



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Zdziarstek  
**Respondent:** Green and Brown Ltd  
**Heard at Leeds** On: 15 August 2023  
(Reserved Decision 21 August 2023)

**Before:** Employment Judge Shulman

## Representation

**Claimant:** Mr T Wood (Counsel)  
**Respondent:** Ms L Fenton (Employment Advisor)  
**Polish Interpreter:** Mrs A Thorpe

# RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that the claimant has the disability of a dilated right kidney and the claimant's claims will go forward to a final hearing in respect of which case management orders were made on the same date as this Judgment.

# REASONS

## 1. Claims

The claimant makes claims of discrimination arising from disability (Equality Act 2010 (EA) section 15) and reasonable adjustments (EA sections 20 and 21).

## 2. Issues

This a preliminary hearing confined to the question of whether or not the claimant has a disability as defined in section 6 EA. The issues relating to disability are set out at paragraph 45.1.1 of a preliminary hearing dated 4 April 2023. That preliminary

hearing also ordered that this hearing consider whether or not the respondent had knowledge of the claimant's alleged disability at the time of the alleged discrimination. By agreement with the parties the question of knowledge was not proceeded with at this hearing because of the factual nature of that question which would be required and this could equally be done, if not done better, at the final hearing. Further the claimant alleged that he had a further disability, namely, of testicular hernia but he did not proceed with that allegation.

### 3. The law

The Tribunal has to have regard to the following provisions of the law:

#### 3.1. Section 6(1) EA

##### **“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.”

#### 3.2. Physical Impairment

Although this is not defined in the EA it is well understood that a person has a physical impairment if that person has something wrong with them physically - see *College of Ripon and York St John v Hobbs (Hobbs)* [2002] IRLR 185 EAT.

#### 3.3. The impairment

This must have a substantial adverse effect on the person's ability to carry out normal day-to-day activities. A substantial effect is one that is more than a minor or trivial effect – see *Guidance on Matters to be Taken into Account in Determining Questions relating to the Definition of Disability* [2011] (Guidance) Section B paragraph B1.

#### 3.4. Long-term

The effect of an impairment is long-term if –

(a) It has lasted for at least 12 months – see EA Schedule 1 Part 1 paragraph 2(1)(a). Further a person who has had a disability but has recovered or the effects have become less than substantial is to be treated as having a continuing effect if that effect is likely to recur. This means that the effects can count as long-term if they lasted more than 12 months or more after the first occurrence – see Section C paragraph C12 of the Guidance.

#### 3.5. Day-to-day activities

These are things which people do on a regular or daily basis – see Section D paragraph D3 of the Guidance.

#### 3.6. **Elliott v Dorset County Council (Elliott) UK EAT/0197/20/LA(V)**

Judge Tayler in this case stressed that tribunals must consider the statutory definition of disability, identify sufficiently the day-to-day activities and analyse the medicals when considering whether there is a disability within the meaning of s6EA.

#### 4. Facts

The Tribunal having carefully reviewed all the evidence (both oral and documentary) before it finds the following facts (proved on the balance of probabilities):

##### Medical Records

- 4.1. In or about 29 December 2015, when the claimant was 27, his GP practice (GP) diagnosed that his right kidney was dilated, suggestive of hydro-nephrosis due to a pelvi-ureteric junction (PUJ) obstruction (Document 80).
- 4.2. It was confirmed by Miss S J Symons, consultant urologist at Pinderfields Hospital, (Miss Symons) that the claimant's kidneys had an equal function, although the right kidney had a partial obstruction. This was on 12 April 2016 (Document 85).
- 4.3. On the same date Miss Symons described to the GP that the claimant was fit and well but nevertheless confirming the right PUJ obstruction. The renal function was 52% on the right and 42% on the left (Document 85). The parties confirmed to the Tribunal that these percentages represented a 100% function.
- 4.4. On 24 May 2016 Miss Symons confirmed to the claimant, following a urogram, a right sided PUJ obstruction, but that currently no treatment was then required, although the claimant was to be kept under surveillance (Document 88).
- 4.5. On 31 May 2016 Miss Symons wrote to the claimant. Although the claimant's kidneys were currently functioning equally, she stated that the claimant should be offered surgery to his right kidney to maintain the current functioning and ensure the kidney function did not decrease (Document 89).
- 4.6. On 28 June 2016 Mr Elmussareh, a urologist registrar at Pinderfields, wrote to the GP. He described the claimant as generally fit and well with no regular medication. He stated that the claimant was having occasional right-sided loin pain. For post surgery the claimant would require a stent for six weeks (Document 90).
- 4.7. On 5 September 2016 the claimant attended Pinderfields Emergency Department with abdominal pain with known renal problems. The claimant was going to be assessed for surgery but the pain improved and was likely to be due to existing renal problems (Document 114).
- 4.8. On 6 March 2017 the claimant was admitted to Pinderfields for surgery on the right pelvi-ureteric junction (PUJ) obstruction. He was discharged following surgery on 9 March 2017 (Document 115).
- 4.9. The claimant's stent was removed at Pinderfields on 4 April 2017. A renogram in May 2017 revealed a retained renal function and improved drainage. There was occasional discomfort on the right flank. A renogram would be repeated towards the end of the year (Document 119).
- 4.10. On 5 October 2018 Mr Hughes of the department of urology at Pinderfields wrote to the GP recording no significant flank pain. A renogram showed a right PUJ dysfunction consistent with a partial obstruction. The split function was unchanged with the right kidney contributing 50%, suggesting this was not a functioning significant obstruction. No additional interventions were

currently required, but a renogram would be advised for May 2019 (Document 120 – incomplete).

- 4.11. In a GP's note dated 5 March 2019 it was recorded that the claimant was experiencing right flank pain, there being past history of the right kidney pyeloplasty, but that there were no lower urinary tract symptoms (Document 68). A sick note was issued for the pain for 10 days (Document 123).
- 4.12. In a letter dated 1 September 2020 from Pinderfields to the claimant, it was recorded that a renogram showed equal split function of the claimant's kidneys. The right kidney was dilated but it was non-obstructed following the claimant's pyeloplasty. The scan showed a tiny millimetre area of calcification in the lower pole of the claimant's right kidney near his embolization coil, which would hopefully not require any treatment going forward. The left kidney also had a 3 millimetre stone in the mid pole, but there were no other stones in the claimant's kidneys. The claimant would have to come back to discuss further stone prevention. The claimant was advised to undergo a metabolic stone screen and a magnetic resonance cholangiopancreatography (Document 131 – incomplete).
- 4.13. By a letter dated 3 February 2021, from Miss Symons to the GP, the claimant was diagnosed with bilateral renal stones, but with a small stone in the left kidney only and stone free status on the right, but with a very high risk of further calcium stone formation. The claimant was advised to increase his urine output. He also needed to increase his fruit and vegetable intake, as well as reducing his animal protein. This would avoid stone risk (Document 100).
- 4.14. The claimant produced a fit note on 12 October 2021, his condition being lower back pain, causing him to be unfit for work for two weeks (Document 144). The claimant told the Tribunal that this was caused by his kidney condition. This followed the claimant's attendance at the Emergency Department at Pinderfields on 7 October 2021 with urinary problems, the complaint being loin pain and haematuria. The claimant was suspectedly diagnosed with renal/ureteric colic due to a stone on his left side. The claimant was sent home (Document 143).
- 4.15. On 26 April 2022 the claimant attended an appointment at Pinderfields to see Miss Symons. The claimant had a right renal stone. A renogram showed dilated non-obstructive kidneys. There was a 3 millimetre stone lower pole right kidney with no other stone disease. The claimant was described as well. There was a reference to the recent admission to "A&E" with a possible stone passage which had all settled and there was further stone prevention. The claimant had improved his dietary intake and there would be a scan in six months and more prevention advice (Document 102).
- 4.16. By a letter from Miss Symons to the claimant dated 22 December 2022 Miss Symons sent the results of a CT scan. This showed no evidence of stones in either kidney or ureters. The dilatation of the claimant's kidneys simply related to the claimant's kidney anatomy and had not changed when compared with the previous CT scan in October 2021. In view of the claimant's current stone free status no further appointments were being arranged and Miss Symons was happy to discharge the claimant back to the care of the GP (Document 180).

### Day-to-Day Activities

4.17. The claimant gave very little oral evidence of the facts relating to any adverse effect on his ability to carry out normal day-to-day activities. The Tribunal wanted to hear evidence of this from him. The claimant mentioned when in pain he had to stay in bed and lie down, relying on his wife and children to help him go to the toilet, to shower and he also mentioned that he could not shop. He said this did not happen every day but only when he had one of his “attacks”, but he did not quantify frequency of when these occurred affecting his day-to-day activities. He said in his evidence that his attacks occurred every several months. The claimant’s witness statement (paragraph 11) mentioned other activities which were affected. The claimant did not mention those when the Tribunal asked him questions about his day-to-day activities but this evidence was taken as read.

### Other evidence

#### 4.18

4.18.1 For the record the claimant experienced surgery relating to his kidneys twice, in 2017 and March 2020, although the Tribunal was not shown evidence of surgery in 2020, (but does not doubt it took place).

4.18.2 The parties agreed that the relevant period in relation to the alleged discrimination fell between 12 August 2022 and 14 October 2022.

## 5 **Determination of the Issues**

### **(After listening to the factual and legal submissions made by and on behalf of the respective parties):**

5.1 The Tribunal finds that the claimant does have a physical impairment, namely, a dilated right kidney. The Tribunal finds that the claimant has something wrong with that kidney (see Hobbs) and having regard to the medical evidence that it is likely to recur.

5.2 The Tribunal finds that the right kidney has in the past had a partial obstruction and, although recently discharged from Pinderfields, the claimant has been sent back to the care of the GP and was under surveillance for his kidney complaint between 2015 and 2022. The claimant has undergone surgery twice for his kidneys and has attended the Emergency Department of Pinderfields twice for kidney related complaints. Connected to one of the surgeries the claimant had to have a stent fitted. The claimant has missed work on occasions because of his kidney condition. The claimant has produced a kidney stone requiring surgery in 2020. The claimant has been advised that as recently as 2021 he experienced a very high risk of further calcium stone formation. The Tribunal finds that he has worked hard to try and take the advice of the doctors in relation to stone prevention and was suspectedly diagnosed as recently as October 2021 with renal/ureteric colic stone in his left side.

5.3 The Tribunal finds that all this amounts to his impairment, being dilation of the right kidney, as having a substantial adverse effect on the claimant’s ability to carry out normal day-to-day activities (s6EA), a substantial effect being more than a minor or trivial effect (Guidance Section B paragraph B1).

5.4 The question of the adverse effect on the day-to-day activities could be stronger, as could the regularity of the pain, but the claimant has described

those day-to-day activities which have had an adverse effect on his ability to carry them out. The Tribunal finds that that description is sufficient to pass the disability test in respect of day-to-day activities aspect of s6EA. See also Guidance Section D paragraph D3.

5.5 There is no question that this impairment is long-term starting as it did in 2015 going through at least to 2022 and the Tribunal finds on the evidence likely to recur. See Guidance Section C paragraph C12.

5.6 In coming to its decision the Tribunal has applied the dictum of Judge Tayler in Elliott, taking into account s6EA, the relevant day-to-day activities and the medical evidence.

5.7 In all the circumstances the Tribunal finds that the claimant has a disability within the meaning of section 6EA, namely, dilation of the right kidney.

\_\_\_\_ J Shulman \_\_\_\_\_  
Employment Judge Shulman

\_\_\_\_\_  
Date 24 August 2023

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

---