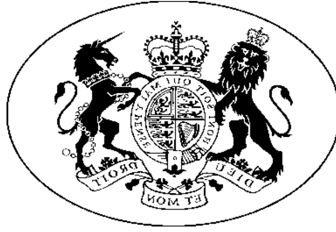

EMPLOYMENT TRIBUNALS

Claimant:	**Mr Anwar Abushama**
Respondents:	**(1) Extons Foods Limited &** **(2) Proman Supply Chain Limited**
Heard at:	**Manchester Employment Tribunals**
On:	**27 February 2024**
Before:	**Employment Judge G Tobin**
Appearances	
For the claimant:	**In person**
For the respondent:	**(1) Mr H Asif (solicitor)** **(2) Mr E Stenson (counsel)**
Interpreter:	**Mr A Rahman (Arabic – Middle Eastern)**

JUDGMENT having been given at the hearing and reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, reasons are set out as follows.

REASONS

The hearing

1. Employment Judge Horne listed this hearing to determine the following issue:

   Whether or not, between 28 July 2022 and 16 August 2022, the claimant had a disability consisting of the effects of the physical impairment of cervical spondylosis.

Evidence

2. At the outset of the hearing the claimant complained about the hearing bundle. He said that this had not been prepared in accordance with the case management orders. I was more concerned that the bundle for this hearing

included (a) material that the claimant had disclosed and (b) that he wanted to rely upon. I wanted to ensure that the claimant would not be taken by surprise by any of the respondent's inclusions. Once I ascertained that I had all of the relevant documents and that all parties had had sufficient time to consider these documents, we proceeded. The hearing bundle amounted to 312 pages. I had read the pleading prior to commencing the case. I also read some of the documents prior to starting the evidence. I read all documents referred to me but informed the parties at the outset that they needed to bring to my attention all document that they regarded as relevant because, as a matter of course, Employment Tribunals do not read through the whole of a hearing bundle.

3. The claimant presented a disability impact statement. This consisted of 6-pages and 37-paragraphs. The claimant signed the statement at the hearing, and he confirmed the content under oath. We were assisted by an interpreter. Mr Rahman initially spoke to the claimant, and I satisfied myself that there were no difficulties between the claimant and the interpreter in understanding each other. The claimant was cross-examined by the respondent's representatives, and I asked questions for clarification. The claimant insisted that he had no assistance in preparing his disability impact statement, which was not a big deal, but which I found unrealistic given the way the statement was drafted and the content of the statement.

4. Having heard the totality of the claimant's evidence, I say as follows. The claimant would not answer many straightforward questions asked by the respondent's representatives. I was satisfied that this was not a difficulty caused by the interpretation. I warned the claimant about possible adverse inferences. I intervened on a few occasions to tell him that he needed to answer the questions that he was asked. The claimant persisted in not answering straightforward questions. The claimant was evasive. So, I conclude that his evidence was unreliable on key points. I made finding of fact where these were supported by independent corroboration. I was unwilling to make findings solely or largely on the evidence of the claimant because I regarded him as an unreliable historian.

The law

5. S4 EqA identifies "disability" as a protected characteristic. So, an employee should not be discriminated against on the basis of their disability. S6(1) EqA defines disability:

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.

6. According to *Goodwin v Patent Office 1999 ICR 302 EAT* there are 4 different questions (or conditions) to determine disability within the meaning of the EqA.
    a. Did the claimant have a mental/and/or physical impairment? (The *impairment condition*)
    b. Did the impairment affect the claimant's ability to carry out normal day-to-day activities? (The *adverse effect condition*)

c. Was the adverse effect condition substantial? (The *substantial condition*)
d. Was the adverse condition long-term? (The *long-term condition*).

7. In respect of, can carry out certain activities, for example cooking, a person may well be able to do this but often only with great difficulty. So, in order to constitute an adverse effect, it is not doing of the acts which is the focus of attention but rather the *ability* to do (or not do) the acts; see *Goodwin v Payment Office*. There must be a causal link between the impairment and the substantial adverse effect, but it need not be a direct link: see *Sussex Partnership NHS Foundation Trust v Norris EAT 0031/12*.

8. The time to assess whether the impairment had a substantial adverse effect on day-to-day activities is as of the date of the alleged discriminatory act(s): *Cruickshank v VAW Motorcast Ltd 2002 ICR 729*. Our reference period was set out by Judge Horne as 28 July 2022 to 16 August 2022.

9. So far as a long-term condition, if the impairment had not lasted 12 months, the Tribunal will need to decide whether the substantial adverse effect of the condition was likely to last for at least 12 months. The government's *Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)* stipulates that an event is likely to happen if it "could well happen" (see para C3). How long an impairment is likely to last should be determined at the date of the discriminatory act and not the date of the Tribunal hearing all: *McDougall v Richmond Adult Community College 2008 ICR 431 CA*.

My findings of fact

10. I made the following findings of fact. I did not resolve every dispute on disability as I confined myself to the matter set out by Judge Horne. Where I considered it appropriate, I set out our reasons for making such findings. In making my findings of fact, I placed particular weight on contemporaneous or near-contemporaneous documents and correspondence as a more accurate record of events. Statements and (to a lesser extent) submissions were, of course, central; however, for a statement that was written sometime after the events in question the author may have difficultly remembering what was happening at the material time. Furthermore, statements are often written through the prism of either advancing or defending the appropriate claims, which needs to be assessed.

11. The claimant appeared to be a frequent attender at his GP surgery, so I regarded his medical records as likely to be full and a fair account of his various conditions.

12. The claimant suffered a back injury on 27 July 2022. He reported to the GP a couple of days later that he was worked hard and was over-burdened with heavy work. He did not see or speak to a doctor, he merely said that he wanted this recorded in his notes. This was recorded as "Backache (First)" on 29 July 2022. The medical notes referred to the claimant complaining of pain in back and legs [Hearing Bundle page 164]. The claimant said in evidence that he

thought that his back complaint would get better, which is why he did not escalate matters.

13. On 1 August 2022 the claimant requested a sick note when he attended the surgery on an unrelated matter. He was not seen by the GP, but he was given a fit note for 1 week saying “Back injury at work causing back and pain in legs” [HB163].

14. On 3 August 2022 the claimant had a telephone consultation with his GP, so he was not seen or physically examined. The claimant complained of lower back (or lumbar) pain radiating to the back of both thighs and numbness to the saddle area. It was recorded that he was independently mobile and had a normal gait. He had pain on all movement. The GP appeared unconvinced as he refers to this being incongruent with the history and examination. However, given the lower back pain complained of, the sciatica and the numbness in the saddle area the GP referred the claimant to accident & emergency for a MRI scan to rule out a serious condition called cauda equina syndrome [HB162].

15. The claimant was admitted to hospital on 4 August 2022. He stayed 5 days. The main reason for his admittance to hospital was shortness of breath, wheezing and cough, which was unrelated to any cervical spondylosis and the prognosis for this was likely undiagnosed asthma. The claimant does not refer to his breathing difficulties as a source of hospital admittance in his disability impact statement. His disability impact statement was at significance variance with the contemporaneous documentary evidence in respect of this crucial point. The claimant tried to relate his hospital admittance to his back pain, I determine, to create a misleading impression of his medical history. This undermined the claimant’s case further. The hospital discharge summary is at pages 195 to 196 of the hearing bundle. While in hospital the claimant underwent an MRI scan [HB305-309].

16. There is an entry in the claimant’s notes for 8 August 2022 in respect of musculoskeletal pain – back pain. This suggested no lumbar (lower back) problems were seen after the MRI scan. The MRI scan identified “moderate” spondylosis in the cervical spine with potential left nerve root irritation at C7. The cervical spine is high up in the spine, i.e. the neck section and consists of 7 vertebrae C7 being at the base of the neck. This is above the 12 vertebrae thoracic or upper back section, which in turn sits above the 5 vertebrae lower back or lumbar section, where the claimant reported his problem.

17. Significantly, the notes record the claimant as denying any root irritation within the neck and/or upper limbs. The notes were amended on 11 August 2022 following a discharge summary from the hospital [HB305-309]. The claimant had been seen by the spinal team and neurology team who felt that the symptoms were secondary to pain. They recorded that the claimant was able to mobilise (i.e. get up and walk), including on stairs, independently on discharge and given paracetamol, codeine and a short supply of diazepam [HB161-162].

18. On 10 August 2022 the claimant telephoned his GP. The consultation was recorded under cervical spondylosis with nerve entrapment, as by that time the GP practice had seen the MRI scan result. The claimant complained of bilateral limb pain and left shoulder pain. He was prescribed painkillers, given a sicknote, and a 2-week review was booked.

19. When the claimant was asked at the hearing how his symptoms were progressing during this 2-week period, the claimant said that they were the same or got worse. I do not believe him because this conflicts with the contemporaneous and authoritative contemporaneous evidence. On 24 August 2022 the claimant had a further telephone consultation with his GP. He had been prescribed pregabalin, which was a sedative and analgesic. The records say said that he respondent well but that he had problems with intermittent numbness, which was a feature of his lumbar/sciatica/saddle injury and not the cervical spondylosis. A further sick note was issued [HB158].

20. A further sick note was requested by the claimant on 26 September 2022 and issued by the GP, without any recorded assessment [HB157].

21. On 18 October 2022 the claimant had a face-to-face consultation with his consultant. He complained about worsening neck and shoulder pain [HB156]. This was the first time that any neck complaint was made.

Determination

22. The claimant clearly had a physical impairment, cervical spondylosis. This is an age-related degenerative condition. It is caused by wear and tear to the spinal discs in the neck. It is common for someone to have this condition for some considerable time before it is noticed of diagnosed. This was diagnosed because of the MRI scan was investigating the unrelated strain injury to his lumbar/sciatica/saddle.

23. The claimant was engaged in heavy lifting at work, and he strained his lower back and thighs. This was nothing to do with either the upper back (thoracic) or the cervical spine. The lower back and sciatica problem did not improve so he went to the GP. I am not convinced that the claimant's back pain persisted, the respondents questioned whether he was seeking to make a person injury claim. That may or may not be the case, but I do not find the claimant credible in his evidence and I am unconvinced that the story he told the medical practitioners at the time was credible.

24. When the claimant was asked about the lack of reference in his medical notes to neck pain until October 2022, he said that he either did not mention neck pain because his low back pain was worse or it went unrecorded by the medical practitioners. He was not able to identify were this was mentioned but not properly recorded by a medical practitioner in the medical notes. I do not believe that successive doctors could not record a patient history or complaints accurately. The claimant said he had a conversation with a nurse while he was in hospital about his neck pain which went unrecorded. If such a conversation

occurred, then I am not persuaded that his neck pain was of any significance to his lower back injury or to any other condition.

25. Anyway, the claimant complained of lower back pain caused by lifting at work. The low back pain, sciatica and numbness to his lumbar region are unrelated to the cervical spondylosis because the condition under my scrutiny relates to the neck and possibly shoulders and the claimant complained of an acute condition (back injury) as opposed to the gradual onset of a chronic condition (cervical spondylosis). The GP was unconvinced about the claimant's symptoms but referred the claimant for an MRI scan to rule out the possibility of something more serious. The claimant was misleading about his hospital admission but while in hospital the MRI scan revealed the degenerative condition, the claimant had not previously complained of neck problems. He did not previously complain of shoulder problems. However, once he had the outcome of his scan, he complained of shoulder pain (which was later attributed to a muscle tear). It was not for some months later that the claimant said that he had neck pain. So his story changed and I determine that he changed his story to match the outcome of the medical enquiries.

26. The claimant did not present documentation from the physiotherapist to deal with cervical spondylosis referral, which is surprising, but I draw no inference from that because it may be that this evidence might not have assisted me either way.

27. The effect of cervical spondylosis on the claimant's day-to-day activities was not substantial at the material time. He did not report any neck problems. The reason for the claimant's hospitalisation was to rule out the possibility of a more significant medical condition and treat the claimant's respiratory concerns. I am not persuaded by much of the adverse effects the claimant now contends because I do not find him credible and these matters were not documented at the material time, or indeed at all.

28. In any event, there is no evidence from which I could establish that as of 16 August 2022 the claimant suffered from adverse effects from cervical spondylosis which could last 12 months or longer. On 8 August 2022, at the time of diagnosis, the claimant's condition was described as moderate, with potential irritation. He did not have any of the expected symptoms of that condition at the time. He was prescribed painkillers for the lower back complaint and was to be reviewed in a matter of weeks.

29. The claimant's statement gives no indication of an ongoing degenerative condition. The "impacts of day-to-day activities" at paragraph 24 to 34, is inconsistent with the contemporaneous evidence. There is no reference in the hospital or GP records to limitations on lifting, walking, dressing, cooking, cleaning or sleeping. This is a claimant who would have ensured that such limitations were recorded in his medical history as he did so on 29 July 2022. So, I reject his evidence in this regard.

30. The contemporaneous evidence says that the claimant was able to mobilise and walk up stairs. He complained of pain but if this was at the level that he

asserted then it was clearly and directly attributable to his strain injury to his lower back/thighs/saddle and not to a degenerative neck condition. There is no evidence to suggest that the cervical spondylosis adversely effected the claimant's day to day activities or that this was substantial. There is no evidence that the claimant's strain injury to his lumbar, thighs and/or thighs might cause or make worse his cervical spondylosis so in accordance with *Sussex Partnership v Norris* the claimant has not established a causal link between the lower back and sciatica problems and the cervical spondylosis.

31. Cervical spondylosis is a degenerative condition, so the condition is likely to last for 12 months or longer. But so far as ascertaining the long-term condition, that is not the question for me to determine. The question for me to determine is whether, from the time of our reference period, the substantial adverse effect of this impairment was likely to last more than 12 months, see *Royal Borough of Greenwich v Syed EAT/0244/14*. In respect of the likelihood of an effect being long-term and re-occurring, the assessment must be made from the information available at the material time, and later information should be disregarded, see *McDougall v Richmond Adult Community College*. Under the circumstances, following from above, there is no evidence from which I can be satisfied that the claimant could suffer a substantial adverse effect that was long-term.

Employment Judge Tobin
Date: 22 June 2024

JUDGMENT SENT TO THE PARTIES ON
25 June 2024

FOR THE TRIBUNAL OFFICE

Notes
Reasons for the Judgment having been given orally at the hearing, Written Reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to Employment Tribunal decisions
Judgments and Written 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.