



EMPLOYMENT TRIBUNALS

Claimant

Mr B Sanchez-Stoker

v

Respondents

Reiss Edwards Limited (1)

Mr J Dinh (2)

Mr A Ali (3)

Heard at: Central London Employment Tribunal On: 28 March 2024
Before: Employment Judge Norris, sitting alone (via CVP)

Representation:

Claimant – In Person

Respondent – Mr J England, Counsel (instructed by Nash & Co Solicitors LLP)

RESERVED JUDGMENT – PRELIMINARY HEARING

1. The Claimant was not a disabled person at the relevant time by reason of his hernia.
2. The Claimant was a disabled person at the relevant time by reason of his flat feet (pes planus).

REASONS

Background

1. The Claimant worked for the First Respondent, a law firm, between 16 April 2019 and 12 January 2023 as the Office Manager. The Second and Third Respondents are solicitors and directors of the First Respondent. The Third Respondent was the founder of the firm and is also its sole shareholder.
2. The reason for the Claimant's dismissal is a matter that will be in issue at the main Hearing. Suffice it to say, the Respondents say that the reason for his dismissal was redundancy. The Claimant alleges that his dismissal was because of disability (direct discrimination) or because of something arising in consequence of disability (section 15 Equality Act (EqA) 2010) or that it was disability-related harassment (section 26 EqA 2010) or that it was victimisation (section 27 EqA 2010) or that it was a failure to make reasonable adjustments (section 21 EqA 2010) or that it was because he had made a protected disclosure or that it was because the Respondents believed he was likely to take shared parental leave.
3. The Claimant also makes complaints of other discriminatory conduct in connection with his claimed disabilities. The Respondents deny the claim in its entirety.

Hearings

4. Early Conciliation took place between 20 February and 3 April 2023 and the Claimant submitted his claim on 3 May 2023. The Respondents lodged their response on 13 June 2023.
5. The parties appeared before EJ Tinnion on 31 July 2023 for a Preliminary Hearing Case Management (PHCM). They were represented by Ms Ricci, Solicitor (for the Claimant) and Mr England, Counsel (for the Respondents).
6. EJ Tinnion listed the matter for a full merits hearing for six days starting on 3 June 2024. He noted that the Claimant's claimed disabilities were an inguinal hernia (left side) and flat feet. The Respondents did not accept that these amounted to disabilities. EJ Tinnion ordered the Claimant to send to the Respondents by 4 pm on 25 September 2023, two separate disability impact statements, one for each impairment and, by the same date and time, his relevant medical records. The Respondents were to confirm by 23 October whether disability was conceded in respect of the claimed impairments.
7. The Claimant was also ordered to provide a substantial set of Further and Better Particulars relating to his allegations. If that necessitated any application to amend his claim, he was ordered to make that application by 25 September 2023.
8. The Claimant supplied a single disability impact statement with different sections for each of his claimed impairments. It is unclear when he did so. The Respondents submitted revised grounds of resistance on 23 October 2023. At the same time they also wrote in explaining the reasons why disability was not conceded for either of the claimed impairments. On 17 January 2024, EJ Baty listed the matter for a public Preliminary Hearing (PH) on 28 March 2024 to determine the question of the Claimant's disability status. That was the hearing before me.
9. Some two weeks before the PH, the Claimant made attempts to postpone the hearing on the basis that Ms Ricci's firm was no longer on the record and he had been unable to secure new representation. His applications were refused and the PH was to proceed. The Claimant also secured a GP note saying he was unfit for work, but it did not say he was unfit for the PH.
10. At 08.31 on 28 March 2024, the Claimant's partner emailed the Tribunal with an application to amend his claim to add two other disabilities.
11. We began the PH just before 10.10. We encountered multiple difficulties during the course of the hearing:
 - a. The parties had not exchanged witness statements for the PH. The Respondents wanted to call three witnesses (the two named Respondents and a colleague), all of whom had made statements, but the Claimant had not seen them. The Claimant said he had also produced a witness statement but this dealt with the substantive

liability issues in large part. The Respondents had not seen that;

- b. The bundle had not been agreed fully (possibly at all) but the Respondents' solicitor had uploaded it to the DUC the previous evening. It could not be opened although the separate index could be accessed. The solicitor uploaded it again but the only part that could be opened started at page 434. I was told that this section was the Claimant's additional documentation. His disability impact statement however was at page 70 and so I did not have it.
 - c. We adjourned for the Tribunal (and the Claimant) to read the Respondent's three statements and so that the Claimant's response to the Respondent's letter of 23 October 2023 on disability status and the remainder of the bundle could be sent by email to the Tribunal Clerk. It proved impossible however for me to access the bundle using a Sharepoint link that was emailed to the Clerk.
 - d. The bundle was also too big to send as an emailed attachment, and over the course of the day, it was established that it would have to be broken into smaller sections and emailed as separate pdfs. I received parts 1, 2 and 5 during the lunch break. The other two sections would not come through. By the close of proceedings at 16.30, I still only had pages 1-200 and 401-433 by that method. The Respondents themselves emailed pages 201-400 to me via the Clerk after the hearing was over.
 - e. There were occasional issues with the CVP link. When this happened, we paused or asked whoever was speaking to repeat what they had said. I was satisfied that in this manner I was able to hear everything the parties wished to say.
 - f. There were also problems with the HMCTS recording of the hearing. Despite this and the other difficulties, given the proximity of the full hearing, there was not time to abandon the day's proceedings and adjourn the PH to another day.
12. At the beginning of the hearing, I explained that although the Claimant's redacted medical records were in the bundle, the Claimant had sent the unredacted version to the Tribunal, and I had had the opportunity to read those. He had not copied in the Respondents' representative and I reminded him of his obligation to do so whenever he emails the Tribunal, under the ET Rules of Procedure. In reaching my decision on the preliminary issues, I have had regard only to the redacted version that the Respondent has seen.
13. We discussed the statutory definition of disability and I drew Mr England's attention to some aspects of the Claimant's medical records so far as they related to his flat feet, and in particular his use of insoles. I also drew the Claimant's attention in turn to the "long-term" requirement in the definition so far as his hernia was concerned. It seemed to me that the Respondents had focused on what the Claimant could do, which is not the correct way to approach the issue. Mr England agreed, but noted that in the disability

impact statement, the Claimant said there were a number of things he could not do, but the Respondents' witnesses would say otherwise.

14. I gave a preliminary indication that, without having seen the Respondents' witness statements, it appeared the Claimant's arguments that his flat feet were a disability were stronger than those relating to his hernia. I also made it clear however that this was not a concluded view. I said that I would spend time reading in once I had the statements and the bundle, and if the parties could not agree status in the meantime, I would hear evidence after the adjournment.
15. In the event, we adjourned for an hour and then for a further 20 minutes. We eventually reconvened at 12.40 although as I have noted above, I still had not had the chance to see the bundle. There was no agreement between the parties as to status but rather than start the evidence before lunch, it was agreed that I should first determine the Claimant's application to amend the claim to add two new disabilities (mental health and a fracture to his big toe). For reasons I gave at the time and do not repeat here, I did not allow the application. I explained to the Claimant that he may request full written reasons for that decision. We adjourned for lunch at 13.30.
16. After lunch, the Claimant was cross-examined and then he cross-examined the Third Respondent. He did not have any questions for the Second Respondent or for the other witness (Ms Aslam) who had attended the day's proceedings. By the time the evidence was concluded, it was 16.10. The parties were invited to make submissions in the remaining time. Initially that was agreed but then the Respondents said they wanted to put theirs in writing. I indicated that in that case, I would take the final Hearing out of the list for the beginning of June because there was no realistic prospect of the parties being trial ready by then if I could not get this decision out to them in the first few days in April. They still do not have a finalised list of issues, bundle or witness statements and the Hearing is just two months away. The Claimant is unrepresented and it was not reasonable to require the parties to work over the Easter weekend to produce written submissions. The Respondents then agreed to make oral submissions only and both sides did so before I reserved my decision.
17. I record for completeness that I have not been able to access the video clips that the Respondents sent through but there were stills of them in the bundle and the contents were described in the witness statements.
18. I reminded the parties at various points during the day and repeat here for the avoidance of doubt that it was not part of my remit at the PH to make findings as to any of the conduct complained of by the Claimant. Nor was I determining the question of knowledge (actual or deemed) on the part of the Respondents, or any of them, or whether all or any of the Claimant's disability discrimination complaints are in time. Those issues will form part of the panel's decision at the final Hearing.

Law

19. According to section 6 EqA 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.”
20. The burden of proof is on the Claimant to show on the balance of probabilities that he has a disability, whether it is a mental or physical condition. It is not necessary to consider how the impairment was caused; what must be determined is its effect.
21. The meaning of “substantial” is dealt with in the interpretations clause at section 212 EqA 2010. This says that it means “*more than minor or trivial.*”
22. Guidance on matters to be taken into account in determining questions relating to the definition of disability is available from the Disability Unit (formerly the Office for Disability Issues). This says (at B1) that “*the requirement that an effect must be substantial reflects a general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.*”
23. It was common ground before me that it is important to consider the things that a person cannot do, or can only do with difficulty. The time taken and the way in which an activity is done and the cumulative effects of an impairment are to be considered. Account should also be taken of whether a person avoids doing things which, for example, cause pain or fatigue or because of loss of energy or motivation.
24. The meaning of “impairment” is dealt with in paragraph A3 which says:
- “The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. ... In many cases there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effect.”*
25. The term “normal day-to-day activities” means activities that are carried out by most men and women on a fairly regular and frequent basis such as walking and driving.
26. An impairment is “long-term” if it has lasted for twelve months or is likely to last for twelve months or for the rest the person’s life. If it has ceased to have the effect but is likely to recur, it is treated as long-term.
27. In assessing the likelihood of an effect lasting for twelve 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. This means that the relevant time to consider whether a person was disabled is the date of the alleged discrimination and not the date of the Tribunal hearing. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to the individual (for example, their general state of health or age).

28. The Guidance also notes that:

“It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the ‘long-term’ element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop...”

29. The EqA 2010 provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is “likely” (in the sense of “could well happen”) to have that effect. In other words, the impairment should be treated as having the effect that it would have without the measures in question. Treatment or correction measures to be disregarded for these purposes include, in particular, medical treatment and “*the use of a prosthesis or other aid*”. This provision applies even if the treatment or correction result in the effects of the impairment being completely under control or not at all apparent. Where treatment is continuing it may be masking or ameliorating a disability so that it does not have a substantial adverse effect.

Findings and conclusions

30. I had to determine whether either or both of the Claimant’s impairments as identified by EJ Tinnion at the PHCM on 31 July 2023 amounted to a physical impairment that had a substantial and long-term adverse effect on his ability to undertake normal day to day activities.

Hernia

31. The Claimant’s medical records show that on 16 December 2016, he saw his GP and indicated that the left lower side of his abdomen was more prominent than the right, something which he had noticed for around a year at that point. The GP diagnosed an inguinal hernia and noted that the Claimant was asymptomatic. The hernia was not tender to touch and it was agreed that at that stage there would be no referral for surgery to repair it. The Claimant was given advice about risk factors of his hernia becoming strangulated. The recent summary sheet of the records shows that this issue was considered as part of the Claimant’s “significant past” but that it continued only until March 2017.

32. There is then a further entry in the summary sheet for “left inguinal hernia” for the period 1 May 2018 to 25 July 2018. It appears that the Claimant saw

his GP on 1 May 2018 because he was required to have a medical examination to become a taxi cab driver. At that appointment, he appears to have been referred for surgery on the hernia, but according to a later entry, the Claimant did not go for the referral. There is an entry that says, "*never has pain*", which I infer is related to the hernia. The Claimant himself in his disability impact statement does not suggest that it was having any impact on his day-to-day activities until 2022. He also says in his response to the Respondents' letter of October 2023 that it became enlarged and painful in 2022 so that he knew he was going to have to have surgery.

33. The Claimant claims in the same response that he did not go to the gym because when he tried to exercise, he could feel his hernia "*popping in and out*", and that he told the Third Respondent about this. I do not know when the Claimant suggests this was occurring, but it is not supported by the evidence in the bundle. On the contrary, there is an exchange between them where the Claimant has sent the Third Respondent a screenshot of what I gather were his statistics at the end of a treadmill session. The Third Respondent encouraged the Claimant not just to "*give it 50%*" but to make the most out of each visit because of the money the Claimant was paying. The Claimant responded "*Feel good again. So feel the difference just need to keep [it] up*".
34. I consider that until the late summer of 2022, the evidence shows that the Claimant's hernia was not causing him anything more than minor discomfort or inconvenience.
35. On 25 October 2022 however, the Claimant spoke to the non-emergency 111 NHS line. An entry in his GP medical records the following day states that the hernia has been "*causing more pain and discomfort recently and it's grown in*".
36. The Claimant was referred once more for surgery. An email to the Claimant from the Second Respondent on 2 November 2022 shows that the Claimant had advised the Respondents of his situation and that it was expected he would have an operation "*which may be sometime in December 2022*". A further email two days later repeated that there was a possibility of surgery in December 2022 with an anticipated recovery period of one to two weeks.
37. According to the medical notes, the surgery did not in fact take place until the end of June 2023. The Claimant says that it was not entirely successful and indeed the surgery may have put pressure on a second hernia that was concealed by the first, so that the second hernia has now become enlarged. All of this however took place after the termination of the Claimant's employment.
38. The side effects from which the Claimant claims to suffer as a result of his hernia, according to the disability impact statement are: stomach cramps and pain and cramps in abdomen, swelling of the left groin area, constipation, pain when bending down, crouching and standing up straight, not being able to eat properly (he does not detail further what is meant by this) and pain in the abdomen area when lifting heavy items.

39. During the PH the Claimant added that he had seen his GP at the end of August 2022 because the hernia was rubbing against his leg and causing sores. This appears to be what is meant by the words in the particulars of claim: "*Given the location of hernia, when he walks it rubs against his leg causing sores [sic]*". His GP records do not support this assertion. There are only two visits to the GP during August 2022 recorded in the notes and they are both related to podiatry referrals.
40. It is not at all clear whether the Claimant was aware that in his disability impact statement he should have been describing the effects of the impairment at the point when he was employed by the Respondent rather than thereafter or even at the date of this hearing. I consider that the Hernia Referral Form in the bundle is likely to be more reliable than his disability impact statement in this regard, because this records what the Claimant told his treating clinicians contemporaneously.
41. Unfortunately that form is not specifically dated. It does, as Mr England observed in cross-examination, have a handwritten date and time at the top, which is 26 April 2023 at 09.15, but I infer that is likely to be the time and date of a future appointment which has been scribbled on a document otherwise completed on a screen and printed out.
42. I further infer that the form was the one which was completed by the Claimant's GP and sent to the hospital in or around October 2022. I have done so because the narrative under the heading "Consultations" says that the Claimant's hernia has been "*present for approx. 6 years but recently it has started enlarging and causing pain and discomfort symptoms. Increasingly more difficult to reduce and lying on it causes pain*". The space on the following page of the form for "chronic pain history" is blank. There is nothing about any of the other symptoms or pain in any of the situations that the Claimant describes in his disability impact statement.
43. I find, based on the medical evidence, that the Claimant's hernia did not cause him any particular difficulty until between August and October 2022 at the earliest, over which period its enlargement went from causing him no problem or only "discomfort" to causing him "pain", and that only when lying on it. As of the end of October/beginning of November 2022, it was anticipated that he would have surgery to repair it which could be completed in December 2022 with a short recovery period thereafter.
44. Therefore, the period during which the hernia had a substantial (in the sense of more than minor or trivial) impact on the Claimant's day-to-day activities was the last three to five months of his employment. It cannot be said that it was "likely" at that stage that it would last for twelve months. On the contrary, it was anticipated that it would have been resolved before his dismissal. Even though it was a further five months before his surgery took place, it could not have been foreseen that a previously undiagnosed second hernia would then cause problems that apparently persist to date.
45. I find that the Claimant has not shown that his hernia was a disability at the relevant time.

Flat feet/pes planus

46. The Claimant was diagnosed with flat feet in 2011 and was referred to a specialist podiatry clinic. He has been under their care ever since, sometimes being discharged but returning. While the Respondent notes with some justification that having flat feet is a condition that affects a significant minority of the population, the question is whether the impact it has on the Claimant's day-to-day activities is significant in the "more than minor or trivial" sense.
47. The Claimant says that the following are the effects in his case:
- a. Pain in ankles, feet and legs including medium to severe hip and lower back pain;
 - b. Paraesthesia (numbness or tingling) in his big toe;
 - c. Walking with a limp, balance problems due to overpronation (the rolling inwards of feet when walking) and pain when walking due to calluses;
 - d. Posterior tibial tendon dysfunction;
 - e. Tarsal tunnel syndrome (sharp shooting pains in foot and leg).
48. Consequently the Claimant has been fitted with orthotic insoles through the orthopaedic clinic. These insoles are replaced on the NHS when they wear out. Sometimes, the Claimant says, the insoles can cause pain in other parts of his body (e.g. his back) as they adapt to his walking pattern.
49. The Claimant says that the following day-to-day activities are impacted by the above effects:
- a. He experiences a range of discomfort, and particularly in the evenings, when it becomes pain;
 - b. He cannot stand for long periods; thus he struggles to cook and clean;
 - c. He struggles to pick up and carry heavy objects;
 - d. His backache causes him difficulty in picking up and/or dressing his children;
 - e. The "aches and pains" cause him to become restless and tired;
 - f. He travels by car where possible and when there is parking available.
 - g. He finds it difficult to commute by public transport because of the walking and standing required;
 - h. He is less stable when carrying out physical activities such as walking. He fell on 18 November 2021 and broke his big toe. That

has become deformed. At the time he could not wear shoes, was in pain and walked with a limp. The fracture caused pain and stiffness.

50. The medical evidence in the bundle tends to support some or all of the above to a greater or lesser extent. For example:

- a. The Claimant was diagnosed in October 2011 with “*bilateral foot and ankle pain*” and “*severe collapsed arches*”. In December 2011, he was referred by his GP to a podiatry clinic for assessment of “chronic leg and foot pain”. He had bought insoles over the counter and found they “helped significantly” over the preceding two months. He had previously been unable to stand for prolonged periods and recalled heel pain as a child. He was prescribed bespoke orthotics which were posted to him a month later. He reported in February 2012 that they helped with pain while he was at work but that his feet still ached when he got home and put them up. He was advised to continue wearing his insoles.
- b. By May 2012, the Claimant reported that the previous pain had reduced but he had developed pain on his left side when not weight-bearing and driving for long periods. This was attributed to “*strain from dorsiflexion for long period of time*”. By July of that year he was experiencing no pain or discomfort in ankle or feet. His insoles were working, though they were worn and breaking apart in places. New orthotics were prescribed with a view to discharging the Claimant if the improvement was maintained in a further twelve weeks and indeed, that occurred in October 2012.
- c. In July 2014, the Claimant was referred by his GP back to the clinic to seek a replacement pair of insoles because the existing ones had worn out. He reported that the orthotics had made a difference and he was in no pain. Nonetheless, the same “*deformities*” remained, according to the podiatrist. In September 2014, while the Claimant reported being happy with his insoles overall, he had developed bilateral pain. A new replacement pair of insoles was approved.
- d. The Claimant did not return to the clinic for several years and he was discharged in July 2015 after failing to make contact but in April 2019, he returned and underwent an assessment. His feet were said to be “*grossly pronated*” in stance and the impression/diagnosis was one of posterior tibial tendon dysfunction with suspected tarsal tunnel syndrome and plantar fasciitis. He reported paraesthesia in his feet and daily pain bilaterally but mostly in his left foot, ankle and lower leg. Walking and standing for long periods, wearing unsupportive footwear and not wearing orthotics were noted as aggravating factors to his pain.
- e. In September 2019, the Claimant was fitted for bespoke orthotics. He again reported paraesthesia in both feet and daily pain bilaterally but mostly in his left foot, ankle and lower leg, on getting out of bed and with standing and walking. He was asking for a medical report for a claim against his previous employer.

- f. In November 2019, the Senior Podiatrist recorded that the Claimant had said he continued to have paraesthesia and pain when standing or walking, making weight-bearing activities increasingly difficult and causing problems at work if wearing shoes that were insufficiently supportive and/or that did not accommodate his insoles.
- g. On 19 March 2020, the Claimant had a consultation with a podiatrist. This was by telephone because of COVID. The Claimant informed the clinician that he had been having back problems since getting his bespoke orthotics. He had however not arranged a six-week check-up or completed a referral form for physiotherapy. The clinician recorded having made it clear that he should have done so and that a follow-up appointment was booked for six weeks later. I accept that at or around that time the Claimant found it difficult to arrange face to face appointments and/or that appointments were cancelled because of pressures on the NHS due to the pandemic.
- h. In June 2020 the Claimant's GP recorded that the Claimant had low back pain which appears to have been linked to his podiatry issues and for which he was referred for physiotherapy.
- i. In August 2021, the Claimant saw a podiatry specialist. The Claimant said that he had spent a lot of 2020 in pain and that he felt poor orthotic support had contributed to that. His new bespoke orthotics had caused too much pain with use, so he had reverted to using his old, heavily worn insoles, though these did not support him as required. The clinician noted that the old orthotics lacked rearfoot support, had a low heel seat and insufficient valgus correction. The Claimant was measured for new aids and instructed on their gradual wearing in once received.
- j. In August 2022, the Claimant went to the podiatry clinic again. The Claimant told the clinician that he was in a lot of pain from a toe fracture. The clinician records that the area was inflamed and swollen. This provides both objective and subjective support for the Claimant's condition at that time.

This does not purport to be a complete analysis of the Claimant's medical records, which are detailed, and some of which are handwritten and illegible or have been written in medical terms or using abbreviations which have not been explained. I did not consider it appropriate for me to carry out my own searches in this regard, but in fact nor was it necessary.

51. The Claimant was reluctant to accept in cross-examination that he had exaggerated any of the symptoms of his condition or the reliance that he places on the orthotics. For example, there was evidence - in the unchallenged witness statements and in the bundle - of the Claimant:

- a. cooking for himself and others, including posting pictures of meals he has made or barbecues he has prepared;

- b. holding up without apparent difficulty heavy items of office furniture/bicycles, changing the tyres on the Third Respondent's bike and moving apparently freely around the office including bending, reaching up and stretching following an office move and lifting and carrying a heavy box upstairs with the Third Respondent;
- c. standing at the printer for long periods to scan or print files and reaching up or down to retrieve them from or return them to shelving;
- d. playing snooker with the Third Respondent; walking and hiking recreationally. The Claimant denied hiking but I prefer the unchallenged evidence of Ms Aslam on this point;
- e. walking with his child in a rucksack on his back and taking his child to at least one appointment according to the medical notes. The Claimant also denied that he had been the carer for this child while his partner worked, even though the Respondents had agreed to adjust his working hours in the office so that he could perform child care (including in one email saying he was unable to attend the offices three days a week due to "*child care arrangements*"). The Claimant claimed that he would just have "*been there to look after him*" while his partner was at work. I accept the Respondent's submission that the limitations on what the Claimant was able to do for his son have been significantly exaggerated. I do not accept the Claimant's evidence for example that he was unable to bend down to or pick up his child because of his flat feet or at all. I note that, for example, on 15 August 2022, there is an email from the Claimant to the Second and Third Respondents where he says he is using a half day's annual leave to attend an appointment and collect his son, and a week earlier he had again asked to leave early so that he could pick his son up from nursery;
- f. metal detecting, foraging and going fishing on the beach, including spending the day at the beach with the Third Respondent and their families when they went into the sea. The Claimant claims to have worn his trainers at all times while on wet sand and even while in shallow water. I do not accept his evidence on the latter point though I accept there is a photograph of him wearing trainers on the sand. I also accept the Third Respondent's unchallenged evidence that the Claimant erected a pop-up tent with shelter (requiring him to bend and move around) and the evidence that their walk to the spot where they spent the day was around ten to fifteen minutes;
- g. pre-pandemic, using public transport to get to work;
- h. using the treadmill and other gym equipment and cycling, including trying out non-electric bikes and (when his battery failed) actively pedalling on his electric bike. The Claimant says that so far as cycling to work is concerned, he uses an electric bike that requires little or no pedalling and wears trainers with orthotics while doing so. I accept this evidence with the caveat that he told his GP in June 2020 that he was "active, cycling etc" in order to minimise discomfort

or pain in his abdomen; and elsewhere (on an undated report) the Claimant complained of “crepitus” in his knee when cycling. I find that the Claimant has been able to cycle recreationally but that for the long commutes to work during and after the pandemic, it is likely on balance of probabilities that he was mainly using what he referred to as the “twist and go” facility on his Lime/electric bike;

- i. going up and down stairs rather than using the lifts in the workplace when going out for a cigarette break. I accept the Respondents’ evidence that this occurred around four times a day, rather than the Claimant’s evidence that it was “maybe once or twice”;
- j. walking for up to 20 minutes each way to and from cafes and restaurants to get coffee or lunch and attending workplace “social” events, including walking barefoot around the Third Respondent’s apartment and walking or using public transport when socialising at the weekends. The Claimant also said he would get the bus back if he walked to a particular Chinese restaurant in Liverpool Street which he eventually accepted was a 15-20-minute walk away. The Respondent has made much of a reference in the notes to the Claimant being able to “walk 600 yards and climb two flights of stairs”. While these may not be the Claimant’s own words and may well instead be a level of achievement that the clinician has used generically rather than specifically, I accept that when the Claimant wears his insoles, this accurately reflects what he can do;
- k. sometimes wearing “formal” shoes to work rather than trainers. I note that orthotics are not fixed in any particular pair of shoes so I do not consider this to contradict the Claimant’s assertions either that his trainers were more supportive or that his insoles greatly reduced the pain and discomfort during and after the working day.

52. In an email dated 8 February 2021, the Claimant has described his mother as his “adult dependent relative”. There is also reference to him possibly having “anxiety or depression related to caring for [his] mother”, in a letter from his then solicitor in an earlier claim against his previous employer that I gather was settled without a hearing. The Claimant was reluctant before me to accept that he is his mother’s carer and indeed suggested that it is she who cares for him. I do not accept the Claimant’s evidence before me on this point. I find he is capable of doing more than his statement suggests.

53. I am cautious about the fact that there have been periods when the Claimant has seen clinicians when he was bringing Employment Tribunal claims against his previous employer or against these Respondents and accordingly, he may tend to exaggerate, whether or not consciously, at times when he wants the clinicians to support such claims. I am also mindful that the Claimant has occasionally not helped himself as might reasonably have been expected by:

- a. Failing to arrange or attend appointments so that he has been discharged from the podiatry service;

- b. Wearing old and worn-out orthotics;
- c. Not following up on clinical referrals.

54. It is also right to note that the Claimant was not automatically entitled to a “blue badge” to be able to use disabled parking and again did not attend a follow-up assessment to enable that to be reconsidered.

55. Nonetheless, there is also ample evidence of the relief from the pain in his feet that the Claimant receives through wearing his insoles. I accept that during the period after he fractured his toe, he was unable to wear them because his foot was swollen and he could not get his shoe on (or could not get it on if he wore the orthotics). I do not consider that the Claimant is to be criticised for declining a course of pain relief via injection or surgery to attempt to correct his flat feet, as he describes the surgery as being both invasive and with long post-operative recovery time, with risks outweighing potential benefits.

56. Overall then the things that the Claimant cannot do at all or can only do with difficulty (i.e. pain free) without his orthotics include walking, cycling, going up and downstairs, standing to cook or perform work functions such as scanning and printing. These are all day-to-day activities because people do them on a regular or daily basis. The fact that the Claimant can walk around without his orthotics on (e.g. while in the sea or in someone else’s flat) does not affect the conclusion that for the most part, he needs to wear them on a daily basis in order to be able to carry out very basic functions in mobility, to a greater extent than the majority of the population.

57. The Claimant has had flat feet for well over ten years and although the impact is inconsistent, there is a very high likelihood of recurrence every time his orthotics wear out and have to be replaced. At times, it may cause different impacts at different times of the day, but there is always the underlying deformity (as one clinician described it). It is long-term.

58. It may well be that the Claimant’s broken toe exacerbated the impact of his flat feet, or vice versa. However, even removing from consideration the difficulties that the Claimant experienced following that fracture, I conclude that the impact of his condition at the relevant time was more than minor or trivial. In the circumstances, it did amount to a disability.

Employment Judge Norris
Date: 1 April 2024
JUDGMENT SENT TO THE PARTIES ON

10 April 2024

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FOR THE TRIBUNAL OFFICE