



EMPLOYMENT TRIBUNALS

Claimant

Mr A Cain

Respondent

Crossroads Group Limited

v

Heard at: Sheffield

On: Tuesday 5 September 2023

Before: Employment Judge A James

Representation

For the Claimant: In person

For the Respondent: Mr R Lassey, counsel

JUDGMENT

(1) The claimant had a disability for the purposes of these proceedings from 15 June 2022 onwards (s.6 and Schedule 1 Equality Act 2010).

REASONS

The issues

1. At a preliminary hearing for case management purposes on 20 June 2023, this hearing was listed to determine whether the claimant had a disability during his employment by the respondent and if so from what date. In order to determine that issue, the tribunal needs to answer the following questions:
 - 1.1. Did the claimant have a physical or mental impairment? The claimant relies on the physical impairment of Inguinal hernia, prolapsed disc and nerve damage to the back.
 - 1.2. Did the impairments have a substantial adverse effect on his ability to carry out day-to-day activities?
 - 1.3. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
 - 1.4. Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

1.5. Were the effects of the impairment long-term? The Tribunal will decide:

1.5.1. did they last at least 12 months, or were they likely to last at least 12 months?

1.5.2. if not, were they likely to recur?

The hearing

2. During the hearing, evidence was heard from the claimant. Submissions were then heard from the claimant and Mr Lassey. The tribunal adjourned to make a decision. The decision was then delivered orally at the hearing. Written reasons were requested by the respondent, hence this document. Separate case management orders have been issued with regard to the listing of the final hearing and related case management directions.

Findings of fact

3. The claimant started work for the respondent on 18 April 2017 in the role of Technician.

4. The claimant suffered a hernia injury in December 2021. The claimant consulted with his GP on 29 December 2021. The GP notes record:

Pulled something in stomach while at work, no better after resting over holiday period Pain in lower bowel and groin. Can feel lump under the skin, dose to groin right side. Feels quite firm Sometimes feeling nauseous. No vomiting. BO ok. Someone suggested hernia

5. The injury continued to impact on the claimant over the following months. The following extracts are taken from the claimant's witness statement, which was not substantially challenged by Mr Lassey, although the tribunal accepts Mr Lassey's argument that what the claimant states looking back more than 12 month after the event may have been influenced by subsequent events and needs to be treated with some caution. The statement records:

5.1. December 2021 - I had a lot of trouble picking things up from the floor due to the discomfort and pain from the hernia injury. I also had a lot of trouble getting dressed, putting on socks and shoes due to the difficulties in bending/squatting. Bending to wash below the waist in the shower was painful and difficult. It would take me longer to be able to do these tasks. Stepping up large steps, for instance some lorries with a high ground clearance was difficult and caused extra discomfort.

5.2. February 2022 - The pain and discomfort that I was experiencing due to the hernia injury increased and I started taking pain relief medication. I had stopped tying my shoelaces as it was too difficult to do. Sitting up right at the dinner table also became painful at this point. Medication: Paracetamol, normal shop bought as and when needed.

5.3. March 2022 - I started clock watching with regards to pain medication as I was struggling to make it to 4 hours, the pain was almost constant at this point. I started having trouble with tasks such as putting my 7 year old to bed and also bathing her. I started to get pain in my right hip. Walking any distance and standing was now becoming difficult. Preparing meals was

now difficult due to the discomfort and pain I was experiencing with hernia injury and the pain that had started in my hip. I had a lot of trouble bending and reaching and would require assistance in the kitchen when preparing food. I was unable to reach above head height as this caused a lot of pain in my right hip and right thigh. Medication: Paracetamol and Ibuprofen (shop bought) every 4 hours.

5.4. April 2022 - The pain in my hip increased and was now spreading to my right thigh. This was now a constant pain rather than just reaching and stretching. Sleep had become very difficult due to the pain and discomfort that I was in during the night. I started to sleep with a pillow between my legs to try and alleviate the pain I was experiencing whilst being laid down. Walking up and down stairs was also now becoming very difficult due to the pain in my right hip and thigh. Medication: as previously stated.

5.5. May 2022 - Sitting at the dining table had now become almost impossible as I was in far too much pain when trying to sit upright. Getting up steps was extremely painful. My sleep had now become very disturbed, and I would have a lot of sleepless night because of the pain that I was in. Medication: as previously stated.

5.6. June 2022 - The pain that I was experiencing in my right hip and thigh had now progressed further to my right calf and foot. If I tried to pick up anything from the floor, the pain was so intense that it would make me sweat. At the end of June, I was signed off work as I was in far too much pain to continue. At this point I was unable to drive due to the pain that I was experiencing. I was now experiencing numbness in my right shin and foot. Medication: Co-codamol and Ibuprofen (max strength over the counter at the pharmacist only) every four hours. Amitriptyline once a day in the evening. Started attending Physio appointments. Expectation – told look about 12 months after to make a full recovery. Have been back to doctors and hospital regarding it. Told healing as it should. Pain due to muscle being sliced through. Not going to explode outwards.

6. In oral evidence before the tribunal, the claimant said that he told Chris Heeks, the Health and Safety Manager, in or about February 2022 that he would need surgery, and the symptoms would be likely to persist for 12 to 18 months thereafter. Mr Lassey urged the tribunal to reject that evidence because it was not in the claimant's disability impact statement. The claimant notes that the claimant is not legally represented. On the balance of probabilities, the tribunal finds that words to that effect were used by the claimant in conversation with Mr Heeks around that time. Those words reflected the claimant's understanding as to how long the symptoms were likely to persist.
7. As a result of the ongoing symptoms, the claimant was asking for amended duties in February 2022 and, on his account, after that too. It will be for the tribunal at the final hearing to determine exactly when requests were made, having heard full evidence. This tribunal notes however that it is in any event a matter of record that MED3s were issued by the claimant's GP which requested amended duties in April, May and November 2022 – see below.
8. The claimant was sent for an ultrasound scan at the Hallamshire Hospital in Sheffield. That took place towards the end of March 2022. The claimant was informed of the results on 24 March 2022 in a text message from his GP which reads:

Dear Mr Cain, Your recent ultrasound scan confirms a hernia, containing fat not bowel. This doesn't require any action at present regards

Dr Claire Nash Sothall Medical Centre

9. The claimant's symptoms had by that stage worsened and the claimant disagreed that no action was required. On 1 April 2022 the claimant had a telephone consultation with his GP. The notes record:

USS confirmed inguinal hernia, pt struggling with ongoing symptoms - persistent pain, on amended duties at work, struggling with sleep due to pain from hernia. Works as a mechanic at Volvo. Keen for surgery. Plan - Refer for inguinal surgical repair - meets threshold. med3 for amended duties eMED3 (2010) new statement issued, may be fit for work.
10. The claimant was referred for surgery at the beginning of April 2022. He attended Doncaster Royal Infirmary in or about May 2022. The surgeon he saw tried to push the hernia back into place. That was an extremely painful procedure which unfortunately, despite the pain caused, was unsuccessful. It was decided that the claimant would require surgery. The claimant agreed to travel, in order to obtain the first available appointment. A date was set for 22 September 2022.
11. On 31 May 2022 the claimant requested a further MED3, advising that he was fit for work with amended duties.
12. The claimant saw his GP again on 15 June 2022 when the symptoms were worse. The GP notes record:

Rt sided hip/buttock pain and radiating to thigh. Has had dx of Rt sided inguinal hernia, rtp pain started 3/52 - says feels like sciatica pain radiating into buttock, down thigh into calf. Taking Paracetamol and Ibuprofen ad hoc. Needs stronger analgesia. Has pre-op assessment in 2/52 for inguinal hernia repair.

Examination Walking with antalgic. Looks and feels well, guarding when sitting. Did not examine hernia - pt says no change in size or colour, is not retractable. Back – no boney tenderness to lumbar spine. Worse pain starts upper Rt buttock radiating lateral thigh to calf. No swelling to leg. No altered sensation to foot.
13. A MED3 was issued, confirming that the claimant was not fit for work, on 5 July 2022. A further MED3 was issued on 8 November 2022, advising that the claimant may be fit to work on a phased return and amended duties.
14. The claimant had surgery on the hernia on 22 September 2022. That improved the claimant's symptoms but did not resolve them. The claimant is still on significant pain relief. By 24 March 2023, he was taking up to 55mg of Amitriptyline per day, Zaiapan, and Co-codamol. He commenced on that medication on 5 July 2022. By March 2022 he was taking paracetamol and Ibuprofen every 4 hours.
15. The claimant resigned on 28 November 2022. He subsequently commenced Acas Early Conciliation and submitted this claim.

Relevant law

16. The relevant parts of Section 6 Equality Act 2010 provide:
- (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.*
 - (2) *A reference to a disabled person is a reference to a person who has a disability.*
 -
 - (5) *A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).*
 - (6) *Schedule 1 (disability: supplementary provision) has effect.*
17. Guidance was issued under s.6(5) in April 2011 by the Office for Disability Issues. Paragraph C3 states: *'likely', should be interpreted as meaning that it could well happen.*
18. Paragraph C4 states:
- In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).*
19. This reflects the decision of the EWCA in *Richmond Adult Community College v McDougal* [2008] ICR 431. The Head note, which it is not disputed correctly sets out the principle in the case, states:
- The DDA makes unlawful discriminatory acts of employers when making decisions about employees. Employers must not discriminate against employees who are disabled within the meaning of the Act, but they must first decide whether the employee is disabled within the meaning of the Act. They do that by applying a series of tests which, in an appropriate case, includes that in para. 2(2) of Schedule 1 to the DDA, which involves a prediction on the available evidence. That decision, which may later form the basis for a complaint of unlawful discrimination, is inevitably taken on the basis of the evidence available at that time. The employment tribunal should also make its judgment as to whether unlawful discrimination by the employer has been established on the basis of evidence as to the circumstances prevailing at the time of that decision.*

Conclusions

20. In arriving at the following conclusions on the issues before the Tribunal, the law has been applied to the facts found above. The issues are dealt with in turn.

Issue 1.1 - did the claimant have a physical or mental impairment?

21. The claimant relies on the physical impairments of Inguinal hernia, prolapsed disc and nerve damage to the back, leading to corrective surgery. It is not disputed that he had that condition.

Issue 1.2 - did the impairments have a substantial adverse effect on his ability to carry out day-to-day activities?

22. The tribunal refers to the contents of the claimant's witness statement above. Whilst accepting the logic of Mr Lassey's submission that the tribunal should treat the contents of the statement with some caution, the tribunal is satisfied that by at least 1 April 2022, the effects on the claimant's ability to carry out normal day-to-day activities was substantial. That is corroborated by the contents of the GP records dated 1 April 2022, and the fact that the GP agreed, as a result of those symptoms, to refer the claimant for surgery.
23. As for the question of medical treatment (issues 1.3 to 1.4), there was no expert evidence on that point. However, the tribunal takes judicial notice of the significant pain relieving medication that the claimant was taking for the condition by March 2022, increasing from July 2022 onwards, which the GP records show was still being prescribed on 24 March 2023. Inevitably, the symptoms would have been worse, if that medication had not been prescribed and taken. As expected, the surgery itself did not immediately cure the symptoms.

Issue 1.5 - were the effects of the impairment long-term? The Tribunal will decide: did they last at least 12 months, or were they likely to last at least 12 months? [Note - this is not a case where the tribunal needs to consider whether the effects were likely to recur]

24. Since the claimant's employment ended in November 2022, this is not a case where the substantial adverse effects had lasted at least 12 months by the termination date. It is therefore necessary to consider whether the symptoms were likely to last at least 12 months, and if so, from what date that would or should have been apparent to the respondent.
25. Noting the contents of the GP records, and in particular, those dated 1 April 2022, the further MED3 issued on 31 May 2022, and the contents of the GP notes dated 15 June 2022, when the symptoms were worse, the tribunal concludes that it was likely that the substantial adverse effects (which commenced on or before 1 April 2022) would last for 12 months or more, from on or about 15 June 2022 onwards. Had the right questions been asked at that time, it would have been apparent that the symptoms had gradually worsened over a period of about six months; those symptoms required surgery, which was not due to take place until the end of September 2022; and thereafter, it would still take some 12 to 18 months for the symptoms to improve. The surgery was not going to lead to an instant cure; and the symptoms suffered by the claimant were likely to continue after the surgery, for some considerable time. On that basis, the substantial adverse effects of the physical impairment were likely to last for 12 months or more. Put another way, it would have been apparent, had the right questions been asked at that time, that such a state of affairs 'could well happen'.
26. In reaching that conclusion, the tribunal has noted the principle set out in the *McDougal* case, which is reflected in the Guidance at paragraph C4. The

tribunal has been careful to take into account only the evidence leading up to that point, not the medical or witness evidence after that date.

27. Mr Lassey submitted on behalf of the respondent that it is necessary, in order to determine the disability issue, to decide when the alleged discrimination took place. The Judge respectfully disagrees with that submission. It may be, in some discrimination claims, that the dates of the alleged acts, are obvious - for example, discriminatory remarks on a particular date, which could amount to harassment related to a protected characteristic.
28. Sometimes however, the date that an act occurred - or, in the case of a failure to make reasonable adjustments, an omission occurred - is much more difficult to determine and highly fact-sensitive. The Judge did not consider it was the job of the tribunal at this hearing to determine exactly when any omissions occurred in relation to the reasonable adjustments claim. There appears to have been an omission in about January/February 2022. Since that pre-dates the disability, that in itself is not actionable, although evidence in relation to that is potentially relevant.
29. As to the question as to whether not there were any further omissions to make reasonable adjustments between January/February and the end of November 2022, the date of termination of the claimant's employment, that is a highly fact-sensitive question. On the claimant's pleaded case, his resignation resulted from him being required to carry out duties which it had been agreed, (on the claimant's pleaded case), the day before, that he should not be required to undertake because of his disability.
30. Mr Lassey submitted that the danger of me making a finding as to when the claimant had a disability, without determining exactly when the omission(s) occurred, is that the claimant will try and retrospectively fit the facts to suit that date. In relation to the reasonable adjustments claim, the tribunal does not accept that is something that the claimant will be able to do. The requests made by the claimant will, to a large extent, be a matter of record - for example, the fit notes. The claimant submitted a grievance, and documentation should be readily available in relation to the matters about which the claimant complained. The claimant has already provided further particulars, and claims can be identified from those particulars.
31. The tribunal considers that the question as to when the omission or omissions occurred in relation to the reasonable adjustments requested is properly to be determined by the tribunal at the final hearing of this claim, having heard full evidence and submissions on that point.
32. Mr Lassey also urged the tribunal to conclude that since the first request was made in about January/February 2022, and there is no concept of a 'continuing omission', that the claimant's reasonable adjustments claim could not succeed because he did not have a disability by that stage and the duty to make adjustments could not have arisen.
33. The tribunal accepts that Mr Lassey could be right, that there was only one failure to make adjustments following the request in or but February 2022; and there may also be time limit issues arising as a result of today's decision. Time limits are a live issue in the case and that is reflected in the list of issues. That issue is properly to be determined at the final hearing. As is the question as to when any omissions occurred. In the light of the MED3s issued in April, May

and November 2022, it is clearly open to the tribunal to find in due course that there was more than one omission. The answer to that question is properly to be determined in due course.

34. The tribunal notes that the claimant is in any event pursuing s.15 Equality Act 2010 claims, with the dates of the incidents being 27 June 2022, and the date of the alleged constructive dismissal. The decision on the disability issue, means that the claimant had a disability by the time of those incidents.

Conclusion

35. The claimant had a disability for the purposes of section 6 Equality Act 2010 from 15 June 2022 onwards. A final hearing has been listed to determine whether the claimant's claims succeed or not.

Employment Judge James
North East Region

Dated 12 September 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 shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.