



EMPLOYMENT TRIBUNALS

Claimant: Mr G Oluokun

Respondent: FPC-Global Limited

Heard at: in person at the Central London Tribunal

On: 4 October 2024 with decision delivered on 22 January 2025 at 14:00

Before: Employment Judge Woodhead (sitting alone)

Appearances

For the Claimant: Representing himself

For the Respondent: Mr C Bennison (Counsel)

JUDGMENT WITH REASONS

1. At the relevant times the claimant was not a disabled person as defined by section 6 Equality Act 2010 because of an eye condition.
2. At the relevant times the claimant was not a disabled person as defined by section 6 Equality Act 2010 because of a back condition.
3. The complaints of direct disability discrimination are therefore dismissed.

REASONS

THE ISSUES AND HEARING

1. This claim has had the benefit of the following preliminary hearings:
 - 1.1 A preliminary hearing for case management conducted by EJ Akhtar on 17 July 2023
 - 1.2 A preliminary hearing for case management conducted EJ Kenward on 18 September 2023. The case management orders included a detailed analysis of the claim and a list of issues that included complaints of unfair dismissal, wrongful dismissal, direct age, disability and race discrimination, discrimination arising from disability, indirect race, disability and age

discrimination, harassment (race, age and disability), victimisation, redundancy pay, non-payment of holiday pay and unlawful deduction of wages.

- 1.3 A preliminary hearing conducted EJ Tinnion on 14 June 2024 to consider whether complaints were in the claim, whether complaints should be allowed by way of amendment and applications for strike out. He provided written reasons for his decisions on 3 January 2025 [B2 101-113] (B2 is a reference to the bundle I was provided with in advance of the 22 January 2025 hearing). EJ Tinnion gave verbal reasons at the hearing.
2. EJ Tinnion listed the claim for a preliminary hearing on 4 October 2024 which I conducted. The purpose of that hearing was to determine whether the Claimant was disabled between 12 December 2022 and 30 January 2023 (“**the Relevant Period**”) because of impairments relating to his:
 - 2.1 eyes; and
 - 2.2 back.
3. It became apparent at the hearing on 4 October 2024 that I would also be necessary for me to deal with the other case management than needed to take place and elements of the Respondent’s application for strike out and deposit orders which EJ Tinnion had not had time to address.
4. At the hearing I was provided with:
 - 4.1 A bundle of documents totalling 87 pages [B1/] which included the Claimant’s Disability Impact Statement [B1/59-64] and the medical documents [B1/65-87] on which he relies (“the Bundle”);
 - 4.2 A set of additional documents totalling 10 pages (“**SB**”) which the Respondent said had only come to light more recently and which I determined it was in the interest of justice to admit (the Claimant having been provided with them sufficiently in advance of the hearing to understand them);
 - 4.3 A 7 page document (some of which had no content) submitted by the Claimant which was headed “RESPONDENT FAILS TO COMPLY WITH THE CASE MANAGEMENT ORDER UNDER THE EMPLOYMENT TRIBUNAL RULE OF LAW 2013 IN RESPECT TO THE CASE MANAGEMENT ORDER JUDGE ANTONNIE TINNION 14th JUNE, 2024 EMAIL TO THE PARTIES ON 21st JUNE,2024 FPC-GLOBAL LIMITED(RESPONDENT) AND GODWIN OLUOKUNCLAIMAN (“**the Claimant’s Submission**”).
5. One of the documents on which the Claimant was cross examined in the SB was a probation review document (the “**Review Document**”) which the Respondent said had been completed by the Claimant [SB1-3]. The Claimant denied that he had completed the Review Document and said that during the hearing he had sent both the Respondent and the Tribunal an email of 25 January 2023 (the date of the Review Document) (“**the 25 January 2023 Email**”) which evidenced that he

had been meeting with another organisation about a TUPE matter that day and so he could not have prepared the Review Document. I agreed not to determine the question of disability pending compliance with further orders that I made in respect of the question of disability ("**Further Disability Orders**") which were as follows:

15. *The Claimant confirmed at the hearing that during the hearing he had sent the 25 January 2023 Email to the Tribunal and to Mr Bennison.*

16. *By 1 November 2024 the Respondent is to send to the Claimant and the Tribunal by email any:*

*16.1 documents it holds evidencing its contention that the Claimant did send the Respondent the completed Review Document ("**the Respondent Review Document Evidence**"); and*

*16.2 any submission (limited to 1 page of typed, double line spaced text in font size 12 with numbered paragraphs) in respect of the Claimant's contention at this hearing that he did not create the Review Document and that it is a falsified document (the "**Respondent Submission**").*

17. *By 15 November 2024 the Claimant is to send to the Respondent and the Tribunal by email any submission he wishes to make on the Respondent Review Document Evidence and the Respondent Submission (limited to 1 page of typed, double line spaced text in font size 12 with numbered paragraphs) in respect of the Claimant's contention at this hearing that he did not create the Review Document and that it is a falsified document "the Claimant Review Document Submission".*

18. *As referenced above, the parties were content for me to make a decision on the Disability Issue after having reading the 25 January 2023 email, any Respondent Review Document Evidence, any Respondent Submission and any Claimant Review Document Submission. The Parties were content that such documents would not have been subject to evidence or cross examination.*

6. On 1 November 2024 the Respondent sent a one page Respondent Submission to the Tribunal together with 9 pages of supporting documents. I considered this before determining disability.
7. On 13 November 2024 at 12:23 the Claimant submitted to the Tribunal 13 pages of documents and a submission of 12 pages (including further supporting documents). I considered this before determining disability.

FINDINGS OF FACT

8. Having considered all the evidence, I find the following facts on the balance of probabilities.
9. The parties will note that not all the matters that they told me about are recorded

in my findings of fact. That is because I have limited them to points that are relevant to the legal issues.

10. I find that the Review Document was prepared by the Claimant because, whilst the Respondent has not given evidence:
 - 10.1 I am persuaded by the Respondent Submission and its supporting documentation;
 - 10.2 The manner in which the Review Document is written and its content suggests that it is probable that it was completed by the Claimant;
 - 10.3 The fact that the Claimant might have had a meeting on 25 January 2023 does not preclude him completing the form.
11. I note, by way of postscript, that after I had determined that the Claimant had prepared the Review Document and given my oral decision and reasons on the question of disability, on 23 January 2025 the Claimant himself confirmed verbally at the hearing (in response to questions about submissions made by the Respondent in respect of strike out of an unlawful deduction from wages complaint) that he had prepared content within the Review Document.
12. I note here that the Claimant refused to read the Review Document during cross examination at the hearing on 4 October 2024. The Review Document includes the question "*Do you feel you require any more support to reach the required standard?*". The Claimant's response makes no reference to the Claimant needing support to cope with difficulties with his eyesight or back.

Eye impairment

13. The Claimant's medical records indicate that:
 - 13.1 He had impaired vision, bilateral pterygia and an early right side cataract on 14 June 2007 [B1/73];
 - 13.2 He had lens opacity on 28 August 2007 [B1/73];
 - 13.3 He attended his GP on 3 August 2011 with a cataract problem and the GP noted "*bilateral Pterygta , obscuring medial cornea and also has dense cataracts*" [B1/72]
 - 13.4 He attended his GP with post operative eye problems on 9 December 2014, was given different eye drops and was signed off work for 4 weeks due to the surgery [B1/71] but no medical records directly relating to the operation that was undertaken were disclosed by the Claimant.
 - 13.5 He attended his GP with eye problems on 25 February 2015 and the GP records suggest that the surgery was undertaken in November 2014 and noted on examination "*Pterygium visible L eye nasally*". [B1/71]
 - 13.6 He was proscribed eye drops in 2014 and 2015 [B1/76]
 - 13.7 In 2017 he was diagnosed posterior vitreous detachment and given a

retinal detachment warning [B1/68].

13.8 He attended his GP with pain in his right eye on 30 April 2019 and because he had had previous pterygium, cataracts, and vitreous detachment and he had poor visual acuity and the GP was not able to see his retina because of opacities the GP wanted him to be reviewed by an ophthalmologist [B1/68]. There is no evidence relating to any subsequent assessment carried out.

13.9 He attended A&E on 14 June 2022 and the diagnosis records "*cataract, disorder of refraction, tear film insufficiency*" [B1/83] and the notes record "*Requested Actions GP: Impression bilateral dry refraction Plan for 4 weeks Lubricant hot fomentation and lid hygiene need to see optician for change glasses GP please refer to cataract clinic if patient is happy to do cataract advised to come back if no improv*" [B1/84]

13.10 He attended A&E on 19 August 2022 but did not wait to be seen. [B1/81]

13.11 He attended A&E on 28 September 2022 and complained of marred vision since August 2022. The diagnosis was tear film insufficiency and he was given eye drops and discharged [B1/78-79].

13.12 A Moorfields Eye Hospital letter of 13 October 2023 which refers to the Claimant's attendance at A&E on 12 October 2023 records [B1/86]:

*"Diagnoses - External Eye Disease : Blepharitis Suspected
diagnosis Bilateral Dry eye syndrome*

Investigations - Visual Acuity, Slit Lamp Examination, Tonometry

Treatments - Hot Compress and Massage

Prescriptions –

No acute presenting complaint

Dry eyes since pterygium removal in 2015, gradual worsening in sx

Imp: MGD + dry eyes - hot compress/ lid hygiene and lubricants

Cataract diagnosed at WEH 4 months ago but wanted second opinion as worried re surgery - advised cannot give second opinion in A&E, referred routine to NWP cataract"

13.13 There is no subsequent medical documentation in respect of the Claimant's alleged eye impairment.

14. The Claimant had been given clear guidance [B2/84] by EJ Tinnion on what he would need to cover in his disability impact statement. The statement he produced was imprecise (particularly as regards the time periods) but said, amongst other things:

- 14.1 *that he had had an operation on his right eye in November 2014 for pterygium.*
- 14.2 *“my right eye vision which was aggravated with severe pain and nerves contraction terrible, watering with continuous pain even shopping becomes very difficult for me to undertake due to die pain likewise crossing zebra crossing roads I need to be very careful due to contraction of nerves and strain of die eyes because the Respondent intentionally refuse to provide me adequate light luminous to undertake task at die FPC global Limited and on the pains aggravate and unbearable needs”*
- 14.3 *“have to use my phone lights to strain my eyes to carry out ppm on ceiling panel and rectify lights faults which causes my vision deterioration accompanied by severe headaches, and nervous breakdown”*
- 14.4 *“[lack of PPE] this worsened my right eye vision that led to more struggle at work and consequently sleeping at home becomes uncomfortable with pain”*
- 14.5 *“As mentioned the effect of my right eye and back problems is ongoing impairment which causes blurry and damaged my vision that if care is not taken leads to total blindness. Moor field Eye Hospital I normally attend to check my vision and effects of the lack of recommended safety glasses has caused to my eyes vision.”*
15. In cross examination the Claimant:
- 15.1 confirmed that he could use a computer but reduced the light intensity of the screen;
- 15.2 confirmed that he could use a telephone but that it depended on his concentration;
- 15.3 confirmed that he could travel on the bus and train but did not drive;
- 15.4 when questioned about any ongoing treatment did not suggest that he was having any ongoing treatment or review for cataracts after October 2022.
16. I find that there is no medical evidence to suggest that the Claimant was receiving ongoing treatment for an eye condition during the Relevant Period.

Back impairment

17. The Claimant’s medical records indicate that:
- 17.1 On 6 January and 22 January 2010 he went to his GP with lower back pain and the GP records state *“after lifting heavy object while working on the underground unable to return to work a he is finding painful to flex his spine”*
- 17.2 he attended his GP with back pain on 18 March 2019, 30 April 2019, 7 May 2019 and 15 May 2019 and had a period off work during this time because of it.

- 17.3 He has been prescribed analgesics for periods of time up to October 2019.
18. The Claimant's disability impact statement was also imprecise as regards his alleged back impairment but noted, amongst other things:
- 18.1 *"agony of back problems due to strain and stress of tire type of tasks in different areas undertaken on my back"*
- 18.2 *"even my back problems become unbearable sleeping without pain killers is not possible and due to my age 54 origin Black Africa from Nigeria compare to other Respondent who was given adequate working equipment to carry out day to day activities."*
- 18.3 *"could not bend and stiff back even for a minute; getting up will be an issue especially when changing batteries of the toilet urinary tracts and on the ladder to check the AHU ducts and cleaning the ducts and hovering it . I suffered continuous pain through my spine and around the joints."*
- 18.4 *"My back problem continuously had a severe sharp pain became worsened around January, 2023"*
19. In relation to both alleged impairments or where it is not clear on which impairment he is referring to the Claimant said in his disability impact statement:

"in January 2023 survive on pain killers due to continuous headache and pain itching eyes due to pain all over my body and eyes and used pain killer, also low mood, poor concentration, difficulties in reading social situation and continuous headaches due to hitting my head on steel metals on the ceiling panels when carrying out task giving severe headaches, pains and feeling discomforted even watching television becomes impossible and strenuous and continuous pain."

"My health problems deteriorated terribly, I was on pain killers, co-codamol, lbruophoin, paracetamol and some other medications and even up till now I went to Urgent care on in which when the pain on my eye is so severe and my body where I was given medications."

"In general, day-to-day activities are very impossible regular on daily basis 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, I claimant cannot even drive very impossible, carrying out interviews very impossible, and also preparing written documents, and keeping to a timetable or a shift pattern"

"My eyes vision became very worsened and back problems because of lack of PPE recommended safety glasses and kneel pad, hard hat, compounded by harassment, victimization experienced at work."

20. I find that the Claimant's evidence in his disability impact statement is not consistent with the answers he gave under cross examination as to his abilities with respect to using public transport and using a computer.

THE LAW

21. The definition of disability is found in section 6 of the Equality Act 2010, which states:

"6 Disability

(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.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect."

22. The Tribunal is obliged to take into account statutory guidance and any relevant codes of practice about the issue of disability.

23. Following the case of **Goodwin v Patent Office [1999] ICR 302** the EAT laid down detailed guidance on how this Tribunal should evaluate and decide the issue of disability. The following key points of guidance are given:

- 23.1 Specific reference should be made to the pleadings and the issues clarified before the issue of disability is decided;
- 23.2 When taking into account any part of statutory guidance or statutory code, the Tribunal should expressly refer to each section relevant to making its decision;
- 23.3 If an activity can still be performed with difficulty and great effort, that does not mean the ability to do the activity is not impaired;
- 23.4 Account must be taken of the fact that many people play down the effects their impairments have on them;
- 23.5 The tribunal should take into account how a person manages their condition;
- 23.6 There should be no single focus on a narrow set of activities such as for example housework. How the impairment affects someone in all aspects of their normal lives should be looked at both at home, outside of home and in the workplace;
- 23.7 If medication or other treatment is helping to treat the impairment, the tribunal should take into account both the situation whilst medication for example is being taken and what the effects would be if the medication or other treatment was not being taken or taking place;
- 23.8 The tribunal should never lose sight of the overall picture when coming to its decision about the specific parts of the disability statutory test.

The relevant date

24. The Tribunal must apply the statutory test for disability at the date the alleged discrimination took place and not at the date of the hearing determining the issues **Cruikshank v VAW Motorcast limited [2002] IRLR 24**.
25. It has also been clarified that when looking at the relevant date, the only evidence that is admissible in applying the long term part of the test, is evidence of facts and circumstances that existed at the date of the alleged discrimination or before it. Looking at evidence of facts and circumstances dating from after the relevant date, to determine the test as at the relevant date, is impermissible hindsight **All Answers Limited v W and R [2021] EWCA Civ 606**.

Impairments

26. Physical and mental impairments are treated differently by past and binding case law.
27. Whether an impairment has an adverse effect alleged, is a causation question to be determined objectively by the tribunal **Dias Da Silva Primas v Carl Room Restaurants Limited t/a McDonalds restaurants Ltd and others [2022] IRLR 94**.
28. The Guidance deals with the definition of an impairment at paragraphs A3 – A8.

- 28.1 A3 says "...The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness."
- 28.2 A4 says "Whether a person is disabled for the purposes of the Act is generally determined by reference to the effect that an impairment has on that person's ability to carry out normal day-to-day activities. An exception to this is a person with severe disfigurement (see paragraph B24). It is not possible to provide an exhaustive list of conditions that qualify as impairments for the purposes of the Act. Any attempt to do so would inevitably become out of date as medical knowledge advanced."
- 28.3 A5 lists different types of impairments that can exist.
- 28.4 A6 says "It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment." It is therefore sufficient for a Claimant to establish simply that there was an impairment. It is not necessary to prove it was either a physical or mental one.
- 28.5 A7 says "It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded."
- 28.6 A8 says "It is important to remember that not all impairments are readily identifiable. While some impairments, particularly visible ones, are easy to identify, there are many which are not so immediately obvious, for example some mental health conditions and learning disabilities."
29. In situations where there is clearly a physical impairment, but the medical cause is unknown, the focus is on the effects of the condition, not identifying the condition itself **College of Ripon and York St John v Hobbs [2002] IRLR 185 EAT.**

Substantial adverse impact

30. To determine this point, the correct approach is to ask the question of what the Claimants ability to undertake the day-to-day activity would be, if they did not have the impairment **Elliott v Dorset County Council [2021] IRLR 880.**
31. If the impact is more than minor or trivial, then it must be deemed to be substantial **Aderemi v London and South Eastern Railway Limited [2013] ICR 591.**
32. The guidance at paragraphs B2 – B6 states that the tribunal should take into account the time taken to do the activity, the way it is carried out, the cumulative effects of the impairment in question and paragraph B11 requires the tribunal to also consider environmental factors that may trigger the impairment, make it better or make it worse.
- 32.1 *B2 says "The time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial. It should be compared with the time it might take a person who did not have the impairment to complete*

an activity.”

- 32.2 *B4 says “An impairment might not have a substantial adverse effect on a person’s ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.”*
- 32.3 *B6 says “ A person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments together have a substantial effect overall on the person’s ability to carry out normal day-to-day activities.”*
- 32.4 *Paragraphs B7 – B9 deal with what a person can reasonably be expected to do to cope with an impairment before it is deemed to have a substantial effect.*
- 32.5 *B7 says “Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.”*
33. Coping strategies can amount to measures taken in the same way as medical treatment when considering deduced effects as per Elliott above.
34. Where two or more impairments are relied upon which together but do not individually cause the substantial impact, the overall effect of all the impairments should be considered **Ginn v Tesco Stores Limited [2005] All ER (D) 259 (Oct)**.
35. When considering the effects of treatment, these are to be ignored for the purposes of determining the impact and the correct test is to determine whether the impact alleged could well happen but for the treatment **SCA Packaging v Boyle [2009] UKHL 37**.
36. It is also important to note that there needs to be medical evidence to prove what could well happen as a deduced effect if treatment were stopped. A mere assertion by an employee that something could well happen is unlikely to be sufficient **Woodrup v Southwark London Borough Council [2003] IRLR 111 CA**.
37. Paragraph B12 of the guidance also says:
- “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)). The Act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (Sch1, Para 5(2)). In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs. (See also paragraphs B7 and B16.)"

38. B16 says:

38.1 *"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."*

39. The correct question when deducing effects is what would happen if treatment had stopped at the relevant date, not what would have happened if treatment had never been received at all **Abadeh v British Telecommunications Plc [2001] IRLR 23.**

40. In the same case, it was also decided that the deduced effect argument was only applicable if at the relevant date, treatment was still ongoing. Deduced effects are not applicable where treatment had ceased at the relevant date.

41. If a person has been cured by the relevant date, then they can only allege that they were disabled in the past as at paragraph B17 of the guidance or there was a perceived disability if the alleged discriminator did not know they had been cured. If disability is perceived, then the perception must have all the features of the statutory test for it to found a case of disability discrimination **Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061.**

Long term

42. Relevant parts of Schedule 1 say:

"2 Long-term effects

(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, or

(c) it is likely to last for the rest of the life of the person affected.

(2) 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.

(3)For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4)Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.”

43. When considering this issue and it is clear that an impairment has not lasted for 12 months, the tribunal is usually required to take a broad rather than narrow view of the evidence and must consider the reality of risk of whether the effects of the impairment “could well happen” rather than focussing on the diagnosis itself from medical evidence. Consequently, if there is a diagnosed or present impairment that has not yet lasted 12 months, then it will be a long term condition if the proven effects complained about could well happen **Nissa v Waverly Education Foundation Limited and another UKEAT/0135/18/DA.**

Normal day to day activities

44. The guidance addresses this issue at paragraph D3 and states that normal day to day activities are things that people do on a daily or regular basis in all aspects of their lives.
45. D4 states that this definition is not intended to include things that are simply normal for an individual or a small group of people. But in accordance with paragraph D5 a normal activity does not have to be done by the majority of people.
46. The emphasis when looking at activities is to pay attention to things the Claimant cannot do rather than what they can do and it is incorrect in law to apply a balancing or setting off exercise between things the Claimant can do and those they can't to produce an overall picture **Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19.**
47. Conducting litigation is not a normal day to day activity. Therefore if the Tribunal makes adjustments for a party, it is not then bound to find that they were disabled at the relevant time **Herry v Dudley MBC and another UKEAT/100/16.**

ANALYSIS AND CONCLUSIONS

Eye impairment

48. I find that the Claimant has had a significant eye condition (bilateral pterygia and cataracts) that required and was resolved through surgery in 2014 and that since then he has suffered long term dryness in his eyes.
49. I find on the balance of probabilities that, in the few months preceding the Relevant Period the Claimant had the onset of a new cataract and had continued dryness in his eyes (“**the Found Eye Impairment**”).
50. I accept that people sometimes do not attend their GP even when a health issue is causing them significant difficulty. I find that an operation on the eyes might be particularly concerning and that the Claimant, in October 2022, did have

concerns about the need for a cataract operation [B1/86]. However, the Claimant's medical records evidence that the Claimant is someone who does attend his GP (or A&E) if he has a medical concern (this was evidenced not only through his attendance for the alleged impairments but also for other conditions which I do not need to refer to).

51. I consider that, if the Claimant's eyes were causing him the difficulties (and in particular the pain) that he alludes to in his disability impact statement during the Relevant Period then there would be evidence of him following up on the Moorfields Eye Hospital letter of 13 October 2023 and seeking further intervention. I also consider that there would be evidence of him having raised the difficulties with his employer in the Review Document (albeit I put much less weight on this than I do the absence of medical evidence because employees may be reluctant to raise health issues, particularly early in employment).
52. On the balance of probabilities I conclude that the Found Eye Impairment had been long term or was likely to be long term at the Relevant Time. However, taking into account that the threshold for disability is not high (in particular, if the impact is more than minor or trivial then it must be deemed to be substantial), I conclude that the Claimant has failed to establish that the Found Eye Impairment was having a substantial adverse effect on his ability to carry out day to day activities at the Relevant Time.

Back impairment

53. I find that the Claimant did have a back injury in January 2010 and then again in the spring of 2019. I do not repeat my comments above about the Claimant being someone who does go to his GP when he has a medical problem. Had the Claimant, in the period immediately before and during the Relevant Period, been suffering from back pain and difficulties of the nature he suggests in his Disability Impact Statement then I conclude that there would be medical evidence of his attendance at his GP for treatment. On the balance of probabilities I conclude that the Claimant's back pain resolved in 2019 and that during the Relevant Period he did not have a back impairment as he alleged.

Conclusion

54. For these reasons the Claimant did not have a disability as alleged during the Relevant Period.

Employment Judge Woodhead

24 January 2025

Sent to the parties on:

29 January 2025