



EMPLOYMENT TRIBUNALS

Claimant: Mr C Thompson

Respondent: Ainscough Limited

Heard at: Manchester by CVP Video link **On:** 10 June 2024

Before: Employment Judge Humble
(sitting alone)

REPRESENTATION:

Claimant: Mr Todd, Counsel

Respondent: Mr Maini-Thompson, Counsel

JUDGMENT ON PRELIMINARY HEARING

The Judgment of the Employment Tribunal is that:

1. The claimant was, at the material time, disabled by reason of a functional neurological disorder resulting from long COVID which caused an impairment to his left leg.
2. The disability discrimination claim shall proceed to a final hearing.

REASONS

The Hearing

1. The hearing was conducted remotely by CVP video link. The claimant was represented by Mr Todd of Counsel, and the respondent was represented by Mr Maini-Thompson of Counsel. The claimant gave evidence at the hearing by way of a written statement and was cross examined by Mr Maini-Thompson. Mr Bartley, a manager, gave evidence on behalf of the respondent by way of a written statement and was cross examined by Mr Todd. There was an agreed bundle of documents extending to 112 pages. The evidence and submissions were taken on the day of the hearing and judgment was reserved.

The Issues

2. The hearing was convened to determine the preliminary issue of whether the claimant was disabled within the meaning of section 6 Equality Act 2010. The question for the tribunal was whether, at the material time, the claimant met the statutory definition of disability by reason of a physical or mental impairment. The material time for the purpose of this case was 17th May 2023, which was the date of the claimant's dismissal.
3. Mr Todd, on behalf of the claimant, described the condition relied upon as a functional neurological disorder resulting from long COVID which caused a particular impairment to his left leg. This was a more precise definition than the pleaded case, but it was broadly in line with it and consistent with the reason relied upon at an earlier preliminary hearing when it was said that he had "a leg problem arising from long COVID." The tribunal accepted that, as an alleged neurological disorder, it might also be relied upon as a mental impairment.
4. The issues for the tribunal to determine therefore were whether, on 17th May 2023:
 - 4.1 the claimant had the physical, or mental, impairment of a functional neurological disorder resulting from long COVID which caused a particular impairment to his left leg;
 - 4.2 whether the impairment adversely affected the claimant's ability to carry out normal day-to-day activities;
 - 4.3 whether any such adverse effect was substantial; and
 - 4.4 whether any adverse effect was long-term.
5. The tribunal was assisted by Mr Maini-Thompson who, on behalf of the respondent, indicated that it did not dispute that the claimant had an impairment resulting from long COVID which caused a physical impairment to his left leg. It did dispute, however, that the impairment had a substantial and long term effect on the claimant's ability to carry out day to day activities at the material time.

The Law

6. The tribunal had reference to section 6 Equality Act 2010 ("the Act"), which states:

"(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."*

7. Schedule 1 to the Act, where relevant for the purposes of this case, in relation to long-term effects states:

“(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...”

and, in relation to the effect of medical treatment, provides that:

“(1) 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

(c) but for that it would likely have that effect”

8. The tribunal also had reference to the guidance in the Code of Practice on Employment 2011, which provides, in respect of a ‘substantial’ adverse effect:

“8. A substantial adverse effect is something which is more than a minor or trivial...”

and,

“10. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long term effect on how they carry out those activities. For example, where an impairment causes pain or fatigue in performing normal day-to-day activities, the person may have the capacity to do something but suffer pain in doing so; or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time.”

9. The tribunal was not referred to any case law and there were no skeleton arguments or written submissions. The tribunal reminded itself of the principles in Kapadia v London Borough of Lambeth [2000] IRLR 699, CA which is authority for the principle that the burden of proof rests with the claimant to show that he suffers from a disability, and had reference to Goodwin v Patent Office [1999] IRLR 4, EAT which is authority for the proposition that, when assessing disability, the tribunal should examine the things which a claimant either cannot do or can only do with difficulty, rather than on the things that the person can do.

Findings of Fact

The Employment Tribunal made the following findings of fact on the balance of probabilities (the tribunal did not make findings upon all the evidence presented but made material findings of fact only upon those matters relevant to the preliminary issue to be determined):

10. The respondent is a business which specialises in steel fabrication and supply, and it employs about 23 staff on its site in Skelmersdale, Lancashire. The claimant commenced work for the respondent in July 2002 and was employed as a Forklift Truck Operator and Yard Supervisor until his dismissal on 17 May 2023.
11. The claimant contracted Covid in 2020, he cannot exact recall the date, and was absent from work for a brief period of time as a consequence. Sometime after returning to work he suffered with numbness in his foot and pins and needles in his left leg and, from about May 2021, this developed into a limp. The claimant consulted his General Practitioner in relation to the limp and was referred for an MRI scan which initially ruled out any neurological deficit in his leg, and he was also referred to a physiotherapist. Between 2021 and 2023, there were various referrals and tests carried out but it was not until 4 July 2023, about seven weeks after the claimant's dismissal, that the diagnosis of a functional neurological disorder resulting from long COVID was suggested as the cause of his impairment.
12. The claimant's case was that the impairment to his left leg affected his gait and meant that he was unable to walk long distances without difficulty and, he said, this had a substantial effect upon his day to day activities from about 2021 onwards which worsened as time progressed. He did not give much specific information as to how it affected him in his home life, or indeed at work, other than it impaired his walking and caused him pain such that, by early 2023, he would avoid walking at work whenever possible and would even use his forklift truck to go to the toilet facilities.
13. The respondents case, both in cross examination and submissions, focused upon the claimant's medical notes. It was said that the claimant's GP notes between 2020 and 2023 (pages 64-67) made no reference to the claimant having any difficulty walking until after his dismissal. It was submitted on behalf of the respondent that if the claimant was having genuine difficulties with his leg, he would have disclosed this to his GP and these would be reflected in the notes from the relevant period. A contrast was made with the claimant's complaint of a wrist injury during the same period which featured quite heavily in the GP notes. It was further submitted that the medical reports did not make any diagnosis in relation to the claimant's impairment until July 2023, some weeks after his dismissal. If there was a disability at all it was said that this was only developed after the claim's dismissal and it could not be said that there was a disability at the material time.
14. The tribunal did not share the respondent's interpretation of the evidence. While it was correct that there was no reference to the claimant's leg impairment in the GP notes between 2020 and April 2023, the tribunal accepted the claimant's evidence that this was because a referral had been made to specialists and the matter was therefore not been dealt with by the GP during that period.

15. There was evidence from a physiotherapist, who examined the claimant in October 2021, and produced a report dated 22 November 2021 (page 75), that the claimant suffered an impairment to his gait. Among other things, the report stated that the claimant, "*had some pain around his left hip with rotation and flexion...*" and, "*he tells me he cannot correct it even when he tries and is struggling to walk around the factory in work. He tells me his leg has given way and he has fallen over hurting his ribs.*" The report goes on to state that he had been referred for an MRI scan. There was a further physiotherapist report of 17 December 2021 which referred to the claimant's "*high stepping gait*" and there was a referral for a "*whole spine MRI scan and pelvis*".
16. There follows a detailed report from a Consultant Neurologist, dated 23 June 2022 (pages 78-79). Among other things, that report found that "*there is no weakness in his legs, however, he finds it difficult to walk on his toes on the left side*" and "*Although MR scan changes are on both sides, his symptoms are only on the left side...*" The report concluded, "*I will arrange for him to have an EMG and he will be reviewed after this investigation.*"
17. There were then further referrals from the claimant's physiotherapist in correspondence of 6 and 8 March 2023. The first letter was seeking to expedite a referral to the Neurology Department of Salford Royal Hospital due to "*symptoms worsening*" (page 82), and the second was to a specialist podiatrist which stated, "*on attendance this week he did state due to the unusual high stepping gait he is suffering with left lateral ankle pain and he feels this is more due to the unsteadiness and the unusual biomechanics of his gait. I am unsure if Podiatry would be of any benefit but I would value your expert opinion for an assessment to decide if further intervention may be warranted from yourselves.*"
18. Following the claimant's dismissal, the most significant items of medical evidence were the reports of Dr Tarek Gaber, Consultant Neurological Rehabilitation. His report of 3 July 2024 stated that the claimant had "*developed [a] weakness of the left leg*" and suggested this had been caused by Long Covid and evolved into a "*functional neurological disorder*". A letter of 26 July 2023, from a different consultant neurologist, stated that an MRI on the brain was normal and that this result, "*coupled with his clinical impression reinforces the diagnostic suspicion of functional neurological disorder. I have referred the patient to the consultant in neuro rehabilitation at Leigh Infirmary to aid with his abnormal movements.*" At about the same time, the claimant was deemed to be unfit for work by his GP (page 64).
19. The tribunal found that the medical evidence was consistent with the claimant's evidence that he had difficulties walking from about May 2021, and that this had gradually worsened between that date and the time of his dismissal on May 2023. Mr Bartlett confirmed in his own evidence that he was aware the claimant was limping and had asked, on more than one occasion, whether he needed any assistance. The claimant responded with words to the effect that he was undergoing tests but was able to manage.

20. The respondent submitted that, even if the claimant was disabled, this was only the case after his dismissal given the diagnosis in July 2023, and it was not until a subsequent neurological report of December 2023 (pages 98-99) that there was any real evidence of a disability. The tribunal disagreed with this analysis and preferred the claimant's submission that the fact that a formal diagnosis was made shortly after the dismissal, when the claimant was also deemed unfit to work, was persuasive evidence that he was suffering from the same impairment six or seven weeks earlier and that the impairment had a substantial adverse effect on his day to day activities at that time. It was unlikely that his condition had deteriorated significantly in such a short period of time, particularly in circumstances where, by that time, he had been suffering from a impairment in his left leg for approximately two years.
21. Mr Maini-Thompson sought to cast doubt on the claimant's credibility in respect of three key points: the lack of reference to his mobility in GP notes; that it was implausible that the claimant would use his forklift truck to drive to the toilet whilst at work; and that he did not ask his employer for help which suggested he was coping well with his mobility.
22. The tribunal accepted the claimant's evidence that he had difficulty walking to the extent that he used his forklift truck to drive to the toilet facilities. This was a site which covered hundreds of metres and driving by Forklift, rather than walking to those facilities, was one way to mitigate against his impairment. Further, whilst he was able to navigate his way across the factory, including walking up some stairs to the canteen, it was not without difficulty and pain. The tribunal accepted the claimant's evidence that he was taking co-codamol to manage the pain in his leg using medication prescribed to his wife, and that, by the early part of 2023, was taking up to 8 tablets a day. This was consistent with a GP note of 1 June 2023 (page 64) in which his reliance upon his wife's medication was recorded. The tribunal held that, absent that medication, he would have had great difficulty in walking. He was in pain and his condition was deteriorating which was evidence by his physiotherapist's request to expedite the neurological referral in March 2023.
23. Accordingly, the tribunal held, on the balance of probabilities, that the claimant had the impairment of a functional neurological disorder resulting from long COVID which caused an impairment to his left leg and that it had a substantial adverse effect (being more than minor or trivial) on his day to day activities by May 2023. Further, it was a long-term condition. Even if the substantial adverse effect had not lasted as long as twelve months by early 2023, it was likely to do so given that it was a deteriorating condition which was still awaiting further assessment.
24. The tribunal therefore find that the claimant was disabled on 17th May 2023, which is the material time for the purposes of the claim. The case shall proceed to full hearing and the disability discrimination claims, under sections 13 and 15 of the Act, remain live.

25. It should be noted that a significant part of Mr Bartley's evidence, and some of the claimants, focussed upon the issue of knowledge. No findings of fact were made upon that matter, and the issue of whether or not the respondent had knowledge of the claimant's disability will need to be determined at the substantive hearing where the tribunal will have the benefit of all the relevant evidence.
26. The case remains listed for a final hearing on 22, 23 and 24 October 2024 and directions are already in place to assist in preparing the case for that hearing. The parties are expected to continue to co-operate with each other and, should any further directions be required to ensure the case is properly prepared for the hearing, they shall seek to agree those directions before applying to the tribunal for any additional orders or to vary the existing orders if required.

Employment Judge Humble

Date: 4th July 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

9 July 2024

FOR THE TRIBUNAL OFFICE

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