



EMPLOYMENT TRIBUNALS

Claimant: Mr M Jdidi

Respondent: Diamond Bus North West Ltd

Heard at: Manchester

On: 29 February 2024

Before: Employment Judge McDonald

REPRESENTATION:

Claimant: Mr B Culshaw (Solicitor)

Respondent: Ms Barnes (Counsel)

JUDGMENT having been sent to the parties on 12 March 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. At a public preliminary hearing on 29 February 2024 I decided that the claimant was a disabled person for the purposes of section 6 of the Equality Act 2010. I gave oral reasons which the respondent requested in writing.
2. The preliminary hearing was listed by Employment Judge Leach who granted the claimant's application for a preliminary hearing on the disability issue. At 1.1.1 in the List of issues from the case management preliminary hearing conducted by Employment Judge Buchanan on 28 September 2023 the relevant impairment was identified as "Kidney problems – including kidney stones".
3. The claimant was represented by Mr Culshaw and the respondent by Ms Barnes.
4. The parties had prepared a bundle of documents of 94 pages. Mr Culshaw had also prepared a helpful "Claimant's chronological summary of medical records". The claimant's Disability Impact Statement was included in the bundle at pp.11-13.

5. The claimant gave oral evidence. He was cross-examined by Ms Barnes, answered questions from me and was re-examined by Mr Culshaw. I then heard submissions from Ms Barnes and Mr Cushaw before retiring to consider my decision.

6. The issues I needed to decide were those set out at section 1 of the List of issues namely:

“1.1 Did the claimant have a disability as defined in section 6 of the 2010 Act at the time of the events the claim is about? The Tribunal will decide:

1.1.1 Did he have a physical or mental impairment: Kidney problems – including kidney stones?

1.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

1.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

1.1.4 If so, 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?

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

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

1.1.5.2 if not, were they likely to recur?”

Relevant Law

7. Section 6 of the 2010 Act, so far as is relevant, provides:

“(1) A person (P) has a disability if –

(a) P has a physical or mental impairment, and

(b) The impairment has substantial long-term adverse effect on P’s ability to carry out normal day-to-day activities.

...”

8. Section 212(2) of the 2010 Act provides that an adverse effect is “substantial” if it is more than minor or trivial.

9. Schedule 1(5)(1) of the 2010 Act 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:

- (a) measures are being taken to treat or correct it, and
- (b) but for that, it would be likely to have that effect.

10. The effect of an impairment may be direct or indirect: **Sussex Partnership NHS Foundation Trust v Norris UKEAT/0031/12/SM.**

11. Paragraph 2 of Schedule 1 to the 2010 Act defines “long-term” in this context. It provides:

- “(1) The effect of an impairment is long-term if –
- (a) it has lasted for at least 12 months,
 - (b) it is likely to last for at least 12 months,
 - (c) it is likely to last for the rest of the life of the person affected.
- (2) If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur...”

12. For paragraph 2(1)(a) of Schedule 1 to the 2010 Act to apply, the effect of an impairment must have lasted for at least 12 months at the time when the alleged discriminatory act (or acts) took place (**Tesco Stores v Tennant UKEAT/0167/19**).

13. The likelihood of recurrence within the meaning of paragraph 2(2) of Schedule 1 to the 2010 Act is to be assessed as at the time of the alleged discriminatory act (or acts) took place: see (**McDougall v Richmond Adult Community College [2008] ICR 431, Court of Appeal**). The same applies to the assessment of whether the effect of the impairment is likely to last for 12 months under paragraph 2(1)(b) of Schedule 1 (**Singapore Airlines Ltd v Casado-Guijarro [2013] 9 WLUK 65, EAT**).

14. In cases to which paragraph 2(1)(b) of Schedule 1 of the 2010 Act applies the correct question for the Tribunal is whether viewed at the time and without the benefit of hindsight, the substantial adverse effects of the impairment were likely to last at least 12 months. That is a decision to be reached having regard to all the contemporaneous evidence, not just that before the employer. In reaching that decision the Tribunal is not concerned with the actual or constructive knowledge of the employer (**Lawson v Virgin Atlantic Airways Limited UKEAT/0192/19/VP**). However, it is an error law for an Employment Judge to take into account subsequent events in making that assessment.

15. “Likely” in this context means something that “could well happen” and is not synonymous with an event that is probable: (**SCA Packaging Ltd v Boyle [2009] ICR 1056, Supreme Court**).

16. The Secretary of State’s Guidance on Matters to Be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) (“the Guidance”) <http://odi.dwp.gov.uk/docs/wor/new/ea-guide.pdf> gives guidance to help a Tribunal

decide whether an impairment has a substantial effect on normal day to day activities. At paragraph D.2 and D.3 of the Guidance it explains what “normal day to day activities” means:

“D.2. **The Act does not define what is to be regarded as a ‘normal day-to-day activity’.** It is not possible to provide an exhaustive list of day-to-day activities, although guidance on this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.”

17. When assessing whether the effect of the impairment is substantial the Tribunal has to bear in mind the words of section 212(1) of the 2010 Act which confirm that it means more than minor or trivial. The 2010 Act does not create a spectrum running smoothly from those matters that are clearly of substantial effect to those matters that are clearly trivial. Unless a matter can be classed as within the heading "trivial" or "insubstantial" it must be treated as substantial (**Aderemi v London and South-Eastern Railway Ltd [2013] ICR 591**).

Relevant evidence and correct approach

18. The burden of proving disability is on the claimant.

19. The definition of disability requires a Tribunal to decide four questions (**Goodwin v Patent Office [1999] ICR 302**):

- a. Does the claimant have an impairment which is either mental or physical?
- b. Does the impairment affect the claimant’s ability to carry out normal day-to-day activities?
- c. Is that adverse effect substantial?
- d. Is the adverse effect long-term?

20. These four questions should be posed sequentially and not together – (**Wigginton v Cowie and ors t/a Baxter International (A Partnership) EAT 0322/09**).

It is good practice for Tribunals to state their conclusions separately on each of the questions. However, in reaching those conclusions, Tribunals should not feel compelled to proceed by rigid consecutive stages. Specifically, in cases where the

existence of an impairment is disputed it would make sense for a tribunal to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected on a long-term basis and then to consider the question of impairment in the light of those findings. (**J v DLA Piper UK LLP [2010] ICR 1052, EAT**).

Findings of Fact

21. The claimant's evidence, in summary, was that he had suffered from kidney stones since about 2015. He said that the effect of the kidney stones, specifically the pain he experienced as a result of them, had a substantial adverse effect on his ability to undertake day to day activities. His evidence was that the kidney stones came and went and the effect also fluctuated.

22. Ms Barnes in her submission raised issues about the credibility of the claimant and the reliability of his evidence. There were three particular points which she submitted undermined his credibility.

23. The first related to an entry in the GP medical records for 19 October 2020 (page 62 of the Tribunal bundle). That was an entry which I find was completed by the medical secretary rather than a GP and dated from when the claimant was first registering with that practice. There were two elements in that entry which Ms Barnes said were particularly relevant to the issues in this case. The first was that in relation to the question "past medical history" the claimant's answer was given as "none". The second was that the entry stated "no known disability".

24. In assessing the relevance of that entry, I find it is important for bear in mind the context for it. The claimant is a refugee and he had arrived in the UK some 3 months or so prior to 19 October 2020. I accept his evidence that that entry in the GP records reflects the answers he gave to a series of questions by the practice's medical secretary asking about his medical history when he was registering at the GP practice.

25. When it comes to the question about "past medical history", the claimant's evidence (which I accept) was that he said he did not have any past medical history because he did not have any medical records from his time prior to coming to the UK in 2020. When it came to the "no known disability" entry, the claimant's evidence (which I also accept) was that he did not understand what the definition of disability was in UK law when he was answering the medical secretary's questions.

26. Bearing in mind the context for the entry on 19 October 2020, I do not find that it fundamentally undermines the claimant's credibility or the reliability of his evidence. It seems to me it would be giving too much weight to those entries to say that they contradicted the claimant's case that he had experienced kidney stones from about 2015 i.e. prior to his arrival in the UK. My view is supported by the fact that a few months later in the GP records, on 8 January 2021 (page 63) the claimant did refer to a diagnosis of kidney stones one year prior and to having had large kidney stones five years prior. As Mr Culshaw submitted, it was at that point no benefit to the claimant in making up those facts when consulting with his GP.

27. The second point made by Ms Barnes caused me greater pause for thought. She pointed out that on 1 May 2023 the claimant had reported to the respondent that he had an infection. Ms Barnes submitted that that seemed to directly contradict what the GP would have told the claimant because there was an entry in the medical records for 28 April 2023 (p.70) confirming that based on an urine sample supplied by the claimant, there was “no evidence of an infection”. The claimant was not able to explain why he would have told the respondent he had an infection when the GP’s records appear to show that the GP knew by 28 April he did not.

28. I have considered the GP records carefully. I find that on 27 April 2023 the claimant was prescribed an antibiotic (Ciprofloxacin), so the information he was recorded as passing on to the respondent on 1 May about being prescribed an antibiotic is correct. An urine sample was taken on 27 April 2023. I find that (and the prescribing of an antibiotic) suggests the GP thought that an infection might be a possibility and that the GP may well have communicated that to the claimant on 27 April 2023.

29. The medical records show that the result from the urine sample confirming there was no evidence of an infection was communicated to the practice on 28 April 2023. There is no indication in the medical records that that information was conveyed to the claimant, either on 28 April or before 2 May 2023 (there are no entries between those dates). On balance, I do not find that what the claimant told the respondent on 1 May 2023 about an infection directly contradicted what the GP had told him by then. I do not find that what was said by the claimant to the respondent about having an infection on 1 May 2023 so clearly undermines his credibility that I should not accept his evidence about the impact of his impairment on him.

30. The third point made by Ms Barnes in submissions and to the claimant in her cross examination was that the claimant's disability impact statement provided little in the way of detailed dates for the impact of his impairments on him. I do find that the disability impact statement is short on detail as to when the various effects were said to have occurred. In cross examination and in response to my questions the claimant said that the effects recurred every two or three months but could fluctuate, both in terms of when they occurred and also in terms of how long they lasted. I do find that this was a case where the effect of the impairment on the claimant fluctuated regularly and significantly. In those circumstances I do not find it damaging to the claimant's credibility that he was not able to pin down the episodes when the adverse effect was particularly bad to particular dates.

31. In summary, I find that the claimant's evidence about the adverse effects of the kidney stones on him was reliable. I find that his evidence was corroborated to a certain extent by the medical records, particularly those from page 62 onwards in the bundle. They do show entries where the claimant (as his disability impact statement says) was suffering severe pain and as a result was prescribed strong painkillers, namely naproxen and codeine. There are in particular entries relating to this on 20 September 2021, 9 August 2022, 24 October 2022 and 23 March 2023.

32. I find that the claimant had suffered for kidney stones since around 2015. I did not hear or have detailed medical evidence but I find, based on the medical records that I have seen, that kidney stones can come and go. At times they can be managed

by drinking lots of water and waiting for them to pass. Medication can be taken to help pass them. There was no suggestion in the evidence that the claimant would at some point in the future cease suffering from kidney stones.

33. Based on the claimant's evidence and the medical records what I find in terms of the effect of the impairment on the claimant is that at times he suffered severe pain as a result of kidney stones. Without pain medication the pain would be so intense that he would not feel strong enough to leave the house and would likely remain in bed.

34. In terms of what the claimant was unable to do, which must be the focus of my enquiry, I accept his evidence that at the points where the pain was that intense he would be unable to read or watch TV because he would be unable to concentrate; he would be unable to shower or stand by himself; and he was also unable to socialise because he would often be crying and/or crying out in pain and wanting to be alone. He would at such times also be unable to carry out basic practical tasks round the house, such as carrying dishes. I also accept the evidence in the claimant's disability impact statement (which was not directly challenged) that the pain would be such as to affect his sleep, which would then in terms affect his concentration during the daytime.

35. I find that the adverse effects on the claimant's day to day activities was not present all of the time or even most of the time. Some of the time the claimant would be free from any pain whatsoever; at other times he would be able to manage the pain by using less strong painkillers, such as paracetamol. I find he would need to resort to stronger painkillers such codeine or naproxen every 2-3 months when the pain would otherwise be so debilitating as to have the impacts on his normal day to day activities which I have set out above. substantial adverse effect required to constitute an element of the disability definition.

Discussion and Conclusions

36. Dealing with the elements of the definition of disability in s.6 in turn I reached the following conclusions:

Did the claimant have a physical or mental impairment: Kidney problems – including kidney stones?

37. In terms of the **Godwin** questions, the first issue is whether or not there is a physical and/or mental impairment.

38. For the respondent, it was conceded that the kidney stones evidenced by the medical records for the claimant did amount to a physical impairment. However, during submissions Ms Barnes submitted that rather than the kidney stones being seen as one continuous impairment, each kidney stone should be seen as a separate impairment.

39. Mr Culshaw for the claimant suggested that it would frustrate the purposes of the Equality Act 2010 if, when considering whether there was a physical impairment, each kidney stone produced was seen as a separate and distinct impairment. That was because for the claimant in those circumstances to successfully show he was a

disabled person he would need to show that the effect of a particular kidney stone lasted for 12 months or was likely to recur. Given that kidney stones are passed, that would seem to make it almost impossible for the claimant to satisfy all the elements of the **Godwin** test.

40. I accept the submission for Mr Culshaw. I do find that when considering what the relevant impairment in this case was, it was kidney stones in general or (as identified in the List of Issues) “kidney problems”, i.e. the claimant's kidney tendency to create kidney stones, rather than each individual specific kidney stone.

Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

If so, 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?

41. The next question is whether the effect of the impairment, i.e. the claimant's kidney stones, had a substantial adverse effect on his normal day-to-day activities. In deciding that issue I need to disregard the effect of any medical treatment for that impairment.

42. As I explain in my findings of fact, I accepted the claimant's evidence that the kidney stones did on occasion (though not always) result in such severe pain that he was unable to carry out normal day-to-day activities. Although some of his evidence dealt with the impact on his ability to carry out day-to-day activities when he took the medication which he was prescribed in order to alleviate that severe pain and its side effects, I find that (applying the law in the Equality Act 2010) the correct approach in this case is to consider whether, when the claimant was not taking the medication, the impact of the kidney stones on him amounted to a substantial adverse effect.

43. In deciding that I bear in mind that “substantial” in this case means “more than minor or trivial”. Based on my findings of fact I do find there was such a “substantial” adverse effect in this case. When the pain was at its worse he was unable to concentrate, to sleep or to socialise or carry out basic household tasks.

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?

if not, were they likely to recur?

44. The next question is whether or not the substantial adverse effect was long-term, Mr Culshaw confirmed that the claimant's case was not that the effect was likely to be long-term but rather that it was likely to recur. In deciding whether or not the condition was likely to recur the test I need to apply is whether (applying the definition in **Boyle**) it “could well happen” that the effect was likely to recur.

45. As I set out in my findings, I accept that kidney stones can be said to come and go. There is not a once and for all cure or solution that was suggested in the medical records I saw. The evidence showed that there were “flare ups” where the effect was particularly significant going back to September 2021 with recurrences every 2-4 months in 2022-2023. Based on that I do find that it could well happen that the substantial adverse effect would recur for a period in excess of 12 months. The effect is treated as being continuing for the periods over which it was likely to recur.

46. In summary, what that means is that I find that the impairment relied on by the claimant did give rise to a substantial adverse effect and that it was a recurring condition which would therefore be treated as continuing for more than 12 months for the purposes of the Equality Act 2010.

47. In those circumstances my judgment is that the claimant was a disabled person by reason of kidney stones at the material time.

Employment Judge McDonald

Date: 20 March 2024

REASONS SENT TO THE PARTIES ON

27 March 2024

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