



EMPLOYMENT TRIBUNALS

Claimant: Mr Rohan Brown

Respondents: SPP Transport Ltd

Heard at: London South (by CVP) **On:** 9 November 2023

Before: Employment Judge Cheetham KC

Representation

Claimant: Winston Brown (solicitor)

Respondent: Emma Greening (counsel)

JUDGMENT

1. The Claimant was, at the material time, disabled within the meaning of the Equality Act 2010.

REASONS

1. This hearing was listed to consider two issues: whether the Claimant was disabled for the purposes of the Equality Act 2010 and whether he was a “worker” within the Employment Rights Act 1996 s.230.
2. The Respondent now accepts that the Claimant was a worker and also, for the avoidance of doubt, that he was an “employee” within the meaning of the Equality Act 2010 s.83. Therefore, the only issue for this hearing was the fact of disability. At the previous Preliminary Hearing, the disability was described as, “*severe internal pain in his kidneys and other parts of his body*”.
3. I had before me a bundle of documents running to 125 pages, which included the Claimant’s impact statement and GP notes. I also had his short witness statement.

Findings of fact

4. The Claimant was employed by the Respondent between 13 March 2017 and 23 December 2021 as a Delivery Driver.

5. He suffers from a condition known as hydrocele, which is a collection of fluid around the testicle. The Claimant describes this condition as causing him, “*severe pain under my testicles, in my bottom and lower back*”. In his pleaded case, he puts it more broadly, referring to suffering severe internal pain from March 2020, as recorded at the previous hearing.
6. The Claimant gave his evidence in a straightforward and unexaggerated way and came across as a truthful witness. I therefore accept his evidence as to the symptoms he has experienced. I also accept that, like many people, he did not question what his GP told him.
7. The Claimant was taken through his GP notes, which form the extent of the medical evidence. The first reference to hydrocele was on 1 November 2010, when a scan report noted a “*small hydrocele*”. That condition was not recorded again until 30 October 2018, when there was note recording (with a question mark) “*Hydrocele left testis*”. There was a further reference on 4 December 2018 and then not until 27 January 2022, which is therefore after the Claimant had left his employment. That entry refers to him reporting a 5 day history of “*ipsilateral groin pain*”. In evidence, the Claimant described experiencing symptoms prior to leaving his employment, which is why he had told his employer he needed to see his doctor.
8. Subsequently, the Claimant had an operation in May 2022 to repair the hydrocele.
9. However, although the references to hydrocele are infrequent, the Claimant was a regular attender at his GP, particularly with lower back pain (April and 15 May 2020, December 2021), abdominal pain (May 2020 and October 2021), digestive issues (for example, throughout 2021) and haemorrhoids (December 2021). As to whether there was a connection between those various symptoms, the Claimant’s evidence was that, “*The doctor says it’s all connected*”.
10. The impact statement was very short, but describes severe pain in the morning, difficulty pulling on trousers and pants, pain when walking and issues with digestion and haemorrhoids. I accept that these are symptoms that the Claimant experiences.
11. **The law.** Under s.6 of the Equality Act 2010
 - (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.
12. In ***Goodwin v Patent Office*** [1999] ICR 302, the EAT provided guidance for the tribunal in the correct approach to section 6, which amounts to asking about each element in turn. Thus:

- a) did the claimant have a mental and/or physical impairment?
 - b) did the impairment affect the claimant's ability to carry out normal day-to-day activities?
 - c) was the adverse condition substantial? and
 - d) was the adverse condition long term?
13. It will not always be essential for a tribunal to identify a specific 'impairment' if the existence of one can be established from the evidence of an adverse effect on the claimant's abilities (**J v DLA Piper UK LLP** [2010] ICR 1052, EAT).
14. The tribunal also reminded itself of the "*Guidance on matters to be taken into account in determining questions relating to the definition of disability*", noting paragraph A7: "*What it is important to consider is the effect of an impairment, not its cause – provided that it is not an excluded condition*". This reflects Appendix 1 to the EHRC Employment Statutory Code of Practice, which states that, "*there is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause*".
15. The time at which to assess the disability is the date of the alleged discriminatory act (**Cruikshank v VAW Motorcast Ltd** [2002] ICR 729, EAT). "Substantial" is defined in s.212(1) of the Act as meaning '*more than minor or trivial*'.
16. Ms Greening referred the tribunal to two authorities. First, **Ibekwe v Sussex Partnership NHS Foundation Trust** UKEAT/0072/14 provides a reminder that claims do not succeed by default. The second, **RBS v Morris** UKEAT/0436/10, was a case where the medical notes did not permit conclusions to be drawn on essential elements in the definition of disability.
17. The Tribunal did not have the latter authority before it during submissions, but having read it subsequently notes that the EAT said this:
- The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. (Para. 63)*
18. This is a case involving a physical impairment, where the GP notes do not explicitly address the issues arising under the Act.

Submissions.

19. Both Ms Greening and Mr Brown made oral submissions, which I need not set out in detail.
20. Ms Greening said, correctly, that the burden is on the Claimant to establish the disability and submitted that expert evidence would be needed to allow the argument that all of the Claimant's conditions were linked to hydrocele. While she accepted that what the Claimant described could amount to an adverse impact on his ability to carry out day-to-day activities, she pointed to the lack of a unifying diagnosis. There was nothing, she said, to show that all of the symptoms from which the Claimant suffered were related.
21. Mr Brown understandably emphasised the various conditions suffered by the Claimant over a lengthy period. He also pointed to the Claimant's own evidence connecting the symptoms.

Conclusions

22. The first question to ask is whether the Claimant had a physical impairment. The medical evidence and the Claimant's own evidence show that:
 - (i) the Claimant experienced a range of symptoms during his employment, including lower back and abdominal pain, digestive issues and haemorrhoids.
 - (ii) In 2010 and in 2018, his GP specifically diagnosed a hydrocele and again in January 2022, shortly after his employment ended.
23. Given that there is compelling evidence of an adverse effect on the Claimant's ability to carry out normal day-to-day activities (the second question), it would seem to me that the existence of the impairment is established. The Claimant described that impairment at this hearing as "hydrocele", but also put it more broadly in his Particulars of Claim and elsewhere. Therefore, properly described, the physical impairment is hydrocele, with digestive problems, back and abdominal pain.
24. Ms Greening, whose submissions and cross-examination were excellent, focussed upon the cause of the Claimant's condition, but that approach tends to ignore its effects. Irrespective of whether the GP linked all of the symptoms of the Claimant's condition together under a single heading, it is apparent that the Claimant was suffering from an impairment that had all of those effects.
25. It is also clear from the Claimant's evidence and from the medical evidence that the cumulative effects of the adverse condition have been substantial and also that the condition satisfies the requirement of being long term.

26. Therefore, at the material time the Claimant was disabled within the meaning of the Equality Act 2010.

Employment Judge S Cheetham KC
Date: 11 November 2023