



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107252/2020

Held via Cloud Video Platform (CVP) on 7 February 2022

Employment Judge: M Sutherland

5

Gerard Spence

**Claimant
In Person**

10 **West Lothian Council**

**Respondent
Represented by:-
Ms K Graydon,
Solicitor**

15

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the Claimant was not disabled during the relevant period and his claim for disability discrimination is dismissed.

20

REASONS

25

1. The Claimant has presented complaints of unfair dismissal and disability discrimination. An open preliminary hearing was arranged to determine whether the Claimant was disabled in terms of Section 6 of the Equality Act 2010 at the time of the alleged acts of discrimination ('the relevant period'). It was agreed by the parties that the relevant period began 27 November 2017 and ended 24 September 2020.

2. The Claimant appeared on his own behalf. The Respondent was represented by Ms K Graydon.

30

3. At the start of the hearing the Claimant made an application to postpone the hearing. That application was in the same terms and on the same grounds as an application made immediately prior to the hearing and which had

already been refused. There had been no change of circumstances and no additional information provided, and accordingly the repeated application to postpone was refused.

4. The Claimant relied upon the physical impairment of labyrinthitis and had prepared an impact statement detailing the impact of his condition on his day to day activities.
5. The Claimant gave evidence on his own behalf and called Stephen Hawthorne (ex-colleague) to give evidence. The Respondent did not call any witnesses.
6. A joint of bundle of documents was provided to which some supplementary documents were added during the hearing following discussion.
7. The Respondent made written and oral submissions and the Claimant made oral submissions in response.

List of issues

8. The tribunal required to determine the following issues:
 - a. During the relevant period, did the claimant have the physical impairment of labyrinthitis?
 - b. If so, did that impairment have an adverse effect on his ability to carry out normal day to day activities? If so, was that effect substantial (more than minor or trivial)?
 - c. If so, was the substantial effect long term having lasted (or being likely to last or recur) for 12 months?

Findings of Fact

9. The Claimant was employed by the Respondent as an approved electrician from 12 November 2012 until 24 September 2020. The Claimant was dismissed the Respondent on the stated basis that he was not capable of undertaking the full duties of his contractual role.

10. In 2005 the Claimant had an acute episode of labyrinthitis and was hospitalised for 2 days. He had a recurrence of acute vertigo in March 2007, February 2010 and July 2012. On each occasion his symptoms improved in a few weeks with treatment from anti-emetics and antihistamines.

5 11. Labyrinthitis is an inner ear infection that affects balance. The most common symptoms of labyrinthitis include dizziness, hearing loss, and vertigo (the sensation that you or the environment around you, is moving). Many other conditions can also cause dizziness and vertigo. Labyrinthitis is usually treated using a combination of self-help techniques including lying still in the dark and medication including a short course of sedatives and/or antiemetics (anti-sickness). Most cases of Labyrinthitis get better within a few weeks better. However a few people have persistent symptoms that last for several months, or possibly years. Chronic labyrinthitis may be treated with vestibular rehabilitation therapy.

15 2017

12. The Claimant was absent from work due to vertigo from 10 April 2017 until 4 May 2017. The Claimant was seen by his GP on 10 April 2017. The Claimant had an acute episode of labyrinthitis. During an acute episode of labyrinthitis he was unable to move and needed to sit still or lie down until the symptoms had passed and was accordingly is unable to engage in any activities.

13. The Claimant was absent from work due to vertigo from 8 August 2017 until 7 September 2017. The Claimant was seen by his GP on 9 and 22 August 2017 and was prescribed antiemetics. He did not have any other absences due to vertigo or dizziness in 2017.

14. On 25 September 2017 the Claimant was seen by occupational health 'OH' and adjustments were made to his role.

15. On 10 November 2017 his GP provided a report to OH which stated: he has had problems with both ears since early childhood; he described recurrent infections which may have contributed in part to the development of the principal problem of orogenic vertigo or labyrinthitis; his pattern of recurrent

otogenic vertigo was not uncommon (many individuals find that having had one serve episode initially, recurrences happen in future months and years, often associated with upper respiratory tract infections); during an acute episode he would be unable to undertake any part of his work, but he would be able to undertake all aspects of his role once he is completely symptom free.

- 5
16. On 20 November 2017 OH advised that he was likely to be considered to be disabled but that it was difficult to provide objective confirmation as to whether or not the Claimant is suffering from the symptoms of autogenic vertigo or labyrinthitis.

10 2018

17. The Claimant was referred to OH on 22 February 2018 who advised on 3 April 2018 that since 2005 he has been periodically suffering from symptoms of dizziness likely related to ear infections and the clinical examination revealed some abnormalities especially in relation to unsteadiness and he was likely to be considered disabled.

- 15
18. On 3 April 2018 the Claimant was seen by his GP who noted that he was having a 4 week episode of dizziness particularly in the morning. The symptoms were intermittent and generally short lived. The Claimant was not off work during this time. The Claimant was prescribed medication and was referred to the ENT Balance Clinic.

- 20
19. The Claimant was absent from work due to self-declared vertigo on 4 October 2018. The Claimant was not otherwise absent from work due to vertigo or dizziness in 2018.

- 25
20. The Claimant was seen by the ENT Balance Clinic on 1 October 2018. The ENT Clinical Nurse Specialist noted he'd had intermittent episodes of dizziness since a diagnosis of labyrinthitis 2 years ago which does not affect his daily living. Having conducted various tests she believed he had mild BPPV (benign paroxysmal positional vertigo). She performed the Epley manoeuvre to treat the BPPV. He was also given vestibular rehabilitation exercises. He discontinued these exercises because they exacerbated other conditions. The Claimant was discharged from ENT service.
- 30

21. The Claimant was referred to OH on 10 October 2018 who advised on 29 January 2019 that he had a long standing problem with balance; it was difficult to establish how significantly his dizziness has been affecting him recently but the examination findings were consistent with significant balance problems.

2019

22. On 8 January 2019 the Claimant advised his GP that he was only slightly troubled by dizziness upon getting up in the morning and going to bed at night. The GP described this as mild but recurrent dizziness.

23. The Claimant was absent from work due to self-declared labyrinthitis on 26 February 2019. He did not attend his GP regarding the incident which was not acute. The Claimant was not otherwise absent from work due to vertigo or dizziness in 2019. He went home early on another occasion because he felt dizzy.

24. On 2 April 2019 his GP provided a report to OH which stated that the Claimant was free of dizziness from November 2017 until April 2018; he suffered an episode of vertigo on 3 April 2018; that otherwise he has mild but recurrent dizziness most notable in the morning and evening which does not show signs of resolving. The mild but recurrent dizziness was momentary, lasted only a second, he was able to recompose himself, and it did not affect activities in his daily life.

25. The Claimant was referred to OH who advised on 26 November 2019 that: he has only slight dizziness, mainly first thing in the morning and in the evening and some odd predictable episodes during the day; the examination findings today have not suggested ongoing significant balance problems.

2020

26. The Claimant was not absent from work due to vertigo or dizziness in 2020.

27. On 2 April 2020 the Claimant advised his GP that he does not have vertigo, but his symptoms are the room spinning for a few seconds on getting up and

on bending forward. He was offered an antiemetic in case it was labyrinthitis.

28. On 11 February 2020 the Claimant was referred to OH who reported on 2 April 2020 that the Claimant advised that he had entirely recovered from labyrinthitis; he reported only very mild incidents of slight dizziness first thing in the morning, lasting seconds and resolving entirely, that these incidents could happen every 6 weeks or so; that he had had no contact with his GP due to symptoms of dizziness over the last 18 months; he reported undertaking numerous activities in his daily life with no problems
29. On 8 October 2020 the Claimant advised his GP he does not have symptoms of vertigo.

Observations on the evidence

30. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event, etc was more likely than not, then the Tribunal is satisfied that the event did occur.
31. The Claimant was keen to explain that he did not have vertigo which he understood to be a fear of, or dizziness at, heights. Following discussion the Claimant accepted that in a medical context the term did not pertain to heights but instead described the sensation that you or the environment around you, is moving.
32. In evidence the Claimant at times appeared to be trying to strike a difficult balance between proving disability status because of an impact on normal activities and proving his fitness to work because there was no impact on his contractual role. His evidence was therefore at times contradictory (e.g. he asserted that labyrinthitis is a temporary and curable infection but he also asserted that labyrinthitis is a chronic permanent condition). However the Claimant was entirely clear and candid in his evidence that firstly he had not had an acute episode of labyrinthitis since 2017 and secondly it was only during acute episodes that his normal day to day activities were affected.
33. The Claimant gave evidence regarding headaches but was unable to say whether there was any connection with labyrinthitis. He sometimes had

headaches when he did not have labyrinthitis and he sometimes had labyrinthitis when he did not have a headache. It was therefore difficult to infer any connection.

The Law

5 34. Section 6 of the Equality Act provides that: (1) A person has a disability if:
(a) that person has a physical or mental impairment , and (b) the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

10 35. In determining disability status the Tribunal must take into account any aspect of the Guidance on the definition of Disability (2011) (the 'Guidance') and the EHRC Code of Practice on Employment (2011) (the 'Code') which appears to be relevant.

36. The burden of proof is upon the Claimant.

Physical impairment

15 37. The Equality Act does not define 'physical impairment'. It is not necessary for the cause of the impairment to be established, nor does it have to be the result of illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient (Guidance A3).

20 38. It may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects. (Guidance A3). Where there is no clear medical diagnosis it may be legitimate for a tribunal to first consider adverse effect and then to consider whether the existence of an impairment can reasonably be inferred from
25 those adverse effects (*J v DLA Piper UK LLP 2010 ICR 1052, EAT*).

Normal day to day activities

39. Day to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This includes work related

activities such as interacting with colleagues, using a computer, driving, keeping to a timetable etc (Guidance D2– D3).

Substantial adverse effect

- 5 40. The impairment must cause an adverse effect on normal day to day activities but it need not be a direct causal link.
41. The adverse effect must be substantial. Section 212(1) of the Equality Act provides that “substantial” means more than minor or trivial. The Code notes that a disability is “a limitation going beyond the normal difference in ability which might exist among people”.
- 10 42. It is important to consider the things that a person cannot do, or can only do with difficulty (Guidance B9). This is not offset by things that the person can do.
43. The time taken by a person with an impairment to carry out an activity should be considered when assessing whether an effect is substantial
15 (Guidance B2).
44. Schedule 1 paragraph (5) of the Equality Act provides that 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 measures are being taken to correct it and but for that, it would be likely to have that effect.
20 The tribunal should deduce the effect on activities if medication or treatment were to cease unless it has resulted in a permanent improvement.
45. The Guidance provides at para B7 “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
25 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
30 out of normal day-to-day activities.”

Long term effect

- 5 46. Schedule 1 paragraph 2(1) of the Equality Act provides that the effect of an impairment is long term if it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.
- 10 47. Schedule 1 paragraph 2(2) provides that if an impairment ceases to have a substantial adverse effect, it is to be treated as continuing to have that effect if that effect is likely to recur. In *SCA Packaging Ltd v Boyle 2009 UKHL 37*, the House of Lords ruled that “likely to” in this context means “could well happen” rather than “more likely than not”.
- 15 48. Where a person has a physical impairment with recurring or fluctuating effects, the effects are to be treated as long term if they are likely to recur beyond 12 months (Guidance C6). If a person has separate episodes each of which last less than 12 months the issue is whether these are discrete episodes which are not connected by an underlying condition or whether these short separate episodes are connected as part of a long term underlying condition the effects of which are likely to recur beyond the 12-month period.
- 20 49. Whether a person has an ongoing underlying condition and the likelihood of recurrence of its effects must be judged during the relevant period and not with the benefit of hindsight. An employment tribunal should disregard events taking place after the alleged discriminatory act but prior to the tribunal hearing.

Respondent’s Submissions

- 25 50. The Respondent’s submissions were in summary as follows –
- a. For the most part there is no substantial adverse effect. Only the acute episodes have a substantial adverse effect on his normal day to day activities
 - b. There have been only three acute episodes (in 2003 and 2007) which were before the relevant period
- 30

- c. There were two single days of absence in the relevant period and no GP visits
- d. The spells of dizziness in the relevant period are intermittent, mild and last a few seconds first thing in the morning. They do not have a substantial effect on his day to day activities.
- e. Despite attendance at his GP for other conditions there is no mention of labyrinthitis and only two mentions of dizziness in the relevant period. The Claimant did not suffer from labyrinthitis during the relevant period. There was no medical or other evidence that his labyrinthitis was or is ongoing.
- f. During the relevant period the Claimant did not have an underlying physical impairment and further there were no ongoing or recurring substantial adverse effects.
- g. In the Court of Appeal decision *Sullivan v Bury Street Capital Ltd [2021] EWCA Civ 1694* the Claimant had the impairment of paranoid delusions which persisted over a 4 year period but only two episodes which had a substantial effect on his daily activities which were years apart. At the time of the first episode it could not be said that the episode was likely to recur and likewise at the time of the second episode. Accordingly the effect was not considered long term. The fact that a substantial effect has recurred might be strongly suggestive that it could well happen but this is not necessarily the case.

25

Claimant's Submissions

51. The Claimant's oral submissions were in summary as follows –

- a. The Respondent considered him unfit to perform his contractual role because of ongoing issues with dizziness and made adjustments to his role. It is clear that they considered him to be disabled.

30

- b. Labyrinthitis is permanent and the acute symptoms were likely to recur and when they do the effect on his daily activities is substantial
- c. Occupational health said he was disabled under the Equality Act 2010

5 **Discussion and decision**

During the relevant period did the Claimant have the physical impairment of labyrinthitis?

52. In the 12 month period immediately prior to the relevant period the Claimant had two acute episodes of labyrinthitis in April and August 2017. In the
10 relevant period itself (27 November 2017 to 24 September 2020) the Claimant did not have any acute episodes of labyrinthitis but was absent for 2 separate days with self-declared labyrinthitis (or vertigo) in October 2018 and February 2019. Since 2017 the Claimant has suffered from intermittent episodes of dizziness which are generally short lived and occur mainly in the
15 morning. Having conducted various tests in 2018 the ENT Specialist Nurse believed he had mild BPPV (benign paroxysmal positional vertigo). The Claimant was not in receipt of any medication or treatment for labyrinthitis (or dizziness or vertigo) during the relevant period other than the treatment pertaining to the episode of dizziness in April 2018. It did not therefore
20 appear that the Claimant had the physical impairment of labyrinthitis during the relevant period.

53. However, where there is no clear medical diagnosis it may be legitimate to consider adverse effect and then to consider whether the existence of an impairment can reasonably be inferred from those adverse effects.

25 *If so, did that impairment have an adverse effect on his ability to carry out normal day to day activities? If so, was that effect substantial (more than minor or trivial)?*

54. The Claimant was absent from work with two acute episodes of labyrinthitis in April and August 2017 which had a substantial adverse effect on his ability to carry out any normal day to day activities. He was then absent on 2
30 separate days with self-declared labyrinthitis (or vertigo) in October 2018

and February 2019. He was not otherwise absent from work on account of dizziness or vertigo. Since 2017 the Claimant has suffered from intermittent episodes of dizziness which are generally short lived (lasting a few seconds) and occur mainly in the morning. These intermittent episodes of dizziness or vertigo were momentary and did not have any effect on his ability to carry out normally day to day activities.

55. The existence of an impairment cannot reasonably be inferred from these circumstances. Further there was no medical evidence that he had labyrinthitis as a permanent condition during the relevant period. It was therefore considered that the Claimant did not have the physical impairment of labyrinthitis during the relevant period. From the medical evidence it appeared more likely that his intermittent momentary dizziness (which did not affect his normal day to day activities) was caused by mild BPPV (benign paroxysmal positional vertigo).

If so, had the substantial effect long term lasted (or was likely to last or recur) for at least 12 months?

56. For completeness it is noted that since 2017 the Claimant has suffered from intermittent episodes of momentary dizziness. During the relevant period (which ended September 2020) these episodes had recurred for at least 12 months and were considered likely to continue to recur for at least another 12 months. However these intermittent episodes of momentary dizziness had no substantial adverse effect on his ability to carry out normal day to day activities. There was no evidence that an acute episode was likely to recur (could well happen) during the relevant period. There was in the circumstances no substantial long term effect.

57. Accordingly at no time during the relevant period did the Claimant have a physical impairment which had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. The Claimant was not therefore disabled under Section 6 of the Equality Act 2010 during the relevant period. The claim of disability discrimination cannot proceed and is therefore dismissed.

Employment Judge: Michelle Sutherland
Date of Judgment: 10 February 2022
Entered in register: 11 February 2022
and copied to parties