



EMPLOYMENT TRIBUNALS

Claimant: Mr J Hackney

Respondent: James Glancy Design Limited

Heard at: Remotely by CVP **On:** 13 January 2022

Before: Employment Judge Harrington

Appearances

For the Claimant: In person

For the Respondent: Mr A Smith, Counsel

JUDGMENT

- 1 At all relevant times, the Claimant was not disabled as defined by Section 6 of the Equality Act 2010.
- 2 Accordingly, the Claimant's claim for disability discrimination is not well founded and is dismissed.

Introduction

[The references in square brackets are to page numbers in the Preliminary Hearing Bundle.]

- 1 This case comes before me today as an Open Preliminary Hearing to determine the question of disability.
- 2 By way of background the Claimant, Mr Hackney, presented claims of unfair dismissal, disability discrimination, breach of contract and a claim for a statutory redundancy payment, to the Tribunal on 30 June 2020 [1-12]. The Respondent denies the entirety of the claims.
- 3 On 26 February 2021 a Case Management Preliminary Hearing took place before Employment Judge Kelly. The issues in the Claimant's

unfair dismissal claim were identified and the preliminary matters concerning the claim of disability discrimination were noted as follows,

Was the claimant a disabled person in accordance with the Equality Act 2010 ('EQA') at all relevant times because of the following condition(s): Disc ruptures in his lumbar sacral spine resulting in chronic pain? The respondent does not accept that this is a disability under the EQA.' [28]

4 Various case management orders were made including the listing of a further preliminary hearing on 15 June 2021 and the final hearing, for a period of 5 days, commencing 28 February 2022 [30].

5 Following this, the Claimant produced an impact statement which made reference to his back condition but also to severe anxiety and depression. The addition of this further condition prompted correspondence between the parties.

6 At the second preliminary hearing, on 15 June 2021, Employment Judge Barker listed this further Preliminary Hearing [34-43]. He also made detailed directions concerning the issue of disability, including permitting the instruction of an expert. The Case Management Orders directly addressed the additional mental health condition identified by the Claimant in his impact statement, requiring the Claimant to make an application to amend his claim of disability discrimination to rely upon a second disability – namely anxiety and depression and providing the Respondent with an opportunity to respond to any application.

7 On 20 July 2021 Employment Judge Wright refused the Claimant's application to amend his claim [47]. Later, she also refused an application for reconsideration, noting that the Claimant had had opportunities to make his application much earlier in the proceedings [51].

8 On 30 November 2021 there was a case management discussion held remotely by Regional Employment Judge Freer, at which directions were made for a judicial mediation which will take place on 3 February 2022.

9 Accordingly, the issue I am to determine today is as set out at the first Preliminary Hearing:

Did the Claimant have a disability for the purposes of the Equality Act 2010 at the relevant time, which the Claimant says is June 2018 to 29 February 2020? [29] The disability relied upon remains the disc ruptures in his lumbar sacral spine resulting in chronic pain.

10 The Tribunal has been provided with the following:

- 10.1 Preliminary Hearing bundle paginated 1 – 347;
 - 10.2 Witness Statement bundle;
 - 10.3 Additional witness statement from Claimant headed 'Claimant's Impact Statement, specific to the Index Period (Nov 2015 – Feb 2020);
 - 10.4 Supplemental letters from Mr O'Dowd, dated 11 and 12 January 2022;
 - 10.5 Respondent's Skeleton Argument;
 - 10.6 Bundle of authorities produced by the Respondent;
 - 10.7 Electronic copy of the Scott Schedule;
 - 10.8 Further documents, as requested by the Claimant, and sent by email on 13 January 2022 at 11.13 am.
- 11 The hearing was conducted remotely via the Cloud Video Platform (CVP). The Claimant represented himself and the Respondent was represented by Mr Smith of Counsel. At the start of the hearing there was a discussion about the material available and the Claimant requested that I was provided with a number of additional documents. These were duly provided by email, as noted in paragraph 10.8 above. There was also the outstanding issue of whether the Tribunal should hear oral evidence from Mr O'Dowd. I was informed that Mr O'Dowd had some availability to attend the remote hearing during the afternoon. The Claimant told me that he thought it might be useful to hear from Mr O'Dowd but he was unable to identify any particular issue upon which he wanted to ask the expert further questions. Mr Smith stated that the Respondent did not have any further questions for the expert. Following my initial consideration of the written material, I decided that Mr O'Dowd was not required to attend the hearing to give oral evidence and he was duly notified of this. The parties had already asked Mr O'Dowd a number of supplemental questions, following the production of his report, which were answered in writing and neither I nor the parties could identify any further matters upon which to question him.
- 12 Following my initial reading of the core documents, I proceeded to hear oral evidence from the Claimant, Mr Hall and Mr Sedgley. Both parties then made closing submissions. Due to a lack of available time, I reserved my judgment.

Findings of Fact

- 13 I made the following findings of fact on the balance of probabilities:

- 13.1 The Claimant has a long-term problem with mechanical low back pain and sciatica [282]. The history of mechanical back and radiating leg pain is as a result of degenerative change or spondylosis [283];
- 13.2 This condition did not progress or substantially deteriorate during the relevant period [285]. It has got worse and deteriorated since the end of the relevant period;
- 13.3 During the relevant period the Claimant experienced back pain and had occasional flare-ups [285]. This is confirmed by Mr O'Dowd who describes the Claimant as having '*chronic mechanical low back pain and intermittent leg pain*' during the relevant period [284]. The Claimant took various medications for pain including Naproxen, Co-codamol and Diazepam. Whilst during the relevant period, the Claimant took medication for his pain, this had no effect on his underlying diagnosis or level of restrictions at the time [287-288];
- 13.4 At all relevant times the Claimant lived alone in Kent. He was able to look after his personal hygiene, his shopping, cooking and washing his clothes. He also kept sixteen birds (chickens and ducks) and was able to tend to their needs including feeding and watering them and collecting their eggs;
- 13.5 During the relevant period, the Claimant's working life included the following features: he would drive to and from work commuting approximately 300 miles per week and spending 10 – 15 hours per week in the car for this purpose. He did not require breaks when driving. Activities performed by the Claimant at work are described in paragraphs 2.3 and 2.4 of his statement included in the bundle [74]. His work included physical activities and, as the Claimant described it, many hours on his feet undertaking tasks such as welding, carpentry and spray painting and sedentary, seated activities including reviewing and amending documents requiring sustained concentration. It is agreed that the Claimant's work included him walking several miles a day;
- 13.6 The Claimant was able to carry out his work including working on carpentry and welding tasks and as a workshop manager. He did require some time off when experiencing a flare of his symptoms. On the basis of the Claimant's good and regular service in his role at work, I accept and agree with Mr O'Dowd's conclusion that, insofar as his work activities were concerned, the Claimant's back condition did not have a substantial adverse effect on his ability to carry out his normal day-to-day work activities [286];
- 13.7 More broadly, the Claimant's lifestyle was active during the relevant period. In addition to working, looking after himself and his birds, the Claimant liked to go on a yearly active snowboarding holiday and he carried out various DIY projects both to his own home and a rental property he owns in Streatham. Works at his own home included

building polytunnels, using arches with a diameter of four metres that were not needed at his work. He loaded these arches into his truck, took them home and constructed a polytunnel at his home. He also renovated his bathroom including carrying out the tiling work. Often these projects would be carried out with friends and the Claimant would work on them after being at work for the day;

- 13.8 He enjoyed snowboarding and went on snowboarding trips to Utah in 2018 and 2019. These were typically ten days in length and included both snowboarding and excursions into the desert. I accept the Claimant's description of his snowboarding as physically active, requiring a degree of physical flexibility and that it was demanding to his muscles. The Claimant would use chair lifts and sit on benches and banks of snow to unclip from his snowboard;
- 13.9 At no time has the Claimant claimed relevant benefits such as Disability Living Allowance or Personal Independence Payment.
- 14 The Claimant experienced some back pain. He reported this to people at work. The Claimant also had other health issues during his employment with the Respondent including tennis elbow and an injury he sustained when he went snowboarding in 2018.
- 15 The Claimant's back pain has stayed at the same level during the relevant period. There was no progressive deterioration in levels of pain during the relevant period; he described daily back pain with approximately three 'flare ups' a year. [274, 275] Historically he has been referred for a specialist opinion and to a consultant pain management specialist. He has also seen his GP and had some physiotherapy and chiropractic treatment.
- 16 At the time of his examination by Mr O'Dowd on 20 October 2021, when the Claimant's symptoms had progressed and deteriorated, Mr O'Dowd described the Claimant's limitations as some restrictions to the amount of time he can cook, carrying out cleaning activities with pain, not being able to reach the floor and driving with pain [286, 287]. This is not a description of the Claimant's functional limitations during the relevant time but, as stated, when Mr O'Dowd examined him in October 2021. I am entirely satisfied that these restrictions are not representative of how the Claimant was during the relevant period as, confirmed both by Mr O'Dowd's report and again in his letter dated 11 January 2022. Mr O'Dowd refers to this as the difficulties the Claimant had '*with the worst symptoms he can remember*' (see answer following question 2.2, letter 11/1/2022).
- 17 I accept the Claimant's oral evidence that he was in pain with his back during the relevant period. However, and for the avoidance of doubt, I am not satisfied on the balance of probabilities that the pain was 24/7 and such that the Claimant had significant difficulty sleeping, using the

toilet at work due to problems with bending and stretching and that he could only brush his teeth with difficulty.

- 18 I have reached this conclusion by firstly referring to the evidence of the Claimant's work and home activities, as set out above. The difficulties identified by the Claimant, for example, with using the toilet and brushing his teeth are inconsistent with what the Claimant was doing at work and at home at the relevant time. Secondly, once his condition deteriorated, the extent of the Claimant's restrictions are as set out in paragraph 16 above. Again, these restrictions discussed with Mr O'Dowd do not include or accord with the Claimant's account that during the relevant time he had difficulty sleeping due to pain and had difficulties using the toilet and brushing his teeth. Accordingly, whilst I accept that the Claimant suffered back pain from his condition, I am not satisfied that he had the problems he has referred to with sleeping, toileting and brushing his teeth.

Legal Summary

- 19 Pursuant to Section 6(1) of the Equality Act 2010, a person has a disability if he has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. This definition is elaborated on and extended by Schedule 1 of the Act and by the Equality Act 2010 (Disability) Regulations 2010.
- 20 It is for a claimant to show to the Tribunal that he meets the criteria of being a disabled person.
- 21 In Chacón Navas v Eurest Colectividades SA [2006] IRLR 706, 'disability' was held to cover those who have a 'limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'. This definition was approved in HK Danmark, acting on behalf of Ring v Dansk almennyttigt Boligselskab [2013] IRLR 571.
- 22 In assessing whether the disability has a substantial effect, the focus of the tribunal should be on what the Claimant cannot do, not on what they can do (Aderemi v London and South Eastern Railway Ltd [2013] ICR 591). Where some level of impairment is established, the question for the tribunal is whether the adverse effects of the impairments were "substantial" (Equality Act 2010 section 6(1)), where "substantial" means more than minor or trivial (section 212(1)). In Aderemi, Langstaff P provided the following summary,

"It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant

maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other'." (paragraph 14, p 591)

- 23 In answering the question of whether the effects are, at a certain point in time "likely to last a year or more", the tribunal must interpret "likely" as meaning "it could well happen" SCA Packaging Limited v Boyle [2009] ICR 1056.
- 24 One aspect of considering whether an impact on day to day activities is "substantial" is to compare the difference in how the individual carries out those activities because of the condition(s) relied on, using her coping mechanisms, albeit without any medication or aids: "If the difference is more than the kind of difference one might expect taking a cross-section of the population, then the effects are substantial."(Paterson v Commission for Police for the Metropolis [2007] ICR 15523 (paragraph 68)).
- 25 The simple fact that a claimant can only carry out normal day-to-day activities with difficulty or with pain does not establish that disability is made out. As pointed out in Condappa v Newham Healthcare Trust [2001] All ER (D) 38 (Dec), the Act is concerned not with any adverse effect but rather with a substantial adverse effect. Whether or not pain or difficulty is sufficient in any particular case is a matter for the tribunal to decide on the facts before it.
- 26 If a medical report expresses an opinion on whether a claimant meets the legal test for disability, that is not conclusive. The issue is a matter of fact for the tribunal to decide (Vicary v British Telecommunications [1999] IRLR 680, see also Abadeh v British Telecommunications Plc [2001] IRLR 23).
- 27 The relevant time to consider whether a person was disabled is the date of the alleged discrimination (McDougall v Richmond Adult Community College [2008] IRLR 227). It is necessary to assess whether, at the time of the act (i.e. on the evidence available at that time) the individual had suffered a substantial effect for a year or more, or – on the evidence at that particular time – was more likely than not to suffer substantial effect(s) for a total of a year or more (Tesco Stores Ltd v Tennant [2020] IRLR 363).

Tribunal's Conclusions

- 28 In reaching my conclusions I have considered the entirety of the evidence I have heard and seen. I have also taken into account the Respondent's written submissions and closing oral submissions from both parties.
- 29 I am required to consider whether, at the relevant time of June 2018 to 29 February 2020, the Claimant was disabled as defined in Section 6 of the Equality Act 2010. Whilst I have carried out my consideration in the context of this stated time period, I do note that, as a matter of fact, the Claimant was notified of his dismissal on 29 January 2020 and that this date is therefore likely to mark the end of the relevant period for any claim of disability discrimination.
- 30 I accept that the Claimant had a physical impairment throughout the relevant time period. As stated in my findings of fact, this impairment was mechanical low back pain and sciatica. I am satisfied that this amounted to a physical impairment at the relevant time for the purposes of the statutory definition.
- 31 Following this conclusion, I must decide whether this impairment had a substantial and long term adverse effect on the Claimant's ability to carry out normal day-to-day activities.
- 32 I do accept that, at all relevant times, there was an effect, that was adverse, upon the Claimant's ability to carry out normal day-to-day activities. I have reached that conclusion because I am satisfied that the Claimant experienced pain from his back condition whilst performing day-to-day activities. The Claimant's oral and written evidence that he experienced back pain is also supported by his reports of this to the Respondent during the relevant time period and the medications the Claimant was prescribed by the medical professionals he consulted.
- 33 Following this conclusion, I must then assess whether the adverse effect he experienced was 'substantial'. In my judgment, on the balance of probabilities, the Claimant's impairment did not have a substantial adverse effect on his ability to carry out normal day-to-day activities.
- 34 In reaching this conclusion I have referred to the following matters:
- 34.1 The Claimant bears the burden of establishing that he was disabled;
- 34.2 As noted by Mr O'Dowd, there is a lack of contemporaneous evidence as to the extent of the Claimant's difficulties during the relevant period;

- 34.3 Following a thorough consideration of the documentary material, Mr O'Dowd is unable to identify specific restrictions which he would consider substantial (see letter of 11 January 2022);
- 34.4 I, similarly, am not satisfied that the Claimant has established by way of examples of adverse effects on his ability to carry out normal day-to-day activities, that these effects were substantial;
- 34.5 On the basis that, once the Claimant's symptoms had deteriorated outside of the relevant period and on the basis of the worst symptoms experienced by the Claimant, his limitations were as noted in paragraph 16 above, I conclude that during the relevant time period they were, logically, less than these identified limitations;
- 34.6 During the relevant time period, the Claimant was not so affected as he is noted to be, once suffering the post-dismissal deterioration to his symptoms. Rather, during the relevant period, the adverse effect was suffering some pain whilst carrying out his day-to-day activities;
- 34.7 The fact that a claimant can only carry out normal day-to-day activities with pain does not establish that disability is made out. I am not satisfied, on the balance of probabilities, that the pain experienced by the Claimant in this case was such that the adverse effect on his activities could be said to be 'substantial'. This conclusion is supported by the findings of fact I have made.
- 35 In my judgment the Claimant was not disabled at the relevant time. The adverse effect on his ability to carry out normal day-to-day activities was the pain that he experienced. However I am not satisfied that the pain was 'substantial' as required by Section 6 of the Equality Act 2010. Accordingly, the Claimant's claim of disability discrimination shall not proceed.

Employment Judge Harrington
25 January 2022

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