



EMPLOYMENT TRIBUNALS

Claimant: Mr A Toth

Respondent: Amazon UK Services Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Liverpool (in private; by CVP) On: 5 September & 28 September
2023 (in chambers)

Before: Employment Judge Shotter (sitting alone)

Representatives

For the claimant: In person

For the respondent: Mr Sanders, counsel

Interpreter: Catherine Fowler

RESERVED PRELIMINARY HEARING JUDGMENT

The judgment of the Tribunal is that:

1. The claimant has a disability as defined in section 6 of the Equality Act 2010 between the relevant period 13 May 2021 to 26 September 2021. He had the physical impairments: Tendonitis in wrist, Polyarthritis in shoulder and Cervicalgia in the neck.

RESERVED

2. The claimant was not employed for 2 years and he does not have sufficient continuity of employment to bring a claim of unfair dismissal under the Employment Rights Act 1996 as amended. The Tribunal does not have the jurisdiction to consider the claimant's claim of unfair dismissal, which is dismissed.
3. The claim has been listed for an in person preliminary hearing to discuss and agree case management orders and a list of issues. A Hungarian interpreter will be provided. The preliminary hearing will take place before a judge sitting alone on the **20 February 2024** at Manchester Employment Tribunals, Alexandra House 14-22 The Parsonage, Manchester, M3 2JA with an estimated length of 3 hours.

REASONS

Preamble

1. This has been a remote preliminary hearing by video which has been consented to by the parties. The form of remote hearing was CVP video fully remote. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are in a bundle of 158 pages, the contents of which I have recorded where relevant below, in addition to the claimant's unsigned and dated impact statements and the oral submissions received from both parties, for which I am grateful.
2. The hearing is to decide whether the claimant was disabled within the meaning of the Equality Act 2010 at relevant times by reason of tendonitis in wrist, Polyarthritis in shoulder and cervicalgia in the neck.
3. It is accepted that the relevant period for the alleged discrimination is 13 May 2021 to 26 September 2021.

Issues

4. We discussed and agreed the issues to be decided at this preliminary hearing which are as follows;
 - a. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is 13 May 2021 to 26 September 2021. The Tribunal will decide:
 - (i) Did he have a physical impairment?: Tendonitis in wrist, Polyarthritis in shoulder and Cervicalgia in the neck?
 - (ii) Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

- (iii) If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
- (iv) If so, would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
- (v) Were the effects of the impairment long-term? The Tribunal will decide:
 - (a) did they last at least 12 months, or were they likely to last at least 12 months?
 - (b) if not, were they likely to recur?

Claimant's disability issue

5. In order for the complaints of disability discrimination to succeed, the claimant will need to establish that he had a disability within the meaning of section 6 of EqA, and this is the issue before me today. Oral evidence has been heard on oath from the claimant who confirmed the contents of his impact statement was true. He is a credible witness whose evidence was to some extent supported by the medical records. The claimant relies on Tendonitis in wrist, Polyarthrititis in shoulder and Cervicalgia in the neck.

Findings of Facts: Medical history

6. The medical reports/records cover a historically lengthy period of time which includes the following:

6.1 6 July 2015 confirming the left wrist pain, the X-ray showed some degenerative changes and "his signs are in keeping with early osteoarthritic changes."

6.2A 23 September 2015 orthopaedic report confirmed a "one year history of left sided wrist pain...probably point towards something like ECU tendonitis...modification of his risk factors for a time may settle the problem. During this period the claimant was working in a cold chicken factory.

6.3 In a report dated 3 November 2015 ACU tendonitis was diagnosed and the claimant injected with medication/steroids. in a further report modification/time off was suggested.

6.4 The claimant was signed off with joint wrist pain in 2015 and 2016.

6.5 By February 2016 the claimant was advised to modify his activity and a splint was provided. Surgical treatment was not needed.

RESERVED

- 6.6 In a physiotherapy referral reference was made to bilateral shoulder pain and left wrist pain that had developed 18 months previously diagnosed as tendonitis of wrist and shoulders. On the 7 April 2016 the claimant was signed off with tendonitis wrist and painful bilateral shoulder with a requirement of workplace adaptations including unfit for heavy lifting, not to lift weights more than 5kg and avoid working above shoulder height.
- 6.7 A fit note was issued on the 19 May 2016 referring to a physiotherapy appointment on 3 June 2016, a course of physiotherapy and a time scale of 2-3 months in which to improve. The 2 June 2016 fit note referenced lower back pain, avoid heavy lifting, prolonged standing, prolonged sitting, working in confined spaces, awkward positions and "must have time to mobilise and exercise lower back."
- 6.8 On the 5 October 2016 the DWP confirmed the claimant had Tenosynovitis loss of power or function assessed at 3% from 16 April 2014 to 27 March 2017 the date of onset being 1 January 2014.
- 6.9 In a fit note dated 19 February 2018 the claimant was signed off with lower back pain and adjustments were suggested, including unfit for heavy lifting and working with arms above shoulder height with regular 5 minute breaks.
- 6.10 A number of fit notes were issued during 2017 to 2018 referenced neck pain, shoulder pain, lower back pain arm and wrist pain with adjustments including lighter duties.
- 6.11 In a referral for an MRI scan reference was made to the claimant's condition "getting worse" and "not settling with physio." The MRI revealed "marked spondylosis from C5 to C7, with loss of disk spacing and marginal osteophytes. At level C5/C6 there is a posterior central and right paracentral disk protrusion...causing stenosis of the right neural foramen and probably C6 root compression."
- 6.12 The claimant was referred to a consultant spinal surgeon and a report dated 7 June 2017 reference "the main pain is in the neck, radiating to the arms, mainly to the shoulders, occasionally going to the hand and affecting the fingers...a disk prolapse C5/C6."
- 6.13 Nerve conduction studies were carried out and in a letter dated 11 September 2017 confirmed they showed "mild bilateral carpal tunnel syndrome...chronic partial denervation of the right left biceps...with chronic C6 radiculopathy so it is a bit of a double crush, a little bit coming from the neck and a little bit coming from the carpal tunnel. Clinically, this pain down the arms and numbness comes and goes and is not there all of the time..."
- 6.14 In a report from the Walton Centre Clinic dated 23 May 2018 referenced the pain in the claimant's shoulders and arms for over 2 years, dexterity issues, the occasional taking of anti-inflammatories and confirmed the claimant "is

RESERVED

managing his symptoms well at the moment...surgery would not be advantageous.”

6.15 There are no GP or hospital medical records for the period 13 May 2021 to 26 September 2021.

6.16 In an occupational health report dated 23 January 2023 there is a reference to spinal stenosis “that put restrictions on his work from May 2021 to March 2022. At that time it was noted that he was not fit for heavy manual handling and that he would be restricted in what he could do as far as his upper limbs were concerned.”

7. I am satisfied on the balance of probabilities that the during the period in question, 13 May 2021 to 26 September 2021, the claimant managed his long standing medical condition as best as he could. His pain varies from day-to-day and that had been the situation for a number of years. It intensifies in the cold, and can be made worse if he carries heavy items. The claimant uses over the counter medication such as anti-inflammatory drugs and gels, and has a coping strategy which includes avoiding lifting heavy items and working over shoulder height..

8. The respondent relies on two occupational health reports dated 3 August and 17 September 2021. Occupational health found the claimant fit for work with no adjustments. In the first report occupational health advised the claimant to “**continue with the guided self-management**, exercises and staying active...work has been proven to help as a rehabilitation technique and remaining and staying at work will not only help to build up his ability to return to normal activity and movement will help strengthen his back, neck and shoulder...any change of task will be down to discussion between manager...**pain symptoms may persist there is no medical evidence to suggest work will adversely affect his condition...Andras must continue to self-manage any ongoing pain symptoms present with the required pain relief**” [my emphasis]. Reference was made to back, neck, shoulder and arm symptoms with a duration of less than 12 months and that “Andras reports he is able to undertake the majority of his activities of daily living[sic] but report he may require assistance with some tasks depending on his symptoms.”

9. The information provided by the claimant to occupational health, who had not physically examined him and appeared not to have accessed his medical records, did not contradict the evidence given at this hearing. However, I query how occupational health could conclude in the first report that the duration of the medical condition was less than 12-months given the medical history and this raises a question mark over the report generally, taking into account it was prepared by a physiotherapist over the telephone in direct contrast to the reports referenced above. It is clear that the claimant’s medical condition continued over a period of years which he was self-managing by the relevant period in this litigation, to some extent unsuccessfully when he was feeling pain and his condition was affecting day-to-day activities, for example, needing help to put on clothes on a number of occasions and being unable to lift heavy objects at work.

RESERVED

10. By the time of the second occupational health report there is a reference to the claimant having “recently” seen his GP who “suggests he has spinal stenosis.” The relevant GP record was not disclosed by the claimant. The report confirmed that the **“rotation of tasks and micro breaks should be continued** as stated in the report dated August 2021 and **should aid to reducing Andra’s symptoms and improve his ability to complete daily tasks”** [my emphasis]. On this occasion the duration of the medical condition was found to be 12 months or longer.

11. I am satisfied on the balance of probabilities the claimant has a medical condition that adversely affects the day-to-day activity of lifting heavy objects such as boxes, which has been ongoing for a number of years possibly going back to 2014. He is over 60 years old and there is no medical evidence that the condition improved by 13 May 2021 through to 26 September 2021. The pain he suffers is variable and can be affected by the cold, carrying heavy objects and so on. When he is in pain he finds it difficult to put on a jacket and needs help, put on socks, take out his wallet from his coat, carry heavier shopping bags, take larger pans off the stove, open jars, cans and soft drink bottles and cannot apply painkiller gel without assistance. The shoulder pain can affect his sleep when he lies on his side. Sometimes the claimant cannot take ibuprofen because it hurts his stomach and is limited to using the anti-inflammatory gel. He does his best to manage his symptoms as he wants to avoid having an operation on his back referenced in the Walton Centre report provided by Mr Piggott, consultant surgeon, on the 23 May 2018.

Law and conclusion

3 S.6(1) of the Equality Act 2010 (“EqA”) provides that a person, ‘P’, has a ‘disability’ if he or she ‘has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.’

4 Schedule 1 of the EqA 2010 sets out factors to be considered in determining whether a person has a disability. S.6(5) of the EqA 2010 provides for the issuing of guidance about matters to be taken into account in deciding any question for the purposes of determining who has a disability. When considering whether a person is disabled for the purposes of the EqA regard should be had to Schedule 1 (‘Disability: supplementary provisions’) and to the Equality Act (Disability) Regulations 2010, and the ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ under 6(5) of the Equality Act 2010 should be taken into account.

5 The relevant time to consider whether a person was disabled is the date of the alleged discrimination; see the well-known case of McDougall v Richmond Adult Community College [2008] IRLR 227, [2008] ICR 431.

6 Paragraph 5(1) of Schedule 1 to the EqA provides that 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 measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, *likely* means

RESERVED

'could well happen' — the well-known case of Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) [2009] ICR 1056, HL In assessing whether there is a substantial adverse effect on the person's ability to carry out normal day-to-day activities, any medical treatment which reduces or extinguishes the effects of the impairment should be ignored. medical treatment and measures have not been taken to treat or correct her condition. This is relevant to Mr Toth as there has been medical treatment over the years, and he has set in hand measures to try and self-manage his condition without which the adverse effect on his day-to-day would be more regular and much worse.

7 For any claim to succeed, the burden is on the claimant to show, on the balance of probabilities, something an 'impairment' whether it is a mental or physical condition. In the case of Millar v ICR [2005] SLT 1074, [2006] IRLR 112, the Court of Session held that a physical impairment can be established without establishing causation and, in particular, without being shown to have its origins in any particular illness. The focus should be on what the claimant cannot do. In Mr Toth's case causation has been established and I am satisfied that a person of the claimant's age with long standing "pain is in the neck, radiating to the arms, shoulders, occasionally going to the hand and affecting the fingers...a disk prolapse C5/C6, mild bilateral carpal tunnel syndrome...chronic partial denervation of the right left biceps...with chronic C6 radiculopathy so it is a bit of a double crush, a little bit coming from the neck and a little bit coming from the carpal tunnel, pain down the arms and numbness comes and goes and is not there all of the time" (see the reports above) has resulted in the claimant experiencing an adverse effect on day-to-day activities as set out above. In short, his medical conditions cumulatively produce the substantial adverse effect specified in legislation.

8 Goodwin v Patent Office [1999] ICR 302, EAT, the EAT included the following which is relevant to Mr Toth:

'What the Act is concerned with is an impairment on the person's ability to carry out activities. **The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired.** Thus, for example, a person may be able to cook, but only with the greatest difficulty. **In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves.** Thus a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be "yes", yet their ability to lead a "normal" life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be "no". Those might be regarded as day-to-day activities contemplated by the legislation, and that person's ability to carry them out would clearly be regarded as adversely affected.' Taking this guidance

RESERVED

into account, I concluded that Mr Toth had adjusted his life and circumstances through self-management.

9 Appendix 1 to the EHRC Employment Code states account should be taken not only of evidence that a person is performing a particular activity less well but also of evidence that ‘a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation’ (our stress) — para 9. This was the case for Mr Roth, for example, in respect of carrying heavy objects in particular. The focus must be on the extent to which the impairment adversely affects the claimant’s ability to carry out normal day-to-day activities. Substantial is defined in S.212(1) EqA as meaning ‘more than minor or trivial’. In determining whether an adverse effect is substantial, the tribunal must compare the claimant’s ability to carry out normal day-to-day activities with the ability he would have if not impaired. Appendix 1 to the EHRC Employment Code states: ‘The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people’ — para 8. This should not be interpreted as meaning that in order to assess whether a particular effect is substantial, a comparison should be made with people of ‘normal’ ability — which would be very difficult to ascertain.

10 In Paterson V. Commissioner of Police of The Metropolis [2007] ICR 1522, EAT a dyslexic police officer wanted adjustments to be made under the DDA in respect of his application for promotion. In comparison with ‘the ordinary average norm of the population as a whole’, the tribunal considered that the dyslexia had no more than a minor or trivial impact on his day-to-day activities. Allowing P’s appeal, the EAT (the President of the EAT, Mr Justice Elias, presiding) emphasised that, in assessing an impairment’s effect on a claimant’s ability to carry out normal day-to-day activities, a tribunal should not compare what the claimant can do with what the average person can do. Rather, the correct comparison is between what the claimant can do and what he or she could do without the impairment. Referring to what is now para B1 of the Guidance, Elias P observed that in order to be substantial ‘**the effect must fall outwith the normal range of effects that one might expect from a cross section of the population**’, but ‘**when assessing the effect, the comparison is not with the population at large... what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired**’ [my emphasis].

Conclusion – applying the law to the facts.

11 The respondent has raised an issue with the claimant’s impact statement which clearly relates to other proceedings and not this case. Mr Sanders is correct. The claimant has had and continuous to have numerous claims in the Employment Tribunal and relies on an impact statement produced in an earlier claim without updating it or providing medical records covering the relevant period. This is not acceptable, and the claimant should ensure he complies with all case management orders in the future for all of the cases he has in the Employment Tribunal. However, taking into account the Equal Treatment Bench Book and 22 April 2020 Presidential Guidance on Vulnerable Witnesses I concluded that the claimant’s inability to

RESERVED

understand and read has resulted in short cuts being made that should not go against the claimant in this instance. I was satisfied on hearing oral evidence from the claimant that he was telling the truth about his medical conditions, his evidence was credible and largely supported by the historical medical documents produced and referenced above, the contents of which I do not intend to repeat.

12 The claimant relies on two earlier Tribunal decisions, the first by Judge Davies on the 12 July 2018 which is a judgment only with no reasons, the second a reserved judgment and reasons by Judge Ryan sent to the parties on the 6 April 2021. I accepted Mr Sander's submission that no reliance can be placed on the 12 July 2018 judgment as there are no reasons and the disability relied upon is unspecified. The same cannot be said of the second judgment finding the claimant was disabled with the medical conditions he relies on in the present case, albeit the relevant period was earlier than the period before me today. Mr Sander's accepted it was closer in time but argued Judge Ryan had no clinical assessment before him and we do not know the basis on which the claimant gave his evidence. I concluded that whilst I was not bound by the judgment reached and did not rely on Judge Ryan's findings of facts when I reached my conclusions based on the evidence before me including the claimant's oral evidence, I concur with Judge Ryan's final sentence "ultimately it comes down to my believing the claimant's evidence." I also found this to be the case, independently assessed, without any reference to Judge Ryan.

13 With reference to the first issue, namely, did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is 13 May 2021 to 26 September 2021 I found that he was disabled. He had the physical impairments of Tendonitis in wrist, Polyarthritis in shoulder and Cervicalgia in the neck. Mr Sanders submitted that the Culina Group letter dated 23 March 2023 had no mention of the claimant's conditions other than cervical spinal stenosis (Cervicalgia) and the medical evidence disclosed was not enough to show the claimant was suffering from the relevant conditions in 2021. I did not agree, having taken into account all of the medical evidence in addition to the claimant's oral evidence and was satisfied the claimant had met the burden of proving he was disabled in accordance with section 6 of the EqA.

14 With reference to the second issue, namely, did it have a substantial adverse effect on his ability to carry out day-to-day activities, on the balance of probabilities I found that cumulatively the physical impairments did as recorded in the findings of facts above. The test is whether an adverse effect is 'substantial' in the light of the statutory definition: the Guidance and Code are supplementary to this. Section 212(1) EqA 2010 defines it as being something which is "*more than minor or trivial*". The hurdle is not a high one, and the claimant's evidence on this issue was found to be credible. In terms of establishing whether the effect of an impairment is substantial, the Guidance, paragraphs B2-B17 sets out several factors to be taken into consideration. In cases where it is not clear whether the effect of an impairment is substantial, the Guidance suggests a number of factors to be considered (see paras B1– B17). These include the time taken by the person to carry out an activity (para B2) and the way in which he or she carries it out (para B3). A comparison is to be

made with the time or manner that might be expected if the person did not have the impairment.

15 Another factor to be taken into account, relevant to the claimant's claim, is 'how far a person can reasonably be expected to modify his behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. This was not the case for Mr Toth, who even with his coping or avoidance strategy, there were still adverse effects on the carrying out of normal day-to-day activities' when he was in pain— para B7 of the Guidance.

16 The Guidance states that it would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person (see para B9). In Goodwin v Patent Office (above) the EAT cautioned against accepting claimants' assertions that they can cope with normal daily activities when in fact they may simply have developed avoidance or coping strategies. This is relevant to Mr Toth as is paragraph B10 which states that if it is possible a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment. The Guidance gives the example of someone who has dyslexia and whose coping strategies cease to work when he or she is under stress. In Mr Toth's case he complained to the respondent's occupational health that he was experiencing "a gradual flare up to his pain...worsening of symptoms" since May 2021 when he started working which included lifting heavy items and above the shoulder lifting.

17 With reference to the third issue, namely, if not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment, I found that the claimant did. He took over the counter medication and took steps, such as avoiding carrying heavy shopping bags and exercising, to self-manage the condition. I take the view that the claimant's medical condition had an adverse effect on day-to-day activities with or without the treatment or other measures and the claimant has discharged the burden of proof in this respect.

18 With reference to the final issue, namely, were the effects of the impairment long-term, I found that they were. They had lasted at least 12 months and were they likely to recur for the foreseeable future. The claimant has produced an occupational health report to his present employer dated 27 June 2023 regarding adjustments and "his health issues remaining much the same."

19 In conclusion, the claimant have a disability as defined in section 6 of the Equality Act 2010 between the relevant period 13 May 2021 to 26 September 2021 He had the physical impairments: Tendonitis in wrist, Polyarthritis in shoulder and Cervicalgia in the neck.

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**Case No. 2401698/2022
2401700/2022**

Employment Judge Shotter 9.10.23

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON
16 October 2023

FOR THE SECRETARY OF THE TRIBUNALS