



EMPLOYMENT TRIBUNALS

Claimant: Mr J Drozdowicz

Respondent: TIMET UK Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Midlands West Employment Tribunal (by CVP)

On: 19 July 2024 and in chambers on 20 July 2024

Before: Employment Judge Kelly (sitting alone)

Appearances

For the claimant: In person

For the respondent: Mr Parsons, solicitor

JUDGMENT

1. This was a hearing to determine whether or not the claimant had a disability under the Equality Act 2010 ('EQA') at the relevant time. The relevant time was identified as being August to October 2022.
2. The medical condition relied on by the claimant as being a disability was chronic anal fissure and haemorrhoids ('the Condition'). The respondent accepted that the claimant had this physical impairment but did not accept that it was long term or that it had a substantial effect on the claimant's ability to carry out day to day activities.
3. The claimant confirmed that he was not relying on the conditions of depression and anxiety, or ADHD as a disability. However, he said that an effect of the Condition was to cause depression and anxiety.
4. We were referred to a bundle of documents. The claimant gave evidence and was cross examined. We heard oral submissions from both parties.
5. The claimant said he did not require any adjustment to the hearing process other than periodic breaks, which were taken.

6. The claimant had produced a copy of his electronic GP record from August 2017 to October 2023. The GP record listed the following relating to the Condition:
 - a. 26 Oct 2018 Rectal haemorrhage. Significance: Minor. Status: Past. Problem severity: Major Ended on 26 Oct 2018;
 - b. 26 Nov 2018 Rectal haemorrhage. Significance: Minor. Status: Past. Problem severity: Major Ended on 7 Feb 2019
 - c. 7 Feb 2018 Bleeding per rectum. Significance: Minor. Status: Past. Problem severity: Minor Ended on 7 Feb 2019;
 - d. 25 Apr 2019 Rubber band ligation of haemorrhoids. Significance: Minor. Status: Past. Problem severity: Minor Ended on 28 Jun 2019;
 - e. 27 June 2019 Suicidal thoughts. Significance: Minor. Status: Active. Problem severity: Major.
 - a. 27 June 2019 Depression. Significance: Minor. Status: Active. Problem severity: Major.
 - b. 28 June 2019 Depressed mood. Significance: Minor. Status: Past. Problem severity: Minor Ended on 28 Jun 2019;
 - c. 30 June 2019 H/O:depression. Significance: Minor. Status: Past. Problem severity: Minor Ended on 30 Jun 2019;
 - d. 17 Sep 2019 Depressed mood: Significance: Minor. Status: Past. Problem severity: Minor Ended on 16 Oct 2019;
 - e. 14 Oct 2019 Anal fissure. Significance: Minor. Status: Past. Problem severity: Minor Ended on 4 Jan 2020;
 - a. 24 Oct 2019 Haemorrhoid: Significance: Minor. Status: Past. Problem severity: Minor Ended on 24 Oct 2019;
 - b. 26 Aug 2020 Anal fissure. Significance: Minor. Status: Active. Problem severity: Minor.
7. The claimant also produced various other medical reports and letters:
 - a. 18 Dec 2019 letter from a consultant surgeon at The Royal Wolverhampton NHS Trust regarding clinic date 13 Dec 2019. Diagnosis: Fissure in ano, Haemorrhoids. Botox injection: April 2019. Botox injection + Rubber band ligation of haemorrhoids October 2019. The report stated that the claimant's fissure remained unhealed, his piles were still symptomatic and there was evidence of oedema. It was a 'difficult situation'. The key symptom was pain. Both the fissure and haemorrhoids required treatment. Surgery was recommended for the fissure but had a significant risk of incontinence. For the haemorrhoids, rubber band ligation had not been adequate but there were surgical options. The surgeon commissioned tests.
 - b. 24 Nov 2020 letter from Horizon Healthcare, Derby, (which we take to be a GP) to a colorectal surgeon at Royal Derby Hospital, Derby Teaching Hospitals NHS Foundation Trust. The letter referred to the above consultation and said that the claimant had now moved to Derby and was awaiting an appointment with

the surgeon. The letter stated that the claimant had undergone procedures for an anal fissure whilst he was in Wolverhampton but his symptoms persisted. He reported severe pain in relation to the fissure as well as daily bleeding. He had contacted the surgeon's secretary and been told the operation would not be for another 9 months. The claimant had had the problem for about two years and had not got any better in spite of previous intervention. The doctor requested the appointment be brought forward.

- c. 19 May 2022 visit to Medical Center Phlebology Clinic, Warsaw: Problem with haemorrhoids and anal fissure. Tested twice in England – RBL + Botox, then Botox alone. Last Botox 2-3 years ago. Symptoms included pain after defecation and bleeding less frequently. Signs of severe inflammation and chronicity. Recommendations: Surgical treatment. Emergency: suppositories and rectal ointment. Diagnosed disease: Chronic anal fissure; Fissure and fistula of the rectum and perianal area.
 - d. 8 Jun 2022 report from Una Medica Warsaw. The claimant had been suffering from Haemorrhoids and fissure for several years. Recurrent bleeding and pain. Two administrations of botulinum toxin, the last time two years ago. Rubber banding during the same treatment. Laser treatment performed.
 - e. 15 Jun 2022 report from Una Medica Warsaw. After removal of the fissure on 8 June, there was initially pain. 'Currently, there is exudate from the wound.' Swelling of the left haemorrhoid. Part of the wound edge was painful. The wound was healing. Prescribed pain relief and dressings. Surgery required on the haemorrhoids.
 - f. 3 Sep 2022 report from Una Medica Warsaw. Condition after cutting out: the gap still hurts but less. Increasing bleeding. Persistent discharge. No healing progress. Prescribed hyaluronic acid, and probiotics.
 - g. 8 Oct 2022 report from Una Medica Warsaw. Condition after cutting out: the gap still hurts but less. Increasing bleeding. Persistent discharge. No healing progress. Surgery to scar tissue and polyps. Haemorrhoids grade II/III. Prescribed medication for washing, probiotics and pain relief.
 - h. Other letters postdated the relevant period.
8. We were also referred to a Universal Credit Work Capability Assessment decision of 28 Apr 2021 which stated that the claimant had limited capability for work and work-related activity.
9. The claimant gave evidence by way of an impact statement as follows:
- a. The claimant was first diagnosed with fissure and haemorrhoids at a hospital in Poland in 2016. He started seeing doctors in Basingstoke for the Condition in 2017. Since then, he had had several operations for the Condition.
 - b. On 8 Jun 2022, the claimant had an operation to treat the fissure in Poland. His condition improved and he looked for work.
 - c. The claimant had a recurrence of symptoms by the end of August 2022 including bleeding and pain.
 - d. The claimant had a further operation for the fissure on 8 Oct 2022.

- e. The claimant had recurring symptoms from the Condition such as pain and profound anal bleeding. After treatment, his condition would improve for a while and he would then have a recurrence.
- f. During the relevant period, the claimant had a recurrence of his symptoms and would sporadically have to spend longer in the toilet which impacted his attendance at work and ability to conform to strict time schedules.
- g. The effect of the Condition was taking longer in the toilet, going more often to the toilet, taking time to apply medications. He would be late when the symptoms recurred and could not function normally until the symptoms had worn off which could take a few hours.
- h. Without treatment, the claimant would bleed profoundly after going to the toilet, be in pain after going to the toilet, and through the day, go to the toilet more frequently, not be able to function normally until the symptoms ended. The claimant became depressed due to suffering the Condition.

10. The claimant gave oral evidence as follows:

- a. The symptoms of the Condition made him late for work in the mornings because it would take 30 minutes to an hour for the pain to stop after using the toilet. He had to stop work and wait for the bleeding to stop before he could resume work.
- b. The claimant avoided going out when he had the symptoms, for example, going into town to meet his friends. If he did go out, he would spend more time on the toilet than participating in the activity.
- c. At times after treatment, the symptoms improved for three or six months and then his condition would deteriorate again. He often managed his condition by following treatment protocols such as an appropriate diet, using water instead of toilet paper, using grease and using comfort pads for bleeding. If he did not follow these protocols, his symptoms returned.
- d. His first operation in Wolverhampton in 2019 did not resolve the problem. There was no improvement to the symptoms until he had surgery in Poland in 2022.
- e. The symptoms of the Condition affected the claimant's concentration at work because he was in pain, bleeding and worrying about when he would need to go to the toilet. The medication he took for depression affected his sleeping from July 2021. This impacted on his time management in the morning. He took sertraline and other medications.
- f. Any apparent omissions from his GP record must be due to an issue with the GP records. The records stating his condition was 'minor' was also a mistake. When the GP notes said that the issue had ended, this meant that the assessment ended, not that the condition ended. There was an extended period from August 2020 when the claimant did not consult his GP because he was awaiting an operation and he knew there was nothing else his GP could do.
- g. The claimant accepted that, when he was late for work with the respondent, he had informed the respondent that this was due to public transport issues. The claimant explained that he was unable to get up earlier due to the medication

he was taking. He would then not be able to get earlier public transport. We understand that the claimant was saying that he was unable to get earlier public transport due to the Condition which meant he left himself open to the vagaries of public transport and was late for work.

- h. On the claim form, the claimant had ticked 'no' in response to the question of whether he had a disability because of ADHD.
11. A workplace health assessment routinely commissioned by the respondent and done on 26 Jul 2022 assessed the claimant as fit for work. The occupational health adviser told the respondent later that the claimant disclosed a pre-existing medical condition, but this would not have affected his ability to carry out his role at the time of assessment.
12. The claimant was employed by the respondent as an EBM operator which means that he operated machinery to weld metals. This was a skilled job. The respondent accepted that the claimant's work was a normal day to day activity.

Relevant law

13. Section 6(1) EQA sets out the statutory definition of disability: a physical or mental impairment which has a substantial and long-term adverse effect on the employee's ability to carry out normal day-to-day activities. We will use 'SAE' below to mean a substantial effect on the claimant's ability to carry out normal day-to-day activities.
14. Section 212(1) EQA defines 'substantial' as 'more than minor or trivial'.
15. This is supplemented by Schedule 1 Part 1 EQA 'Determination of Disability' which says:
- a. The effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected.
 - b. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
 - c. 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—
 - i. measures are being taken to treat or correct it, and
 - ii. but for that, it would be likely to have that effect.
 - d. "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.
16. In *Goodwin v The Patent Office* [1999] ICR 302 Morison J set out four conditions that require consideration when assessing whether a person is disabled, at p308B: 'The words of the section require a tribunal to look at the evidence by reference to four different conditions. (1) The impairment condition. Does the applicant have an impairment which is either mental or physical? (2) The adverse effect condition. Does the impairment affect the applicant's ability to carry out normal day-to-day activities in one of the respects set out in paragraph 4(1) of Schedule I to the Act, and does it have an adverse effect? (3) The substantial condition. Is the adverse effect (upon the

applicant's ability) substantial? (4) The long-term condition. Is the adverse effect (upon the applicant's ability) long-term?

17. In *SCA Packaging Ltd v Boyle* [2009] ICR 1056 Lord Hope held that when considering whether an impairment is likely to recur the term "likely" means that it could well happen.
18. *Lewis LJ in All Answers v W* [2021] IRLR 612, at paragraph 26: 'The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months.'
19. *Sullivan v Bury Street Capital Limited* UKEAT/0317/19/BA per Choudhury P at paragraph 38 (in which SAE stands for substantial adverse effect): 'Similarly, the fact that the SAE in question is itself a recurrence does not preclude the Tribunal from concluding that, as at the date of the later episode, a further recurrence was not likely. Although in many instances, the fact that the SAE has recurred episodically might strongly suggest that a further episode is something that "could well happen", that will not always be the case. Where, for example, the SAE was triggered by a particular event that was itself unlikely to continue or to recur, then it is open to the Tribunal to find that the SAE was not likely to recur. The triggering event here was, according to the Tribunal, the discussions about remuneration in 2017. The Tribunal found that these were unlikely to continue indefinitely and that the Claimant's condition would improve once these were resolved. In these circumstances, it was open to the Tribunal to conclude that the SAE was not one that was likely to recur, both as at 2013 and as at 2017.'
20. When considering disability, the Tribunal must take the statutory guidance, "Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability" ("Guidance"). Guidance is also found in the EHRC Employment Code.
21. The Guidance says that:
 - a. (C3) 'likely' means 'it could well happen';
 - b. (C4) In assessing the likelihood of an effect lasting for 12 months, account should be taken of circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood.
 - c. (C7) 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 and the initial effect may disappear altogether.

- d. (D3) In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education- related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.
 - e. (D22) pain or fatigue: where an impairment causes pain or fatigue, the person may have the ability to carry out a normal day-to-day activity, but may be restricted in the way that it is carried out because of experiencing pain in doing so.
 - f. (D22) frequency: some impairments may require the person to undertake certain activities, or functions at such frequent intervals that they adversely affect the ability to carry out normal day-to-day activities. The example is given of a person with inflammatory bowel disease who must ensure they are always close to a lavatory. This has a substantial adverse effect on ability carry out day to day activities.
 - g. (D23) where a person is receiving treatment or correction measures for an impairment, the effect of the impairment on day-to-day activities is to be taken as that which the person would experience without the treatment or measure.
22. However, in *Mr A Elliott v Dorset County Council* UKEAT/0197/20/LA, the EAT advised: 'Where consideration of the statutory provision provides a simple answer, it is erroneous to find additional complexity by considering the Code or Guidance.' It also stated: 'The Guidance and Code are most likely to be useful where the answer to the question is unclear. If the answer is clear it may not be necessary to consider the Guidance or Code at all.'
23. The burden of proof lies on the claimant to demonstrate that they have a disability under EQA.

Conclusions

24. We have not taken into account any evidence related to the claimant's medical condition after the relevant period. As the Guidance states: 'In assessing the likelihood of an effect lasting for 12 months, account should be taken of circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood.'
25. We consider that the medical evidence demonstrated that the Condition had begun by October 2018, which is the first time it is mentioned in the GP records. We find the GP records unhelpful in assessing how serious the Condition was. The frequent references to 'minor' and the Condition ending are not consistent with the information contained in the hospital and private clinic records. The claimant had the first botox injections and rubber band ligations in 2019. He was also recommended for surgery. We consider that The Royal Wolverhampton NHS Trust would not have undertaken such procedures and recommended surgery if the Condition were not viewed as serious and likely to continue for a substantial period of time without the intervention. In December 2019, the Condition was described as a 'difficult situation' by the Trust. In December 2019, the Trust said that the key symptom was pain.

26. The situation continued into 2020 with the claimant waiting for a referral to a surgeon in Derby. The claimant's GP considered it warranted to chase for the appointment. The GP said that the claimant's symptoms persisted and the claimant reported severe pain and daily bleeding.
27. We accept the claimant's evidence that he then remained awaiting a hospital operation until he decided to go privately in Poland in 2022, and so there was no point in going to his GP for appointments. The fact that the Universal Credit Work Capability Assessment decision of 28 Apr 2021 stated that the claimant had limited capability for work and work-related activity supports that the Condition remained seriously symptomatic.
28. By the time the claimant visited a Polish clinic in May 2022, he still had pain and bleeding and signs of 'chronicity' serious enough to warrant surgery which took place in June. By 8 Oct 2022, the claimant was in pain and bleeding and the surgery site was not healing.
29. While the claimant had periodic remissions in symptoms, such as after the June 2022 surgery, the impairment is treated as continuing to have an SAE if the effect is likely to recur. After treatments going back to 2019 which had failed to resolve the Condition, we consider from this history that, as at June 2022, the Condition was still likely to recur. The fact that an occupational health report of July 2022 for the respondent said the claimant was fit to undertake his role is consistent with the claimant having a remission of symptoms after treatment and does not undermine our conclusion.
30. Further, any improvements which the claimant had in his symptoms were due to measures taken to treat it, such as the June 2022 surgery, and but for the treatment, the Condition would be likely to have an SAE.
31. We accept that the claimant suffered depression and anxiety due to the Condition. This was the claimant's evidence, and depression and even suicidal thoughts are recorded on the GP notes in 2019. Although the GP notes do not list medications, we accept the claimant's evidence that he was prescribed sertraline and other anti depressants, because this is consistent with the GP diagnosis of depression.
32. We consider that the claimant suffered SAEs from the Condition, as described by the claimant, as these are consistent with the symptoms he was experiencing, as follows:
 - a. He had to use the toilet more frequently than usual;
 - b. He had to spend longer on the toilet than normal;
 - c. He avoided social events due to the problems which the above two effects created;
 - d. He had difficulty with being at work on time and for all the required time because of the time needed on the toilet, difficulty getting up caused by anti depressants relating to the effects of the Condition, and the frequency of visits to the toilet. We also accept the claimant's evidence that he lost concentration at work due to pain, bleeding and worrying about when he would have to go to the toilet. The respondent accepted that the claimant's work was a normal day to day activity. We note that the claimant at the time informed the respondent that his lateness was due to public transport, not a medical condition, but accept his explanation in the hearing that the issue of public transport and his Condition was linked. Also, using our common sense, we can appreciate that

most people would find public transport a less embarrassing explanation to give for being late than being stuck in the toilet, and this may well have impacted on the claimant's explanation to the respondent.

33. We see no evidence to suggest that these SAEs were not long term going back to at least 2019 when the claimant had to have hospital interventions. To have warranted hospital interventions, the symptoms must have been serious and, therefore, the SAEs would have occurred.
34. We therefore conclude that the claimant had a physical impairment, being the Condition, that the impairment had an SAE and that it was long term, starting at least in 2019, if not earlier. By the relevant period, the claimant had suffered the SAE for about three years if not longer. Although he may not have been suffering the SAE when he started work with the respondent after treatment, it was likely that the Condition would recur and, in any event, he would have been suffering the symptoms and the SAE if it had not been for treatment.
35. Therefore, we find that the claimant had a disability under the Equality Act 2010 during the relevant period by reason of chronic anal fissure and haemorrhoids.

20 July 2024

Employment Judge Kelly