



EMPLOYMENT TRIBUNALS

Claimant

Mr J Finn

Respondent

Metroline Limited

v

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: Watford (in person)
On: On: 3 December 2024
Before: Employment Judge Daniels (sitting alone)

Appearances

For the claimant: In person
For the Respondent: Ms Nicolaou, Solicitor

JUDGMENT

1. The claimant was a disabled person on 23 October 2023 at the date he was dismissed

REASONS

The Facts

1. The claimant was a disabled person on 23 October 2023 at the date he was dismissed.
2. The Respondent is one of the major London bus companies, with a number of garages and routes around London and the Home Counties. The Claimant was employed by the Respondent as a Senior Service Controller at the Claimant's Holloway garage from June 2006 until his employment was terminated on 23 October 2023. The Respondent does not accept that the Claimant was disabled within the meaning of s.6 EqA beyond August 2023.
3. The claimant gave evidence at the tribunal. The key parts of his witness statement stated as follows:

“Acid reflux, Vomiting started mildly in 2022 however this was not unexpected as was a known possible side-effect of a MGB (Mini gastric bypass) and had little effect on daily life apart from the odd spell of sickness that was mild. This was

controlled by medication Lansoprazole that was issued from the consultant who carried out the surgery, from the date of the surgery for 6 months.

Feb 2023 Acid reflux causing me to vomit stomach acid and became an issue causing fatigue. I was vomiting 5 times a week approximately, this was partially controlled with the drug Omeprazole. This condition is ongoing and still being investigated by the hospital (Hammersmith). Some days I won't vomit at all then I can eat the same as the day before and vomit to the extent where I have no energy and fall asleep. On average I would state this happens up to twice a week at present.

Gastric Ulcers Diagnosed on the 29/09/23 after a pan endoscopy found 3 large ulcers. They had been present for some time due to the size they were, they were adding to the acid reflux and it was hoped a higher dose of PPI would get rid of them."

4. In the claimant's Impact statement dated 3 May 2024 he stated (in the key extracts) as follows:

"had bariatric surgery in 2022 to address the severe obesity, (self-funded), and

I will always be on Omeprazole as and when needed throughout my life, due to bariatric surgery and the possibility of acid reflux".

2020 – 2022 Severe obesity causing the following issues. Raised blood pressure, sleep apnoea, and gout.

2023 - I suffered with acid reflux, which was directly related to the bariatric surgery which was undertaken to address the obesity.

I was then diagnosed with gastric ulcers resulting in sickness, diarrhoea and fatigue. I was put on a high dose of Omeprazole on 29th September 2023 to address the acid reflux and was told this should resolve the issue within 6-8 weeks."

5. In the Consultation notes with Dr Sefiat Ajibade on 22 May 2023 it was stated: you told us:

"Light headed then blacked out for a few seconds. Awake like I was drunk. Very tired Ok today except for banging my knee on falling I assume as very swollen and painful to walk on. Need assistance with diet advice as getting sick a lot after food had a mgb"

6. In the Consultation notes with GP Dr Andrea Carpenter on 1 June 2023 GP it was recorded:

"You had a gastric bypass 14 months ago, this was at a private hospital Everything went well Around 2-3 months ago you developed vomiting, vomiting up acid A few weeks ago, you passed out on your way to work You have been dropping things and your concentration span has reduced significantly You have spoken to the hospital about your symptoms and they are not being very helpful You are vomiting 4-5 times a week, mainly in the evening times You can swallow as normal, you feel nauseous.. When you lie down, you get a cough and acid taste in the back of the throat. This doesn't happen every day. I discussed whether there is excess acid production/reflux I discussed testing for H pylori and starting on omeprazole to try and reduce acid production. You were keen to try this In

addition, you asked for a sick note for 2 weeks. Our assessment Gastroesophageal reflux disease”

7. The Claimant was assessed by Medigold on 2 June 2023 and the resulting report stated that he had had an excellent result from bariatric surgery and, having been morbidly obese, the Claimant had reduced his weight to 71kg. The Claimant reported that he no longer had high blood pressure or sleep apnoea but was suffering from gastritis and acid reflux following his surgery.
8. The Medigold physician, Dr Wylie, suggested that the Claimant's symptoms pre-surgery, namely reduced mobility, sleep disturbance, fatigue and sleep apnoea would have constituted impairments capable of satisfying the s6 EqA definition of disability and that, although the Claimant no longer suffered from those symptoms he ought to be classed as disabled because the Claimant's treatment, namely bariatric surgery, ought to be excluded from consideration when applying the s6 test.
9. The Respondent does not accept that Dr Wylie was applying the correct legal test to the Claimant's condition in so concluding. I need not rule on this as the claimant did not argue this point. The claimant did not argue he had a disability in the past or that any unlawful treatment took place prior to 23 October 2023.
10. In the Consultation notes with GP Alice Craske dated 24 Jun 2023 it was stated:

“was prescribed omeprazole 40mg with some effect still experiencing symptoms evening and overnight Sleeps on 5 pillows Contacted surgeon who undertook surgery, Medication: “you have been prescribed omeprazole 40 mg once daily”.
11. In the Consultation notes with Dr Mangala Mwambazi on 5 July 2023 it was stated:

“Still got the acid reflux, got a sergen GI appointment on the 8th private for advice and hopefully treatment. Need a further sick note from the 7th from work unfortunately HPC hx gastric bypass and post op complications ongoing reflux He managed to speak to his consultant at the Whittington who feels Sx are due to a blockage post surgery and he is now booking him in for a scan adv to switch to omeprazole 40mg from lansoprazole - this has already been issued but I have updated repeats needs med3 also – issued. Our assessment Gastroesophageal reflux disease”
12. The Claimant remained off sick for 83 days, returning to work on 7 August on a phased basis over a four-week period.
13. On 11 August the Claimant underwent a consultation with Dr Payton at Medigold. Dr Payton concluded that the Claimant was now suffering from was a gastrointestinal condition involving acid reflux, which was being controlled with medication. Dr Payton suggested that the acid reflux began in March 2023 and was now settled, the Claimant having begun medication in June.
14. In a report from Medigold Health on 11 August 2023 it was stated as follows:

“He developed symptoms of acid reflux about March this year and sometimes suffered acid reflux during the night period. He is under the care of a specialist who advised treatment with omeprazole and Gaviscon. Mr. Finn started his medication in June. They’ve proved effective and have settled his symptoms. If Mr Finn were to stop his medication in my opinion that it is likely that the acid reflux would return. I assume that Mr Finn will continue to take the medication for as long as this consultant advises. This is likely to be long-term, if not permanent.”

15. However, the Claimant had a relapse and a further period of sickness absence between 23 and 28 August 2023, related to significant acid reflux, and another period from 8 September until 23 October 2023.

16. In the Consultation notes with Dr Hettiarachchi on 1 Sep 2023 it was recorded:

“Can i get some blood tests done. I feel very tired and have a low concentration level. Still suffering with acid reflux that won't be helping the situation. Post mgb 14 months.”

17. Dr Obichere a specialist saw him on 17 October 2023 and then stated:

“I had a telephone consultation with your patient today following his recent pan endoscopy. You may recall that the colonoscopy was unremarkable however a gastroscopy showed several ulcers at his neo- pylorus following previous gastric surgery for peptic ulcer disease. Biopsies were taken at the time and I'm pleased to inform you that this shows no evidence of neoplasia and indicates a benign peptic ulcer. He has been commenced on high dose PPIs and I've advised him to continue with this and plan a repeat gastroscopy in January 2024.”

18. On 20 October 2023, Mr Delaney wrote to the Claimant to invite him to attend a capability hearing, The Claimant attended the capability hearing on 23 October. The Claimant told Mr Delaney that he was currently unwell because he had ulcers that were causing anaemia and vomiting. The Claimant was dismissed.

19. Dr Obichere saw him again on 1 November 2023 and stated:

“I hereby confirm that the above patient has quite severe peptic ulcers contributing to his anaemia. He has been commenced on high dose proton pump inhibitors to treatment his peptic ulcers and I would hope this will result in resolution of his symptoms in six to eight weeks’ time.”

Conclusions

Relevant legal provisions

20. The Act defines a disabled person as a person with a disability. A person has a disability for the purposes of the Act if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities (**S6(1)**).

21. This means that, in general:

- the person must have an impairment that is either physical or mental
- the impairment must have adverse effects which are substantial
- the substantial adverse effects must be long-term
- the long-term substantial adverse effects must be effects on normal day-to-day activities

Was the claimant disabled on 23 October 2023?

22. The respondent accepts that the gastrointestinal condition in May 2023 had a substantial effect.
23. They argued that the medications that the claimant was receiving should not be ignored when considering the effect of his condition after medication was prescribed
24. The guidance on the meaning of disability states as follows:

“Effects of treatment

B12. The Act 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 to have that effect. In this context, ‘likely’ should be interpreted as meaning ‘could well happen’. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (**Sch1, Para 5(1)**).

B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.

B16. Account should be taken of where the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement. It is necessary to consider whether, as a consequence of the treatment, the impairment would cease to have a substantial adverse effect. For example, a person who develops pneumonia may be admitted to hospital for treatment including a course of antibiotics. This cures the impairment and no substantial effects remain. (See also paragraph C11, regarding medical or other treatment that permanently reduces or removes the effects of an impairment.)”

Findings

25. In this case I have concluded that the continuing medical treatment did not create a permanent improvement but a temporary improvement and the medical evidence is clear that this is likely to be long term medication which will likely to read lead to a relapse if discontinued.
26. I considered that one of the best judges of the substantiality of the condition was the impact of the condition just before the claimant was given the

prescribed medication. This was his symptoms in May 2023. At this time the claimant was clearly struggling with this condition and it was having a significant impact on his life. The claimant gave very clear and cogent evidence (backed up by the notes above) that in May 2023 he was repeatedly vomiting, his concentration had substantially dropped, he was not eating or holding down food, he had fainted once because of this and this was happening around four to five times a week. He was waking at night too and it was also affecting his sleep badly. In essence, he said that he was walking around like a zombie, his concentration had plummeted and his attention at work was a real issue and was repeatedly notice by his colleagues.

27. I do not agree with the respondent's suggestion that there was a change in his medication of significance and I find that he had been on consistent medication and put on a high dose in November 2023. The claimant gave clear and cogent evidence that the reference to PPI in his notes was a reference to a high dose of his continuing medication.
28. I also note that in October 2023 his condition even while assisted by medication was sufficiently serious for him to have a further period of absence of around six weeks during which he described further vomiting and stomach difficulties and the further more than minor effect on his day-to-day activities.
29. The Consultation notes with GP Dr Andrea Carpenter on 1 June 2023 GP are especially revealing:

“You had a gastric bypass 14 months ago, this was at a private hospital Everything went well Around 2-3 months ago you developed vomiting, vomiting up acid A few weeks ago, you passed out on your way to work You have been dropping things and your concentration span has reduced significantly You have spoken to the hospital about your symptoms and they are not being very helpful You are vomiting 4-5 times a week, mainly in the evening times You can swallow as normal, you feel nauseous”
30. I conclude that the condition during May and June 2023 had a substantial adverse effect on his normal day-to-day activities particularly in relation to his sleep, his toilet habits and his eating ability. This also affected his concentration and mobility in a more than minor or trivial manner. When the claimant was going through a vomiting episode he was weak and significantly impaired in what he could do in his day-to-day activities and also was suffering from fatigueability and had more difficulties with performing day to day activities than normal.

Long term

31. In considering whether the condition was long term I also find that I have to discount the effect of the high dose of medication he was taking too treat him at that time. When discounting his high dose medication, the detailed medical evidence above set out suggests that it was highly likely that the claim would have a recurrence. The condition had started in March 2023 and got worse in June 2023.

32. I found as a matter of fact that it was likely to last until June 2024 and beyond and probably remain a long term condition without the medication in the high dose that he was prescribed.
33. In coming to this conclusion I note that the respondents had accepted that the impairment had a substantial adverse effect in May 2023; I note the further impact during September and October 2023 when medication was also significant and still meant a period of six weeks sickness absence. I also note he was prescribed a high dose of medication reflecting the greater severity of this condition; that large ulcers were noted in the records and the clear frequency of vomiting and the related effect on sleep and his ability hold in food and water. Importantly, I also found that the claimants experience that these symptoms was in the background to having had significant stomach surgery which made him more susceptible to more serious symptoms and more consistent symptoms of this nature. The medical notes referred to above support this finding. In essence, this was not, “standard acid reflex” but significantly more serious acid reflux in a situation where the claimant had a greater susceptibility due to the invasive stomach surgery he had had. There is repeated medical reference to some complications arising from the surgery and this is consistent with the day-to-day impact of his condition without medication being more substantial than for others who had not had such surgery.
34. The Claimant therefore qualified as a disabled person on 23 October 2023 satisfying all of the tests of disability set out above.
35. These reasons have been delayed in being sent out due to an administrative delay in typing.

Employment Judge Daniels

10 January 2025

Sent to the parties on:

10 January 2025

For the Tribunal:

Recording and Transcription

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>