not appear as though the occupational health writer had access to any of the Claimant's medical notes. Rather, they seem to be based on what the Claimant stated, however I note that this can be useful in itself.

60. The March 2022 Occupational Health Report stated that the Claimant reported being in significant ongoing pain, that she could not participate in previously enjoyed activities such as walking, swimming and yoga, that her anterior cruciate ligament was not improving, and that further treatment options may include surgery.
61. Despite this, and without any documented rationale for this statement, the report writer states she would expect the Claimant to make a full recovery in the coming months.
62. The April 2022 Occupational Health Report appeared to show, if not a worsening situation, then a largely unchanged situation. The Claimant stated that she could walk 100 yards with a supported knee and using one crutch, described her pain as being 8/10, and was still unable to do yoga or swimming.
63. The report writer also wrote that "*Ligament injuries often take a lot longer than other injuries [...] to heal*". Additionally, there is no longer mention of a full recovery, but rather that a return to work between 1-3 months *may* be possible *depending on her recovery* and the availability of *adjusted duties* (emphasis added). Even so, no explicit rationale is given for this estimation.
64. I approach the clinic letters with similar caution. I remind myself that they show a snapshot in time and that they are not full medical reports for the benefit of the Tribunal but are rather short letters to the Claimant's GP to assist in future clinical management of the Claimant's condition.
65. In the January 2022 Clinic, the Claimant was told that the injury could be dealt with without an operation. At the March 2022 Clinic, it appears that the Claimant had been told that surgery may be necessary, as this is what was written in the March Occupational Health Report just a few days later.
66. Additionally, the March 2022 Clinic letter appears to paint a more positive picture than was actually the case. By way of example, contrary to what the letter states, the Claimant described not being able to stand up for a few minutes before her knees becoming inflamed, swollen and extremely painful.
67. In any event, matters appear to have deteriorated by the time of the May 2022 Clinic. The Claimant still had problems with her right knee, was extremely anxious about re-injuring it, and there was a significant loss of muscle in her right upper leg.
68. The doctor also advised that the Claimant needed to speak to her physiotherapist in order to intensify the rehabilitation, however the Claimant gave

evidence to say that her physiotherapy sessions had stopped due to a lack of staff.

69. Taking a holistic view of the Claimant's condition, the medical and quasi-medical evidence, and considering in particular:
- 69.1 The attack upon the Claimant had occurred on 12th December 2021, some six months prior to the events of May 2022;
- 69.2 That, on the Claimant's evidence, by May 2022 she was still using strong analgesics and medical devices without which she would not have been able to function in any meaningful way, and that even with them she had limited walking ability and rated her pain as 8/10;
- 69.3 That there was a significant loss of muscle in the Claimant's right upper leg by the time of the May 2022 clinic;
- 69.4 That the doctors at the clinics had suggested intensive physiotherapy which was not available to the Claimant by May 2022; and
- 69.5 That there was interplay between her anxiety and her right knee injury, which meant she was less able to engage in rehabilitating herself, which manifested itself as early as the January 2022 clinic and continued through to the May 2022 clinic,

I find that the Claimant's impairment of a knee injury was likely to last 12 months.

70. Accordingly, I find that the Claimant was a disabled person for the purposes of section 6 of the Equality Act 2010 by virtue of her knee injury.

Employment Judge Krepski

Date: 01/08/2023

JUDGMENT SENT TO THE PARTIES ON
3 August 2023

FOR THE SECRETARY OF EMPLOYMENT
TRIBUNALS