



# EMPLOYMENT TRIBUNALS

**Claimant** Mr D Tafner

**Respondent** Alumasc Building Products Limited

**Heard at:** Exeter

**On:** 13,14 &15 November 2023

**Before:**

**Employment Judge** Goraj

(sitting alone with the consent of the parties)

**Representation**

**The Claimant:** in person.

**The Respondent:** Mr P Bownes, solicitor

## WRITTEN REASONS

**A SUMMARY JUDGMENT** having been sent to the parties and written reasons having been requested (limited only to the preliminary issue of whether the claimant was at the relevant time a disabled person for the purposes of section 6 of the Equality Act 2010) at the conclusion of the oral hearing on 15 November 2023, the following reasons are provided in accordance with Rule 62 (3) of the Employment Tribunals Rules of Procedure 2013: -

## REASONS

### BACKGROUND

1. By a claim form which was presented to the Tribunals on 11 October 2022, the claimant brought a complaint of disability discrimination in respect of his dismissal - pages 4 – 15 of the agreed hearing bundle (“the bundle”).

2. The claimant's ACAS Early Conciliation certificate records that the claimant's Early Conciliation notification was received on 31 August 2022 and that the certificate was issued on 10 October 2022.
3. The claimant was employed by the respondent as an Area Technical Manager between 2 November 2021 and 15 July 2022.
4. The alleged discriminatory act, the claimant's dismissal, occurred on 15 July 2022, (albeit that the decision to dismiss him was taken/communicated on 17 June 2022).
5. The claimant's claims (as confirmed at the hearing) are of direct disability discrimination (section 13) and discrimination arising from disability (section 15) of the Equality Act 2010 ("the 2010 Act"). The impairment upon which the claimant relies for the purposes of his disability discrimination claim is osteoarthritis.
6. The allegations are denied by the respondent including that the claimant met any parts of the definition of disability discrimination for the purposes of section 6 of the 2010 Act and / or that it had the requisite knowledge (actual or constructive thereof) of any disability.
7. After consultation with the parties, the Tribunal decided to deal with the issue of disability as a preliminary matter at the commencement of the hearing as it was potentially determinative of the case, disability discrimination being the claimant's only claim. It was further agreed that the question of knowledge would however be considered as part of any liability hearing on which issue the Tribunal subsequently found in the claimant's favour. The respondent confirmed at the conclusion of the hearing that it was not requesting written reasons in respect of the Tribunal's finding relating to knowledge (or in respect of liability).
8. The Tribunal heard oral evidence from the claimant, including by way of his impact statement. The Tribunal also had regard to the relevant documents relied upon by the parties relating to the disability issue contained in the bundle. The Tribunal further had regard to the case law and associated guidance produced by the respondent together with the further provisions as referred to below.

## **FINDINGS OF FACT**

### **The medical evidence (prior to dismissal)**

9. The GP medical records provided by the claimant (page 126 – 146 of the bundle) include the following entries :-

- (1) That the claimant first consulted his GP regarding ongoing pain in his groin and associated leg pain in January 2021 (page 140 of the bundle).
- (2) In March 2021 the claimant reported ongoing pain and difficulties including that he was walking with a limp at times (page 140 of the bundle).
- (3) In June 2021 (page 138 of the bundle) it is recorded that the claimant was experiencing hip pain which was suggestive of osteoarthritis.
- (4) There are further entries in January 2022 including an entry on 10 January 2022 (page 137 of the bundle) which refers to a clinical history of right groin pain radiating to the thigh with altered gait and "concern re early degeneration /OA". It was further reported that an x ray had shown a little subchondral sclerosis / degenerative change but otherwise normal bone and joint appearances.
- (5) On 25 February 2022 (page 137) it is reported that the claimant was experiencing pain over the lateral aspect of his hip together with pain in his knee and leg. It was further recorded that the claimant was struggling to get out of his car, that he was walking with his legs laterally rotated and had an antalgic gait. There is a recorded diagnosis of osteoarthritis of the hip together with a comment that the Xrays showed mild osteoarthritis with poor biomechanics.
- (6) There is a further entry in March 2022, at page 136 of the bundle, in which the claimant reported ongoing concerns with regard to right groin and inner thigh pain relating to walking and descending stairs. It is also recorded that the claimant had very limited right hip rotation and pain on hip flexion. There is an associated entry on 16 March page 135 relating to a referral to physiotherapy.

#### **Other medical evidence**

10. There is an entry in the claimant's GP notes on 26 September 2022 (page 135 of the bundle) (which postdates the termination of the claimant's employment on 15 July 2022 ), recording the claimant's account of difficulties experienced in his in day-to-day life. The entry also records that the claimant was seen by a physiotherapist in February 2022 when he was advised regarding exercises and to consider the need for steroid injections and possible future hip replacement if his hip deteriorated.

### **The letters dated 8 March 2023**

11. There are two “to whom it may concern” letters from the claimant’s GP practice dated 8 March 2023 in the bundle. In the first letter (at page 160 of the bundle) it is stated that the claimant was first recorded as having osteoarthritis in June 2021 and that an Xray of the claimant’s hip on 10 January 2022 confirmed that there was evidence in keeping with osteoarthritis.
12. The accompanying letter (at page 161 of the bundle) confirms the diagnosis of osteoarthritis in January 2022. The letter further states that since such diagnosis the claimant had been seen multiple times by their in-house physiotherapists and GPs complaining of worsening pain. The letter also lists the symptoms reported by the claimant, talks about the progressive nature of the claimant’s pain and states that it was likely that it would continue to progress in the longer term. The letter further states that the claimant was being considered for steroid injections into his hip and that he may require a hip replacement in the future.

### **The physiotherapy reports**

13. There are two physiotherapy reports in the bundle relating to the relevant period. The first one, which is dated 16 June 2021, is at page 164 of the bundle. The report records that after referral on 9 March 2021 the claimant had had intermittent engagement with physiotherapy until June 2021 at which time his symptoms had improved. There is a further letter dated 18 August 2022 which records that the claimant was referred again for physiotherapy on 16 March 2022, at which time he presented with pain which worsened with static positions and a capsular restriction to movement and that there was a subsequent period of treatment between 7 July 2022 and 18 August 2022 (page 163 of the bundle).

### **The effect on day-to-day activities**

14. The claimant described in his evidence to the Tribunal (in his impact statement at pages 43- 44 of the bundle and in his oral evidence) the alleged effects of his alleged osteoarthritis (including by reason of the associated pain/ restricted movement) on his day-to-day activities which he contended he had experienced on an ongoing/ increased basis from the end of 2021 / the beginning of 2022. These included the inability “to hold on” when needing to go to the toilet, only being able to walk for 10 / 15 minutes at a time, his restricted ability to engage in play with his young children (including the difficulties experienced by him getting up from the floor during play). The claimant also gave evidence regarding the difficulties which he experienced when standing for periods such as when queuing for shopping, when bending down,

for example to take hot food out of the oven and also doing DIY (because of his inability to steady himself on both feet). The claimant also gave evidence of the difficulties which he had experienced when dressing including when putting on his underwear, socks and shoes and the required assistance from his wife.

15. The Tribunal is satisfied having weighed the evidence, that the claimant first experienced pain in his hip/ leg and associated difficulties such as getting in and out of the car in early 2021. The Tribunal is further satisfied that the claimant experienced pain and associated difficulties by reason of osteoarthritis on an ongoing and increasing basis from February 2022 in respect of the activities identified at paragraph 14 above. When reaching this conclusion, the Tribunal accepted the claimant's evidence regarding the difficulties experienced with regard to the above-mentioned activities during such period. Such evidence was consistent with the claimant's medical records including the entries in his GP notes for February 2022 and March 2022 (pages 136 – 137 of the bundle) which refer to the difficulties which it is recorded that the claimant experienced getting out of the car/ pain when walking and descending steps together with the re- referral for physiotherapy in March 2022 with worsening pain and restricted movement (page 163 of the bundle).

## **SUBMISSIONS**

16. The Tribunal has had regard to the oral closing submissions of the parties.
17. The Tribunal has had regard in particular to the following statutory and associated provisions: -
- 18.1 Sections 6, 13, 15, 39 of and Schedule 1 to the 2010 Act.
- 18.2 Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) ("the Guidance") (including the list of factors contained in the Guidance which it would be reasonable/ not reasonable to regard as having a substantial adverse effect on normal day to day activities).

- 18.3 The following legal authorities: -

Those relied upon by respondent namely :-

**Dr G A Mowat – Brown v University of Surrey EAT/462/2000**  
**SCA Packaging Limited v Boyle [2009] UKHL**  
**All Answers Limited v Mr W and Ms R [2021] EWCA Civ 606.**

Together with:- **Goodwin v the Patent Office [1999] IRLR 4**  
**EAT.**

19 In summary, the Tribunal has reminded itself in particular of the following:

-

19.1 It is for an applicant/ employee to establish that they were at the relevant time a disabled person for the purposes of section 6 of the 2010 Act. The relevant time is the date of the alleged act of disability discrimination (in this case the date of the claimant's dismissal on 15 July 2022) and the evidence should be considered accordingly.

19.2 Where disability is in dispute the Tribunal should adopt a structured approach to the issue namely: - (a) did the claimant have a physical or mental impairment at the relevant time (b) did the impairment effect the claimant's ability to carry out normal day to day activities (which may include the claimant's activities at work). If a person is receiving treatment or correction measures for an impairment the effect of the impairment on day-to-day activities is to be taken as that which the person would experience without the ameliorating effect of such treatment or measures (c) is the adverse effect substantial. Substantial for such purposes means more than minor or trivial (c) is the effect long term (as defined in section 6 and paragraph 2 of Schedule 1 to the 2010 Act). If the effect of an impairment has not lasted for 12 months as at the date of the alleged act of disability discrimination it will nevertheless be considered as long term if at such time it is likely to last for at least 12 months. Likely for such purposes means could well happen.

## THE CONCLUSIONS OF THE TRIBUNAL

20 When considering the issue of disability, the Tribunal has reminded itself that the relevant date for determination is the date of the alleged act of disability discrimination namely, the date of the claimant's dismissal on 15 July 2022 ( the decision having been taken on or around 17 June 2022).

21 When determining this issue, the Tribunal has considered the matter in accordance with the approach advocated in **Goodwin** referred to above.

### **Did the claimant have a physical or mental impairment at the relevant time ?**

22 The Tribunal has considered first whether the claimant had a physical or mental impairment at the relevant time ( his date of dismissal on 15 July 2022). This is disputed by the respondent who contended that the X ray in January 2022 showed little degenerative change and that the diagnosis was limited to one of mild osteoarthritis with poor biomechanics. The Tribunal is however satisfied on the evidence, that the claimant had a physical impairment namely, osteoarthritis at the date of his dismissal. When reaching this conclusion, the Tribunal has had regard to the above findings of fact , in particular at paragraph 9 above, including the reported

symptoms in June 2021, which were recorded as being suggestive of osteoarthritis. Further, there was a formal diagnosis, after an Xray, in February 2022 of osteoarthritis (paragraph 9 above) and as confirmed in the subsequent letters from the claimant's GP dated 8 March 2023 (as referred to at paragraphs 11 and 12 above).

**Did the impairment of osteoarthritis have a substantial adverse effect on the claimant's ability to carry out normal day to day activities at the relevant time?**

- 23 The Tribunal has then gone on to consider whether the claimant's condition of osteoarthritis had a substantial adverse effect on the claimant's ability to carry out normal day to day activities at the relevant time (15 July 2022). This is again disputed by the respondent who contended in particular that there this little recorded evidence of any significant problems until September 2021/ limited involvement with physiotherapy prior to the claimant's dismissal.
- 24 Having given careful consideration to the above findings of fact ( and in particular at paragraphs 14 and 15 above) together with the examples contained in the Appendix to the Guidance of effects which it would be reasonable to take into account as evidence of disability, the Tribunal is satisfied that the claimant's osteoarthritis had a substantial effect on his normal day to day activities as at the date of his dismissal (15 July 2022). As stated at paragraph 15 above, the Tribunal is satisfied that the claimant experienced, on an ongoing and increased basis from February 2022, the effects identified at paragraph 14 above including in respect of walking/ standing, holding on when needing to go to the toilet, playing with his children (including getting up off the floor) and difficulties with dressing. Further, the Tribunal has taken into account the references in the claimant's GP's letter dated 23 March 2023 (at page 161 of the bundle) to the likely progressive nature of the claimant's pain and associated diagnosis for the purposes of paragraph 8 of Schedule 1 to the 2010 Act.

**Were such day-to-day effects of a long-term nature ?**

- 25 Finally, the Tribunal has considered whether such day-to-day effects were of a long-term nature term namely, whether they had lasted or were likely to have lasted for at least 12 months judged at the date of the alleged discriminatory act (namely, the claimant's dismissal on 15 July 2022). This is again disputed by the respondent who contended that there was no evidence that any effects had lasted / were likely to last for 12 months at the date of the claimant's dismissal/ that any condition was of a progressive nature. The Tribunal has reminded itself that for such purposes, "likely" means " could well happen".

- 26 Having given the matter careful consideration, the Tribunal is satisfied that although the day-to-day effects identified at paragraph 14 above had not lasted for 12 months as at the date of the claimant's dismissal (15 July 2022), viewed objectively as at that date, it was however likely (could well happen) that the effects would last for at least 12 months. When reaching this conclusion, the Tribunal has taken into account in particular the findings at paragraphs 9, 12, 13, 14 and 15 above including that the the claimant's symptoms had started at the beginning of 2021, with ongoing/ increasing difficulties from the end of 2021/ beginning of 2022, together with a formal diagnosis in February 2022 and subsequent physiotherapy support. The Tribunal has further taken into account the references in the claimant's GP letter dated 8 March 2023 to the progressive nature of the condition as previously referred to at paragraph 24 above.
- 27 In all the circumstances, the Tribunal is therefore satisfied that the claimant has established that he was a disabled person for the purposes of section 6 of the 2010 Act at the relevant time ( the date of his dismissal on 15 July 2022).

---

Employment Judge Goraj  
Date: 27 November 2023

Reasons sent to the Parties on 14 December 2023

For the Office of the Tribunals

### **Online publication of judgments and reasons**

The Employment Tribunal (ET) is required to maintain a register of judgments and written reasons. The register must be accessible to the public. It is online. Judgments and reasons since February 2017 are available at: <https://www.gov.uk/employment-tribunal-decisions>

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in anyway prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.