



THE EMPLOYMENT TRIBUNAL

SITTING AT:
BEFORE:

WATFORD
EMPLOYMENT JUDGE ELLIOTT

BETWEEN:

Ms M Fernando

Claimant

AND

Knight Frank Services Co

Respondent

ON: 29 May 2024

Appearances:

For the Claimant: Ms H Platt, counsel

For the Respondent: Ms E Grace, counsel

JUDGMENT ON PRELIMINARY HEARING

The Judgment of the Tribunal is that at the material time of September 2022 to January 2023 the claimant was a disabled person with the condition of chronic back pain.

REASONS

1. This decision was given orally on 29 May 2024. The claimant requested written reasons.
2. By a claim form presented on 30 June 2023 the claimant Ms Fernando brings claims of direct sex and disability discrimination, discrimination arising from disability, indirect sex discrimination, failure to make reasonable adjustments, harassment related to sex and disability, victimisation, holiday pay and notice pay.
3. The claimant was employed by Knight Frank Services Co who are part of an estate agency and property consultancy, as a front end engineer, from 6 June 2022 until either 30 January 2023 or 7 February 2023. The effective date of termination remains in issue.
4. There were claims for unfair dismissal and for discrimination because of

sexual orientation. Those claims were dismissed on withdrawal.

This remote hearing

5. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The tribunal considered it as just and equitable to conduct the hearing in this way.
6. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.
7. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties.
8. The participants were told that it was an offence to record the proceedings.
9. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

The issue

10. The issue for this hearing was whether the claimant met the definition of disability at the material time, being from September 2022 to 30 January 2023, with the condition of chronic back pain.
11. This hearing was listed at a case management hearing on 4 March 2024 before Employment Judge Price. The issues for this hearing did not include disability status, but issues concerning Early Conciliation and amendment. The hearing allocation was for 2 days and was listed as a public hearing.
12. Ms Platt for the claimant said that she was clear and her note of the last hearing said that disability status was to be considered at this hearing and that was the reason for the 2 day allocation. Ms Platt accepted that the claimant's side had not written to the tribunal on receipt of the Case Management Order to say that this issue had been omitted.
13. Ms Grace for the respondent said that she had prepared for this hearing on the basis of the matters set out in the Order of 4 March 2024 and that did not include the issue of disability status. After a break was taken for Ms Grace to take instructions, the respondent agreed that disability status could be dealt with at this hearing. The hearing had been convened as a preliminary hearing in public.
14. We dealt with the case management issues on day one, 28 May 2024 and on disability status on day two, 29 May 2024.

Witnesses and documents

15. There was a bundle of documents of 233 pages plus a GP letter dated 20 May 2024.
16. The tribunal heard evidence from the claimant.
17. I had skeleton arguments from both parties to which counsel spoke. All submissions, plus case law, were fully considered whether or not expressly referred to below.

Findings of fact

18. The claimant has had back pain since January 2017 having sustained injury in two different circumstances.
19. The claimant has been under the care of a consultant, Dr H Tahir since December 2017. She has had physiotherapy and sees her GP, initially Dr Kumar and latterly Dr Patel. The claimant was first referred for physiotherapy in January 2017 (page 161). She first began taking painkillers in January 2017 (page 178). On 24 October 2017 the physiotherapist recommended that the claimant be referred to neurology (page 158).
20. In February 2018 the claimant asked her GP for stronger a painkiller (page 155). This was prescribed (page 176).
21. The tribunal saw a physiotherapy report dated 15 June 2018 (page 212) which said that the claimant had experienced lower back pain for 8 months. The physio said that the outcome of the examination was that the symptoms related to abnormalities in the claimant's biomechanics. The physiotherapist recommended manipulation of the lower back, soft tissue therapy, back care, a home exercise programme and gave ergonomic advice.
22. The claimant said that she takes a variety of pain medication, including Zapain, Co-codomol, paracetamol, a gel, Naproxen and has taken Pregablin since 2021. She takes aspirin, Nurofen and uses gels and sprays daily. She also uses heat treatments and massage treatment. As these medications were noted in her medical records, I find that she did take these medications.
23. The claimant had MRI scans in March 2018, June 2020 and December 2020. The MRI in March 2018 revealed nothing untoward. It showed a light disc bulge in her cervical spine. Dr Tahir said that a lot of the claimant's symptoms were related to abnormalities in her biomechanics and poor posture (page 207).
24. In April 2018 the physiotherapist provided a report to the GP (page 209).

This dealt with a number of effects on the claimant's ability to carry out normal day-to-day activities. For example, it said that she has pins and needles in her right arm, numbness in her right hand along with dizziness and headaches. It said that she had some sleep disturbances and pain was aggravated when typing, sitting for long periods, lifting weights, looking to the left, bending or leaning forward.

25. There was a further physiotherapist's report dated 15 June 2018 (page 210). This reported that the claimant's lower back was painful and that she had occasional shooting pain in her right leg.
26. On 4 September 2018 the claimant continued to report low back pain to her GP (page 148).
27. There was a letter from the claimant's GP Dr Kumar dated 26 February 2019 (page 219). This said that the GP could not comment on her prognosis as it was taking longer than they would traditionally expect. The claimant was asked why she asked the GP to comment on her prognosis. The claimant could not recall.
28. On 19 March 2019 the medical records showed the claimant's GP Dr Kumar saying that she could not correct the opinion of a colleague. It was put to the claimant that this was her asking the doctor to say what she wanted them to say. I find that this entry shows that Dr Kumar could not set out the opinion of a colleague without something written from that colleague which she could not see in any of the letters. The claimant said that this was about an incorrect date written by the other doctor. I find that if the claimant considered that a date in her medical records was incorrect, she was entitled to seek correction. I find on a balance of probabilities that this was not the claimant seeking to ask a doctor to say what she wanted that doctor to say.
29. The claimant saw her GP in July 2019 for back pain (page 142).
30. The claimant did not take strong painkillers during pregnancy in 2019/2020 on her doctor's advice. She continued to take paracetamol and use gels.
31. In June 2020 the claimant had a second MRI scan (page 133). The outcome was for the claimant to self-monitor and if symptoms persisted to go to her GP surgery.
32. The claimant was referred to the orthopaedic clinic at St Albans City Hospital. She was discharged on 26 November 2020 as set out in a letter from the Registrar to Mr Balaji (page 186). The letter said that she had a 3 year history of back pain with right leg pain. The letter said that she did not attend the clinic that day. The claimant said that this was during Covid and it was not an appointment in the clinic but over the phone. I find on a balance of probabilities that in November 2020 when Covid was still prevalent, that this was not the claimant failing to turn up, but as she

said, it was a telephone review and not an examination in person. The letter said that she had mild degenerative changes which did not require surgical intervention.

33. I find that not requiring surgical intervention is not the same as saying that the claimant did not have chronic back pain. I find that the letter says that it cannot be resolved by surgical intervention, which is consistent with the claimant's evidence that she was told that it "*could not be cured*". I find that the claimant was not exaggerating, as was put to her, when she said that her condition "*could not be cured*".
34. In December 2020 the claimant had a further MRI scan (page 125). Options were discussed with the claimant for further assessment and management.
35. The claimant said she was told by Dr Balaji that for her whole life she would need to mitigate her pain. The claimant assessed the level of her pain as at 7/10 most days and 8 or 9/10 at worst, when she has not taking pain medication. She said that the pain and/or the medication causes blurred vision, dizziness and blackouts. There was a reference to "*faint/blackout*" in her medical records on page 135, on 5 June 2020. I find that the claimant was not exaggerating about this.
36. On 9 February 2021 the claimant was first prescribed the painkiller pregabalin. On 10 May 2021 the claimant was a referred to the pain clinic. She accepted that she did not take up this referral. This was because she was looking at alternative medicine to help resolve symptoms, as recorded in her medical records (page 121).
37. In January 2022 the prescription for pregabalin was ceased and the clamant was provided with an alternative, tramadol (page 115). Tramadol caused difficult side effects (page 110) so she went back on pregabalin (page 173). She remained on this medication until at least September 2023 (page 173). Although September 2023 is after the material time period, it goes to the issue of the impairment being long term.
38. The claimant's evidence as to the effect upon her on her ability to carry out normal day to day activities was as follows.
 - a. She cannot bend or squat without pain
 - b. Walking increases pain
 - c. She is stiff getting out of bed
 - d. She has weakness in her right arm and right leg
 - e. She has intermittent numbness
 - f. Low mood is a result of this including depression and anxiety
 - g. She has difficulty climbing hills and stairs.
 - h. Standing for more than a few minutes is difficult without painkillers. It was put to the claimant that this was not consistent with her evidence that sitting was a problem. The

claimant's evidence was that both sitting and standing could be difficult.

- i. She can prepare light meals but cannot cook anything "too involved".
- j. Chopping food or ironing is difficult as it increases pain.
- k. The claimant cannot do cleaning such as a bathroom where bending or squatting is needed.
- l. Doing laundry is difficult.
- m. She is no longer able to enjoy playing cricket or netball. She does Pilates to help with the pain.
- n. Lifting or playing with her children is difficult.
- o. She cannot carry heavy shopping.
- p. She gets help from her husband with some dressing and washing such as the washing of her hair or feet and putting on shoes.
- q. The claimant's sleep is disrupted due to pain.
- r. Travelling on public transport is possible but difficult and she needs to use tube stations that have lifts rather than just stairs.

39. It was said that majority of the above list was not challenged with the claimant. The respondent did not accept the accuracy of the above list but did not put each item in turn, for reasons of time. Nevertheless, I find that the claimant was truthful in her account of these effects. There were references to many of the symptoms and effects in her medical records, such as sleep disturbance and poor sleep, stiffness when getting out of bed, difficulty lifting weights which I find includes heavy shopping or lifting her children, difficulty with both standing and sitting, bending and pain, weakness in her right arm or right leg and numbness. I found no inconsistency with her description of both standing or sitting for long periods being difficult. On my finding she does not need to experience only one or the other. I find that these were the effects on her day to day activities.
40. It was put to the claimant that she did not report those matters to her doctor. She said that she did and that was the reason why she was given medication. I find that the medical records do not show every word discussed between the claimant and her doctor in a consultation and that they prescribed medication because of the problems she encountered due to back pain. Patients have a short appointment, commonly only 10 minutes or less, and GP's have very little time to complete the record after the consultation. I draw no adverse inference from the brevity of the notes in the medical records and find on a balance of probabilities that there are good reasons why the GP did not record everything she was told by the claimant. I find that the claimant was not exaggerating.
41. The claimant had a telephone medication review on 12 October 2022 (page 106). The claimant thought that there was something not quite right about this telephone call. She said she spoke to a woman on the phone, but the medical records said that she spoke to a man. The call

came from a private number which also made the claimant suspicious. The medical record at page 106 said that the review was undertaken by the Pinn Medical Centre which is the claimant's GP practice.

42. There was GP letter from Dr Deepen Patel dated 20 May 2024, introduced separately from the bundle but with no objection from the respondent. The claimant moved from seeing Dr Kumar to Dr Patel. It was put to the claimant that she asked the GP to send a letter in support of her claim, regardless of whether it was reflective of the details.
43. The claimant said that she asked for the letter and the GP went through her records. It was put to the claimant that the letter was vague; the claimant did not agree. The letter said:

She has been complaining of long term back painwhich started in January 2017. She has been taking analgesia (painkillers) for this pain since January 2017 till date.

Due to various side effects from taking [a list of medications] she has been alternating between these medications.....When she has side effects she temporarily omits this medication until she can resume to mitigate the long term side effects.

She tells me she has tried on occasion taking natural remedies including herbal and ayurvedic treatment to manage the pain and prevent analgesia side effects.

44. I find on a balance of probabilities that Dr Patel did not write a letter that was not accurate or reflective of the details. Doctors are professionally regulated and it would be a very serious matter if Dr Patel had simply written what the claimant asked him to say. I find that this did not happen and the letter is reflective of Dr Patel's clinical opinion.
45. The claimant has taken occasional breaks from prescription medication to take herbal or ayurvedic remedies. This was not in her witness statement but it was set out in Dr Patel's letter of 20 May 2024. On the claimant's evidence I find that she takes the occasional breaks from prescription medication for relief from the side effects. She believes that herbal or ayurvedic remedies could cure her, but this could only be done if she took 4 – 6 months out of the country at an ayurvedic retreat which she cannot do with a family to look after.
46. The claimant could not recall whether she had time off sick from work for back pain. It was put to her that if she did not have any time off sick for back pain that she was "managing just fine". The claimant disagreed and said she was having a really bad time. I find that the claimant was not "managing just fine" because she needed to take pain medication to help her to manage.

Was the claimant a disabled person from September 2022 to January 2023?

47. I find that the claimant has a chronic back condition which has subsisted

since January 2017. The condition relied upon was not a degenerative spinal condition as appeared to be suggested by the respondent, but a chronic back condition involving back pain. By the end of the material time, at the end of January 2023, it has subsisted for 6 years. By January 2023 I am in no doubt and I find that it was a long-term condition. It is not necessary for the tribunal to make any findings as to the causation of that condition.

48. I can find no other plausible basis for the claimant to have taken a variety of pain medications since 2017 other than she had the pain and the condition upon which she relies. The claimant would have preferred to seek a more natural remedy through herbal and ayurvedic treatments but this was not feasible for her as it required 4 – 6 months treatment overseas. I find that she was not taking the prescribed medication for any reason other than a need to mitigate considerable back pain.
49. I have found above that the claimant did not exaggerate the effects of her condition on her ability to carry out normal day to day activities. I find this because of the considerable cross references in the medical records to the effects that she described.
50. I do not accept the respondent's submission that the adverse effects were not caused by the impairment. For example, in April 2018 the physiotherapist described "*sleep disturbances and pain was aggravated when typing, sitting for long periods, lifting weights, looking to the left, bending or leaning forward*". The physio was treating the claimant for shoulder and back pain and noted problems with the cervical spine.
51. As I have found above, the fact that the claimant's condition could not be resolved by surgical intervention does not mean that the condition did not exist or that there was no physical cause. I find based on Dr Tahir's report of 25 March 2018 that the claimant's symptoms were related to abnormalities in her biomechanics and poor posture.
52. There were times during which the claimant was not taking the painkiller pregabalin. I find, based on the medical records, that the claimant experienced side effects from the painkillers that she took, hence her preference to choose herbal medicine or ayurvedic treatment if she could. For the reasons I have found above, this was not altogether practical. The claimant took an array of pain medication and the absence of taking pregabalin over any period, does not lead me to find that the claimant was not experiencing pain caused by her back condition. She took other pain medication, including over the counter pain medication plus sprays and gel.
53. I find that the adverse effects experienced by the claimant were caused by the condition of chronic back pain, which was a long term condition of six years.
54. I find that she did not exaggerate and that the condition had the effects

she described. This was a substantial and long term adverse effect on her ability to carry out normal day to day activities.

The relevant law

55. Section 6 of the Equality Act provides that a person has a disability if that person has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
56. The burden of proof is on the claimant to show that he is disabled in relation to each impairment relied upon.
57. Under section 212(1) of the Equality Act 2010 “substantial” means more than minor or trivial.
58. Paragraph B9 of the Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability (the Guidance), says as follows:

B9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do, or can only do with difficulty.

59. This guidance was issued under section 6(5) Equality Act and under Schedule 1 paragraph 12 an adjudicating body must take into account any aspect of this guidance which appears to it to be relevant.
60. In ***Goodwin v The Patent Office 1999 IRLR 4*** the EAT set out four questions to be considered:
 - 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?
 - d. was the adverse condition long term?
61. There must be a causal link between the impairment and the adverse effect. The impairment must, objectively, be found to cause the adverse effect. It is an error of law to rely on a claimant’s subjective view - ***Primaz v Carl Room Restaurants Ltd (t/a McDonald’s Restaurants Ltd) 2022 IRLR 194*** (paragraphs 62 – 64).
62. In ***Paterson v Commissioner of Police of the Metropolis 2007 ICR 1522***, the EAT looked at the meaning of substantial adverse effect as

described in the Guidance. At paragraph 27 the EAT said:

“In our judgment paragraph A1 [now B1] is intending to say no more than that in the population at large there will be differences in such things as manual dexterity, ability to lift objects or to concentrate. In order to be substantial the effect must fall outwith the normal range of effects that one might expect from a cross section of the population. However, when assessing the effect, the comparison is not with the population at large. As paragraphs A2 and A3 make clear, what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired”.

Conclusions on disability

63. For the reasons set out above I find that at the material time from September 2022 to January 2023 the claimant was a disabled person with the condition of chronic back pain.

Employment Judge Elliott
Date: 29 May 2024

Judgment sent to the parties and entered in the Register on: 5 July 2024
____ for the Tribunal