



EMPLOYMENT TRIBUNALS

Claimant: Mr S Miles
Respondent: UK Research and Innovation
Heard at: Bristol **On:** 29th July 2019
Before: Employment Judge P Cadney

Representation:

Claimant: In Person
Respondent: Mr J French Williams

PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

- i) The claimant was not at the material time a disabled person within the meaning of s6 Equality Act 2010.
- ii) The claimant's claim of direct disability discrimination is dismissed.
- iii) The claimant's application to amend to add further claims of disability discrimination is also dismissed.
- iv) Case Management orders have been set out in a separate order.

Reasons

1. By a claim form issued on 26 August 2018 the claimant brought claims of unfair dismissal, disability discrimination, breach of contract in relation to notice pay and other payments.
2. The case came before employment Judge Salter on 3 January 2019. He gave a number of directions relating to the final hearing which is listed in December 2019. However, the issue of disability was and remains in dispute and EJ Salter set the matter down for a preliminary hearing today to consider 1) whether the claimant is a disabled person within the meaning of the Equality Act 2010; and 2)

any applications the claimant is required to make to amend his claim. The sole claim of disability discrimination on the face of the ET1 is one of direct discrimination, the alleged act of discrimination being his dismissal. If the claimant was not a disabled person that claim must fail automatically, as must the application to amend, as it is an application to add further allegations of disability discrimination in relation to the process that led to his dismissal. For the avoidance of doubt the claimant has in his skeleton argument, and in discussion today, raised the possibility of pursuing a claim for perceived disability discrimination in the event that he is held not to be a disabled person. No such claim is made in the ET1, nor in the Further and Better Particulars which set out the additional discrimination claims which are the subject of the amendment application before me today. It follows that if any such claim were to be pursued it would require a further application to amend which is not before the tribunal today.

3. In relation to the determination of the issue of disability EJ Salter gave directions. The respondent was ordered to provide the claimant by 17th January 2019 with the names and addresses of three medical experts, and the respondent was to bear the cost of the expert's report. The claimant was to notify the respondent of the chosen medical expert, who was then to be instructed and who was to report by 31st May of 2019. The parties had permission to ask any questions of the expert by 7 June 2019 and the questions would be answered by 14 June 2019. By 21st June 2019 the respondent was to notify the tribunal and claimant whether it conceded claimant was a disabled person; or alternatively the claimant the claimant was to notify the tribunal and respondent whether he was withdrawing the disability discrimination claims. The respondent does not concede disability, and the claimant has not withdrawn the disability discrimination claim. This brings into play direction 7.8: *"If either party disputes any significant finding or conclusion in the report that party must arrange the attendance of the expert for the preliminary hearing at their own cost."* During the course of this hearing the claimant has questioned the necessity and wisdom of EJ Salter making that order, and more generally and the use of a joint expert report at all, as he now contends that there was and is sufficient medical evidence to determine the issue without it. However, there was no application for reconsideration, and no appeal against any of those directions.
4. It is not in dispute that in order for the claimant to be a disabled person within the meaning of s6 Equality Act 2010 he must fulfil three criteria:-
 - i) He must have a physical or mental impairment; which
 - ii) Causes a substantial adverse effect on normal day to day activities; and which
 - iii) Is long term; meaning that it has lasted or is likely to last for twelve months (meaning that it "could well happen" that it lasts for twelve months as judged at the time of the act of discrimination).
5. It is not in dispute that the claimant suffers a physical impairment being kyphoscoliosis and scoliosis, in simple terms curvature of the spine. The background, which is also not in dispute, is that prior to October 2017 the condition was asymptomatic but that from a point in October 2017 the claimant

began to suffer from severe pain. It fluctuated in severity in the initial days or weeks, and then caused him to be absent from work permanently from November 2017 until April 2018 when he was dismissed. The respondent contends that he was dismissed for gross misconduct unconnected with any underlying disability; the claimant contends that the basis for the dismissal was manufactured and that the real reason was his disability hence the claim of direct disability discrimination.

6. The first question for determination today, therefore, is whether the claimant was or was not at the relevant time a disabled person.
7. In accordance with the directions a joint medico-legal report was prepared by Professor U.M. Chowdhary a Consultant Neurosurgeon dated 17th May 2019. The status of the Professor Chowdhary's report is in dispute before me. As is set out above, EJ Salter directed that if either party sought to challenge a significant finding in, or the conclusion of the report that party must arrange the attendance of the expert at the preliminary hearing at their own cost. The respondent's position is that it accepts the report of Professor Chowdhary and does not dispute any significant finding or conclusion and therefore has not sought to call him; and it submits that it was always open to the claimant to call Professor Chowdhary and to put to him any concerns or questions arising from the report, but that as he has chosen not to do so the only medical evidence before the tribunal is the joint report of Professor Chowdhary's. It is not open to the claimant simply to ignore the directions of EJ Salter and challenge the contents of the report without giving Professor Chowdhary the opportunity to answer any questions or meet any criticisms. The claimant may not like EJ Salter's order or the Professor Chowdhary's conclusions, but in the absence of complying with the direction he is bound by the contents of the report. This is particularly so as the claimant is not simply challenging the conclusions but has engaged in a fundamental attack on Professor's Chowdhary's integrity, as in at least one respect he is alleging that the report is fabricated. Put simply the respondent contends that the only medical evidence before the tribunal today does not support the claimant's contention that he was a disabled person at the relevant time, and it is not open to him to challenge it in the absence of calling Professor Chowdhary.
8. The claimant's position is that he does challenge the both the significant findings and the conclusions of the report. The claimant submits that he is not able to call Professor Chowdhary as he has been quoted a fee of several thousand pounds for Professor Chowdhary to attend the tribunal which he cannot afford to pay. He contends that he is entitled to criticize the findings and conclusions, and that is open to the tribunal to accept his criticisms of Professor Chowdhary's report without hearing his evidence, and to place the little or no weight on it, and to draw its own conclusions as to whether the test for disability within the Equality Act is made out.
9. The objections the claimant makes to the contents, findings and conclusions of the report can be summarised as follows. Firstly he does not accept that the factual basis set out in the report is correct. For example (at page 117 of the bundle) in the points which he put to Professor Chowdhary, he asserts that there were recurring episodes of similar levels of pain and symptoms on 30th October

2018 as had occurred in October 2017, and that his pain score typically increases in the afternoon and evenings reaching up to 5/6; which along with increased tiredness causes him to limit activities at these times of day. Where Professor Chowdhary states that on 26th March 2019 Mr Miles was able to carry out his normal activities without too many problems, “*..it’s worth noting that what is now normal Mr Miles is not necessarily normal for the general population.*” This appears to be a challenge to section 8 of Professor Chowdhary’s report which details the symptoms as at 26 March 2019, the date of the examination, and section 12 “Opinion” paragraph 10 in which Professor Chowdhary states “*By end May 2018 (approximately one month after he was dismissed) Mr Miles started to show a good amount of improvement from his symptoms complex so that within a couple of weeks that he was able to start a property development business on a self-employed basis and was doing the management and organisational type of work (which was a desk based job) from then onwards and slowly over the next few months he started to engage himself in some manual work so that by November 2018 he was doing a substantial amount of moderate manual work related his property development. Subsequently Mr Miles has further improvement. When I saw him on 26 March 2019 he had only minimal and intermittent symptoms of pain with the range of pain being 0-3 on the visual analogue scale. He was engaged full-time doing a moderate degree of manual work for 4 to 5 months and had no problem with his day-to-day living. Hence as on 26 March 2019 Mr Miles did not fit for the criteria being disabled under the Equality Act 2010.*”

10. If the factual basis for this conclusion is wrong, as the claimant suggests, his conclusion that the symptoms suffered by the claimant after May/June 2018 were not sufficiently substantial to allow the claimant to meet the statutory test of disability may also be wrong. However, after the claimant submitted these questions and contentions Professor Chowdhary did alter his report in some respects. As he did not alter his report in response to these points one must presume that he stands by his original conclusions.
11. Secondly the claimant relies on the acceptance of some of the very alterations he sought to be made as evidence that Professor Chowdhary’s original report was falsified. After the original report was received he sent Professor Chowdhary a number of corrections which he wished to be made to the report. As is set out above, Professor Chowdhary did not accept all of them, but two which he did accept have been referred to by the claimant. Firstly at page 2 of the report under “Occupation” he converted the tense from the present to the past. This appears to be of little significance. Secondly and more significantly (submits the claimant) at section 9 “On examination on 26th March 2019” (point 5) he originally wrote “*A neurological examination of the upper limbs and lower limbs showed no neurological abnormality.*” The revised version reads “*Neurological functions as observed of the upper limbs and lower limbs showed no neurological abnormality*” (my underlining in both cases). The claimant submits that phrase neurological “examination” is wholly different in concept from “observation” of neurological function, and his evidence is that there was no neurological examination of him on 26 March 2019. He concludes from that, that Professor Chowdhary had deliberately falsified that section of his original report and invites the tribunal to draw the same conclusion. He submits that if, as he says, the original report has been self-evidently deliberately falsified the tribunal can

properly ignore the report's conclusions without giving Professor Chowdary the opportunity to respond.

12. There is a third objection relating to Professor Chowdary's use of the results of the MRI scan which is dealt with below.
13. The respondent submitted that Professor Chowdhary is an extremely distinguished neurosurgeon, as can be seen from his CV, and that he was selected by the claimant from the list of three provided. His report is detailed, thorough, and clearly results from a thorough examination of all of the sources of information available to him, including the medical records and an assessment with and of the claimant. On the basis of the information available to the tribunal there is no reason to doubt its thoroughness or accuracy. In addition, and as is set out above, respondent does not accept in any event that it is open to the claimant, having not called Professor Chowdhary, to challenge the report in direct breach of the order of EJ Salter. In any event, and irrespective of the direction of EJ Salter, it would be wholly wrong for the tribunal to conclude that a joint expert report had been deliberately falsified by the expert without him having the opportunity to answer the allegation.
14. Before considering the various submissions it is necessary to set out Professor Chowdary's conclusions. As set out in his Opinion:
 1. *"The structural abnormality of the complex kyphoscoliosis and scoliosis of the thoracic spine was there for a long period of time prior to the onset of sudden severe pain in mid-October 2017....As I've explained in some detail in the diagnosis section and even when taking into account the retrospective evolution of his symptoms and the results of the MRI scan of the whole spine no definitive or discrete cause for the onset of the sudden severe pain which started in mid-October 2017 has been found.*
 2. *During the period starting from mid-October 2017 until mid-April 2018the symptomsrendered Mr Miles unable to work.*
 3. *Sometime between early to mid-May 2018 and early June 2018 Mr Miles started to show quite rapid improvement in his symptoms and from that time onwards he started to work as a property developer on a self-employed basis.... From November 2018 he started to work and was more hands on and by that time he was doing a moderate degree of manual work ...During consultation with me in March 2019 Mr Miles was free of his pain-related symptoms except for minor intermittent pain in the interscapular area which only caused a minimal amount of problems for him mostly related to sleep..."*
 5. *If one takes the evidence available from various sources...regarding his symptom complex and evaluation about capacity to work or not between December 2017 and April 17th 2018 then he fulfils two criteria... of being disabled.. These are..(i) he had a physical or mental impairment and (ii) these impairments were causing a substantial adverse effect...*

6. *But...Mr Miles does not fulfil the third mandatory criteria of long term effects.. On the day of his discharge his physical impairments giving rise to the substantial adverse effect had only lasted 6 months.*
7. *The problem regarding making a determination of whether his substantive physical impairment would have lasted for 12 months or more in April 2018 is very problematic as no precise diagnosis regarding any pathology.. was made. The MRI scan of the whole spine was done in March 2018 and had shown no discrete and identifiable pathological process other than complex thoracic kypho-scoliosis was made at that stage. In the absence of any specific pathology it would not have been possible to predict whether Mr Miles thoracic and brachalgic pain would last at least 12 months.*
8. *Hence it is my conclusion that during the period from the start of his severe symptoms from the period mid-October 2017 to 17 April 2018 Mr Miles did not fulfil the third mandatory criteria to judge disabled persons under the Equality Act.*
15. This gives rise to two fundamental questions. Firstly is Professor Chowdhary correct to conclude that the physical symptoms related to the underlying kyphoscoliosis and scoliosis did not have a substantial effect on day to day activities for twelve months. As set out above the claimant in his questions to Professor Chowdhary challenges that but Professor Chowdhary did not amend that section of his report which presumably means that Professor Chowdhary stands by those conclusions.
16. Secondly in respect of the question of whether judged as at 17th April 2018, which was the date of the claimant's summary dismissal (and, subject to the application to amend, either the only act of discrimination or on any analysis the last act of discrimination) was the claimant a disabled person. This would have to be judged against the question of whether as at April 2018 the symptoms were likely to last for more than 12 months. As will be seen from Professor Chowdhary's conclusions, his opinion is that it would not be possible to predict whether that would or would not be the case because there had been no identification of the specific pathology which had led to the onset of the symptoms and their continuation between October 2017 and April 2018. There was therefore, no medical basis for answering that question. Although this is my analysis, he appears to be saying that the question of whether the symptoms would continue, and if so for how long, is in the absence of any means of identifying the underlying pathology no more than a guess.
17. There is no dispute between the parties that the question of whether the substantial adverse effect was likely to continue for 12 months or longer judged as at the middle of April 2018 is on the basis of the test that it "could well happen". But it follows that if Professor Chowdhary's analysis of the medical evidence is correct and if it would not have been possible to make any prediction, then it is not possible to say it could well happen. The respondent submits I am bound by Professor Chowdhary's conclusions in the joint report, or if I am not bound by them, that they constitute the only medical evidence as to that issue and that I should give very significant weight to them. As there is no alternative

medical evidence in respect of the analysis of whether as at April 2018 the continuation of the symptoms “could well happen” and if so for how long then I should inevitably be drawn to the conclusion that the claimant has not satisfied that part of the statutory test and is not disabled.

18. The claimant contends that for the reasons set out above I am not bound by Professor Chowdhary’s report and should give it little or no weight. I should conclude that as at April 2018 he was suffering symptoms which were related to the underlying kyphoscoliosis and scoliosis, and that although the mechanism had not been identified, given the underlying condition would not change that the only answer to question of whether the symptoms “could well” continue for more than the total period of 12 months is “yes”.
19. Moreover they claimant submits that the conclusion of Professor Chowdhary is based on, as he puts it, a fatal legal flaw. He refers at paragraph 7 of his opinion (above) to the MRI scan being carried out in March 2018; but the letter containing the results was not sent until May 2018, and so it was not, and could not have been, known in April 2018 that no underlying pathology had been discovered. Insofar as Professor Chowdhary relies on information that post-dates the act of discrimination he has made a legal error as the legal test requires that question to be answered on the basis of what was known at the time and not what occurred subsequently.
20. In my judgement the difficulty with this argument is that as at April 2018 in the absence of the results of the MRI scan it is clearly correct to say that nothing which would explain the symptoms had been discovered. The results of the MRI scan merely confirmed that no underlying pathology had been identified. In other words, the situation in May 2018 was no different to that in April 2018. In my judgement it follows that even if Professor Chowdhary has made the error that the claimant tributes to him, and I bear in mind that Professor Chowdhary has not had the opportunity to answer any of these criticisms, that his underlying point is sound and does not depend on the results of the MRI scan. As at 17th April 2018 there was no medical basis on which any conclusion as to the continuation of or the timescale of the symptoms could be formed.
21. In the end I have come to the conclusion that the respondent is correct. Employment Judge Salter gave directions which have not been appealed, and which, therefore, bind both parties. It is not open to a party simply to ignore an order of the tribunal even if it may have good reason for doing so. In the absence of claimant calling Professor Chowdhary and challenging his conclusions, for which he may have good reason, I am left in the position that the medical evidence in the form of a joint report does not support the proposition that the claimant was a disabled person as at April 2018. Despite the claimant’s valiant efforts it does not appear to me that it would be proper to conclude that Professor Chowdhary’s assessment of the medical evidence is incorrect in his absence and in the absence of him having had the opportunity to answer those questions. It follows that in my judgement on the evidence before me today I am bound to conclude that the claimant was not a disabled person as the disabling symptoms did not last for 12 months, and that the question of whether it was likely (could well happen) that they would last for

more than 12 months judged as at the date of dismissal is “no” given the evidence Professor Chowdhary.

22. It follows that if the claimant is not a disabled person within the meaning of s6 Equality Act 2010 his claim for disability discrimination must be dismissed. Equally as the application to amend is an application to add further allegations of disability discrimination that must also be dismissed.

Employment Judge P Cadney
Dated: 9th August 2019

ORDER SENT TO THE PARTIES ON

FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS