



EMPLOYMENT TRIBUNALS

Claimant

Mr C Reay

Respondent

**v Nissan Motor Manufacturing (UK)
Limited**

PUBLIC PRELIMINARY HEARING

Heard at: North Shields

On: 11 July 2017

Before: Employment Judge Hargrove

Appearances:

For the Claimant: Mr R Owen, CAB

For the Respondent: Ms K Jeram of Counsel

JUDGMENT

The decision of the Tribunal is that the claimant satisfied the test of disability under section 6 in schedule 1 to the Equality Act 2010 as from a date in mid October 2015.

REASONS

- 1 The claimant was employed as an operative on a production line at Nissan from October 2009 until his dismissal on incapacity grounds on 20 June 2016. The incapacity, and his absence from work because of it, relates to an injury which he appears to have incurred at work on **26 May 2015**. The less I say about that event the better because it is the subject of a personal injury claim commenced with a claim protocol on 7 July 2015, which remains unresolved. This has resulted in the claimant's Employment Tribunal claim which he commenced on **27 September 2016** having engaged in early conciliation, being stayed for a period although a case management decision was subsequently made that it would be appropriate to have a public preliminary hearing to decide whether the claimant satisfied the test of disability for the purposes of his discrimination claims in the Tribunal.
- 2 The injury which he sustained was an injury to his right knee. There was an initial period during which he submitted sick notes which are mentioned in the claimant's GP records. A period of long term absence commenced on **13 August 2015**. Of significance is that the claimant was placed on unauthorised

absence on **28 September 2015** and his sick pay was in effect stopped from that date although subsequently, following his raising of a grievance, it was reinstated for most if not all of the period up to mid **December 2015**. The event of him being placed on unauthorised absence forms the basis of his first claim of discrimination in order of time on grounds of disability. There were attempts by the respondent to get the claimant to return to work thereafter on limited or restricted duties which are the subject of further claims of discrimination identified latterly, after five case management hearings, in the claimant's second further and better particulars dated **24 May 2017**. The final act of discrimination claimed is the claimant's dismissal with effect from **20 June 2016**. Also, on **25 May 2017**, the claimant disclosed a second disability impact statement, the first having been disclosed on 13 December 2016. The claimant also relies upon a short witness statement dated today's date and he gave evidence and was cross-examined.

- 3 During the case management process there were orders made for the disclosure of the claimant's GP records which however only go back to **May 2015**; a substantial number of reports and correspondence from treating consultants including a Mr Banaszkiwicz, herein after called Mr B, from **4 June 2015** onwards; a Mr Elson from **2 September 2015** onwards and a report from a consultant orthopaedic surgeon, Mr Paul Partington, dated **13 March 2017** following an examination on **1 September 2016**. This report was prepared for the purposes of the personal injury proceedings and was disclosed to the respondent on **23 March** this year. There are also relevant occupational health reports which were obtained by the respondent during the course of the claimant's employment.

The respondent has disputed that the claimant satisfied the test of disability throughout these proceedings up to the date of a second amended response received by the Tribunal on **15 June**, about three weeks ago. This states as follows:-

- "(3) It is accepted that the claimant is currently a disabled person within the meaning of section 6 of the Equality Act 2010. However it is not accepted that the claimant was disabled at the 26 May 2015 as alleged nor that he was disabled at the material times set out in the claimant's second further particulars of claim. The respondent puts the claimant to proof that he was disabled at the material times particularised at paragraphs 1A-J of the second further particulars.
- (4) In particular the respondent denies that at each material time the claimant's position was likely to last for more than 12 months. It is evidenced from the claimant's medical records from the outset the medical opinion was his symptoms were waxing and waning and his recover had been atypical such that at each material time, the effect upon him was not likely to last 12 months or more.
- (5) Further the medical evidence suggests the claimant's symptoms were improving and should continue to do so ...".

- 4 At this hearing it has not been disputed that as from the date of the injury the claimant in fact have substantial adverse effects from the impairment on his normal day to day activities. What remains in dispute is only whether, and if so

when, the claimant satisfied the long term test set out in schedule 1, paragraph 2 of the Equality Act 2010. This states:-

- “(1) The effects 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”.

It is convenient to mention also paragraph (5) the effect of medical treatment. This states that:-

- (5) 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
 - (b) but for that, it would be likely to have that effect”.

5 In this connection the measures included, in particular, medical treatment for periods of time commencing within two days of the incident at work in May 2015, from when the claimant was prescribed a combination of Ibuprofen and Paracetamol and, from 28 June 2016 and since, Naprosan. I am satisfied that if the claimant had not been taking painkillers the adverse effects of the impairment in terms of pain and the effect of his mobility would have been more substantial although the substantiality test is not a high one; it means no more than minor or trivial. I think the concession that was made by Ms Jeram was completely justified in this case and there was a considerable body of evidence in the medical reports and in the occupational health records that indicate that the adverse effects on the claimant’s normal day to day activities in terms of mobility, climbing stairs, driving for long periods of time, walking for more than 100 metres at a time etc, were substantial.

For the meaning of the words “likely to last” and “likely to recur” I have been referred to the well known test laid down by the House of Lords in **SCA Packaging Limited v Boyle [2009] ICR page 1056** as meaning “it could well happen”. This is now reflected in the guidance on the effects of disability issued by the Secretary of State under the Equality Act 2010 in 2011. I refer to paragraphs C3 and C4.

C3 The meaning of likely is relevant when determining –

- Whether an impairment has a long term effect;
- Whether an impairment has a recurring effect;
- How an impairment should be treated for the purpose of the Act when the effects of that impairment are controlled or corrected by treatment or behaviour.

In these contexts “likely” should be interpreted as meaning that it could well happen.

C4 In assessing the likelihood of an effect lasting for 12 months account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual, for example general state of health or age.

In C5 and 6, it goes on to deal with recurring or fluctuating effects which is not one of the major decisions for my decision in this case but does rather support it.

6 In the end, having considered the evidence of the claimant and the medical records and having heard the submissions of Mr Owen and Mr Jeram, I have made a decision that there was a distinct lack of clarity both as to the nature of the diagnosis of the injury and its expected adverse effects in the initial stages. There is a lot of medical evidence early on where there was a discussion taking place as to the precise nature of the claimant’s condition and it was not or at least not correctly identified other than that he had substantial bruising of the right knee and down the right leg with recurring pain. The initial diagnosis appears to have been in medical terms haemarthrosis ... See Mr B’s letters of **4 June, 16 June and 30 June 2015**. In the end two successive MRI scans had to be undertaken but there was an expectation that the claimant’s symptoms would settle and an example of that is in an anonymous report from the orthopaedic department of Queen Elizabeth Hospital – pages 19-20 of the bundle. This states:-

“Amongst other things, within 2 to 3 weeks your symptoms should be settling and you can resume normal functions. Occasionally a fracture is not readily identified on the initial x-ray or a more severe ligament injury may not be simply diagnosed in the first assessment. Such injuries behave like a severe bruise or sprain but take longer to settle and in this event may require further investigation and care. If after a week to 10 days your pain is not settling at all or after 2 to 3 weeks your pain is settling but not enough to allow you to use your injured body part then you may require further medical attention. I do not consider that that provides evidence that the claimant’s adverse effects of the mobility satisfied the test in C3 as that it could well happen that it would continue for 12 months. The next stage in the process is a report of 19 June (page 21) following a clinic date of 16 June. A recent MRI shows a significant haemarthrosis within the knee ... there is still a bit of uncertainty as to why he should have developed this, we think a repetitive type of injury to the knee may have caused the injury. It is certainly settling and he is able to straight leg raise today and there is no tendon gap felt in the quadriceps bulk or patella tendon. Today the swelling around the knee is getting better and overall things are improving”.

On **1 July 2015** Mr B says that his right knee continues to improve. There had been recommended a repeat MRI scan. Mr B’s next report at page 23 is dated **5 August 2015**. The position has changed. The letter states “his right knee

has not been settling since he sustained a spontaneous haemarthrosis in May of this year. Mr Reay today did complain that he feels the knee has no strength whatsoever and he is limping with walking.” There was particularly severe pain going up and down hills and walking up and down stairs. An urgent repeat MRI scan was ordered and it was arranged that he would be reviewed in three weeks time. The position significantly altered after he had been seen by another consultant orthopaedic surgeon, Dr Elson, on **1 September 2015** in a report dated **2 September** (pages 25-26). In it he said:-

“What I now see is a case of patella tendonitis with some MRI changes in his medial facet of his patella but otherwise normal findings. In order to treat him for his patella tendonitis I have given him an injection of steroid and local anaesthetic locally at the most tender spot in his patella tendon. Hopefully this will calm things down and allow him to rehabilitate. He needs to work on strengthening his quadriceps and I have recommended that he takes up cycling without resistant on the flat for short distances in order to build up his quadriceps strength. We will check on his progress in approximately three months time”.

The next report is dated, coincidentally, **28 September 2015** which is the date of the first act of discrimination relied upon. The significance of this is that Mr Elson says that having had a telephone conversation with Mr Reay that morning Mr Reay had reported that “the patella tendon injection had given him no benefit and he is yet to see a clinical improvement in his patella symptoms. He is currently working on quadriceps strengthening with physiotherapy”.

The next two documents are of particular significance. On **13 October** the claimant wrote to Susan Gardner, Mr Elson’s secretary. He stated:-

“My knee situation I’m still suffering with clear pain irritation as soon as I place my knee under some stress last Friday because the pain within my knee had subsided for a couple of days I went out on the bike for 30 minutes to test and exercise the knee joint. What resulted was all weekend until today at least as I write this e-mail is pain/irritation once again from my knee as well as feeling quite weak on my right knee joint area”.

He also said in that note that the physiotherapist had instructed him to stop the cycling that he had been specifically instructed to do and to clarify.

On **15 October** Mr Elson replied to that e-mail. He said:-

“I appreciate you are now in a difficult position with your employers from what you describe. Your description of pain following 30 minutes of cycling does seem to suggest continuing patella irritability. On this basis I would probably reduce the exercise regime and have a period of prescribed rest. This will be consistent with what Sharon in physiotherapy was also suggesting. Without strenuous activity there is a chance your symptoms will improve”.

I regard that latter remark as being of considerable significance. In fact his symptoms have not, or at least not significantly, improved since that date and I conclude that from that date it is possible to detect very clearly that the adverse effects were, as of that stage likely to last in the sense that it could well happen for at least 12 months and that is the basis of the judgment that I make. I should say in addition that in my view the medical evidence shows that the

claimant then had a condition with recurring or fluctuating effects which are likely to satisfy the test in paragraph 2.2 in schedule 1 so that if the impairment ever ceases to have a substantial adverse effect on the abilities it is to be treated as continuing if the effect is likely to recur. I do not think that is going to have the effect of making the test of disability satisfied any earlier in this case. I should also say that, even if I were wrong about that, by the end of **May 2016**, before the dismissal, quite clearly the adverse effects had by that stage lasted for at least 12 months, so even if I am wrong on the first test the claimant is going to satisfy the test at the time of the dismissal in any event.

CASE MANAGEMENT SUMMARY

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1 **Exchange of documents and preparation of a single bundle**

1.1 By **15 September 2017** the parties must exchange all documents relevant to the issues identified in the recent correspondence.

1.2 By no later than **2 October 2017** the respondent must have prepared a joint bundle of each side's documents together with an index, a copy of which is to be provided to the claimant.

2 **Witness statements**

By no later than **20 October 2017** the parties must exchange the witness statements of all witnesses upon whom they intend to rely at the hearing. Such witness statements will stand when read as the evidence in chief of the parties and of their witnesses without addition save with the permission of the Tribunal or to answer any new points in the other side's witness statements.

3 **Listing of hearing**

It is ordered that the hearing be listed before a full Tribunal sitting at **North Shields Hearing Centre, 2nd Floor, Kings Court, Earl Grey Way, Royal Quays, North Shields, Tyne and Wear, NE29 6AR** for 5 days in the period **6 November to 1 December 2017**. **By no later than 25 July 2017 the parties must provide to the Tribunal in writing details of their availability during the listing period.**

4 It is noted and recorded that the Tribunal refuses the respondent's application for a further stay of the proceedings pending the conclusion of the claimant's personal injury claim, but notes that the substantive hearing to be listed above **may** not be able to proceed if any personal injury proceedings are outstanding, unless the November Tribunal hearing deals with liability only. There is a clear overlap on remedies because the claimant is claiming for his loss of earnings in the PI proceedings for the whole period from the date of the accident in 2015. The claimant must by no later than **29 September 2017** report in writing to the respondent and the Tribunal what the outstanding position is with regard to the personal injury claim, whether proceedings have been commenced and/or are listed, or if not when they are expected to commence or be listed.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Hargrove

Date 19/07/2017

Sent to the parties on:

20/07/17

For the Tribunal:

Miss K Featherstone