



EMPLOYMENT TRIBUNALS

Claimant

Ms A. Oyeusi

Respondent

v

Metropolitan Police Commissioner

PRELIMINARY HEARING

Heard at: London Central (CVP)

On: 14 October 2022

Before: Employment Judge Goodman

Appearances

For the Claimant: in person

For the Respondent: Richard Oulton, counsel

RESERVED JUDGEMENT

The claimant was disabled by lower back pain at the material time

REASONS

1. This open preliminary hearing was listed to decide whether the claimant was disabled by reason of back pain at the material times.
2. The claim form, presented on 5 November 2020, is about events earlier that year, and that is the material time. The respondent argues that any event before 4 July 2020 is out of time.

Evidence

3. The claimant gave sworn evidence by an undated witness statement she had filed earlier this year about the impact of impairment on her ability to carry out day to day activities, and was questioned on this by counsel for the respondent.
4. There was an indexed bundle of 815 pages. This contained the witness statement, pleadings and some of the orders, the claimant's medical records, both GP and hospital, the occupational health records, (some duplicated several times), a few emails about the claimant's referrals, a DSE assessment, an expert report with the letter of instruction, and questions to the expert and his

replies. The claimant added this morning some notes of treatment by an osteopath in early 2022.

Findings of Fact

5. The claimant was first employed by the respondent (as a civilian) on 16 September 2002. She has changed job and workplace on several occasions within the Metropolitan police area, but from February 2017 has been employed in the witness care unit at Holborn police station.
6. She first experienced back pain during pregnancy in 2003, noted as one of a range of other symptoms. An occupational health report 1 December 2003 noted that she had been recommended a workstation chair with better lumbar support, or a lumbar roll, although as of December 2003 they had not yet been provided. The doctor noted lower back pain starting in August 2003, most likely due to the pregnancy, though it could also have been exacerbated by a minor injury in October 2002.
7. She was on maternity leave from December 2003 to July 2005. On return to work she reported occasional back stiffness, and she saw an occupational health doctor in July 2005 who suggested she was issued with a special chair, and after an assessment, she got a chair on 23 November 2005.
8. She describes how difficult it was at that time, with a long commute to work, fitting in getting her two young children (born 2000 and 2004) to school and back, and that she was often late, tired and had back pain.
9. She made some moves, to Southwark, where she says long periods of sitting, and long periods of standing, made the back pain worse. She went to Walworth, back to Southwark, then Vauxhall and Blackfriars. On each occasion her special chair travelled with her.
10. Early in 2017 she was reassigned to Holborn. Visiting the premises she noted that they had a number of new chairs, which she thought would provide support, and so initially she did not arrange for her chair to be transferred. In 2 to 4 weeks she noted that she was increasingly stiff, and she had her posture chair transferred. It arrived around March 2017.
11. Long periods of sitting, or long periods of standing, made her back hurt more. In all her moves, she says, she alleviated any back trouble by going for a walk at lunchtime, and where possible taking the long route to use the toilet, rather than one that was close by. Some of her jobs involved less desk work and more travel to meetings.
12. She saw her GP for back pain in October 2002, soon after starting employment with the respondent, and got a letter from the GP asking for a chair in September 2003. Other than that, she did not see her GP for back pain until 1 June 2020. She says this was because she knew the GP would only recommend paracetamol, and she did not like to take tablets. Instead she used ointment, applied externally, in particular a Nigerian preparation called Rubb.

13. She did go to see the doctor in November 2019 when she had acute knee pain and was diagnosed with a Bakers cyst. She was off sick for this for 15 days in 2019, then another 14 days in January 2020, followed by 14 days of part-time working at Walworth, as it was closer to home than Holborn. In the course of this absence she had another referral to occupational health, and an occupational health advisor noted “worsening pain both in the back and knees as the day goes on” and referred her to Posturite (an external provider) for a DSE workstation assessment. They might recommend special furniture.
14. Posturite did an assessment on 16 January 2020. They noted that her existing chair lacked a suitable adjustable lumbar support, which might encourage her to slump in the chair and increase strain on the lower back, which is where she reported experiencing constant pain. There was also an inadequate backrest height for the upper back, but it was angled away which might encourage her to lean forward and hunch over. They recommended raising the seat height, to reduce the strain on her arms, but this would require a footrest. Recommendations were made to purchase a Positive Plus high back chair with armrests and memory foam seat. This had an independently adjustable backrest angle, and an adjustable inflatable lumbar (sic) to help support the lower back, plus the adjustable seat depth to reduce additional pressure on the lower back. She might also need a footrest.
15. A new chair was ordered, but when it arrived, the claimant found it unsuitable. There were no instructions, and she was advised to watch a YouTube video to find out how to adjust it. She then reported back that it had no lumbar support, and she kept her old chair. The hearing bundle did not contain any documents showing whether the chair that was delivered was the one recommended. Nor is it clear when it arrived. The claimant said the request for a new chair was made on the 18 or 19 of April, but she also thought it had been provided before lockdown began, which would be around 18 March 2020.
16. Soon after lockdown began she went to work at Walworth, where there was hot desking. Sometimes she used a lumbar posture chair, if there was one free, sometimes not. At some point (and these facts are disputed and must be left to liability hearing) she says she asked for her chair to be transferred and was told, (again, disputed) that she could not take it herself on public transport, and must return to Holborn to use it.
17. She carried on in this way until an episode of back pain at home on the evening of 31 May 2020 that was so acute that she called an ambulance. The doctor diagnosed a ligament/muscle sprain in the lower back, likely secondary to long hours seated in a non-ergonomic chair. She was given a Voltarol gel to ease the pain. Next day her GP added a prescription for co-dydramol tablets. She was off sick for 3 months, returning on part-time hours in September 2020.
18. In a follow-up to this episode, she had an MRI scan. The report on the scan to her GP, prepared by the neurosurgeon Mr H Ellamushi, dated 2 August 2021, says this showed degenerative change of the discs and facet joints of the lumbar spine at multiple levels. At L3/4 there was a disc bulge and facet degenerative change, and the same at L4/5. At one level there was no nerve

compression, at the other, minor indentation of the nerve, but no significant nerve compression. Reviewing the treatment options – analgesia, physiotherapy, muscle strengthening exercise, spinal injections and physiotherapy, she was advised to avoid lifting weights, and to avoid sitting for prolonged periods of time. An occupational health assessment of her work environment could also be helpful.

19. She had a further episode of back pain in January 2022, diagnosed as a facet strain, noting she was overweight, had deep lumbar lordosis and weak abdominals.
20. The claimant has always been heavy for her height. In February 2019 the GP recorded her weight at 116 kg for a height of 163 cm, giving a BMI (body mass index) of 43.7, which falls into the category “morbidly obese”. In August 2013 her BMI had been recorded as 41.4. In this hearing she said she now weighed 124 kg, so her current BMI is even higher.
21. The respondent decided to instruct an expert report for this hearing. As it was assessed at the case management hearing in January 2022 to have marginal value, it was to be a joint instruction, but with the respondent bearing the cost. Regrettably there was difficulty agreeing the terms of the letter of instruction, which was eventually settled by Employment Judge Brown as a further hearing on 12 July 2022, which was to have been the open preliminary hearing on the issue. Even then there seems to have been dispute about what changes should be incorporated in the letter. Eventually the doctor was instructed on 7 September 2022. There is a report from Mr Amit Bhalla, a consultant orthopaedic spinal surgeon, dated 15 September 2022. There was then dispute over joint questions to expert, requiring a further judicial direction, and the parties sent separate questions. Fortunately the expert was able to reply to these on the 11th and 12th of October.
22. The report notes that MRI scans are not very useful guides to the cause of back pain. Severe degenerative change can be accompanied by no reported symptoms. Mild or even no degenerative change can occur with reported symptoms. Low back pain is classically worse when loading the spine when sitting or standing and usually improves lying down. Treatment is usually conservative, with analgesia and attempts to improve mobility. Severe cases may require stronger medication or injections. The claimant’s MRI scan indicates mild osteoarthritis changes only. The absence of nerve compression is important. Looking at this patient as a whole, the most important feature is her weight. Taking lower back pain with morbid obesity, he concludes there is a physical impairment. Taking each on its own, neither the spinal changes nor the weight would by themselves cause significant or substantial symptoms, but, in combination ‘they may well do’. They could also well impact on normal day-to-day activities, though his report is not evidence of what impairment the claimant has suffered.
23. Mr Bhalla was questioned about the claimant’s level of symptoms in three period: (1) leading to March 2020, (2) between March and June 2020, and (3) from June to November 2020. In the first period, he noted a long period of time – 2005 to 2014, with minimal issues. The severity increased at the beginning of

January 2020, the time of the workplace assessment, with a deterioration in March to May 2020, during lockdown. The condition became acute in June 2020. He concluded that her condition had had episodes of acute exacerbation. This was a natural course, and it was likely to recur. Episodes of acute exacerbation were unlikely to last more than 12 months, given the mild changes on the MRI scan. A relaxing remitting course of osteoarthritis is generally progressive. Questioned about the claimant and her lack of reported severe symptoms in December 2019 and into January 2020 without the first chair, which the claimant explained as due to the fact that she only worked there one week in December, and alternative days up to 15 January, he notes that any number of factors could exacerbate the perception of pain, such as obesity or stress.

24. The claimant reported on difficulties at home as well as at work. In the early years she used to carry heavy shopping, but in later years, her husband got her additional carrying cases so she could hook them onto a trolley. Otherwise she would make smaller journeys daily to reduce the weight she carried. She spent very little time sitting down at home, because of all the chores she had, and when she did, it was either on a sofa, or a dining chair. After the acute episode of 31 May 2020, she bought a series of ergonomic chairs, of which two are probably satisfactory, and an adjustable table. She takes a lumbar pillow to church, and more recently has taken to attending online services rather than the building, to avoid long periods of sitting. Before that, she opted to help with children services, because it gave her an opportunity to move around, rather than sit still for long periods. She used to assist on children's school trips, but could not manage the pain she experienced on long bus journeys, so stopped going. At work, she copes by taking breaks to move around when she can, and she is using her old chair, despite the Posturite criticism of it.

Relevant law

25. Disability is defined in section 6 of the Equality Act 2010. A person is disabled if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on (their) ability to carry out normal day-to-day activities.
26. Employment tribunals should assess the evidence to make findings on: (1) whether the claimant has an impairment (2) whether the impairment has an adverse effect on his ability to carry out normal day-to-day activities and (3) whether it is substantial, meaning more than trivial - **Aderemi v London and South Eastern Railway Ltd (2013) ICR 591**. These questions are to be decided by the employment tribunal based on all the evidence – **Adeh v British Telecommunications plc (2001) IRLR 23**, and “it is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant is a physical or mental impairment with the stated effects.” – **McNicol v Balfour Beatty Rail Maintenance Ltd (2002) ICR 1498**. Except for very specialised work, work activity can be a normal day-to-day activity – **Banaszczyk v Booker Ltd. (2016) IRLR 273**.
27. The statutory guidance on the meaning of disability says that the term mental or physical impairment must be given its ordinary meaning. The cause does not have to be established, nor must it be the result of an illness. “The underlying

cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a physical nature may stem from an underlying mental impairment, and vice versa”.

28. A decided case relevant to that the claimant’s facts is **Walker v Sita Infrastructure Networking Company Ltd, UKEAT/0097/12/KM**, decided with reference to a period when the Disability Discrimination Act 1995 applied. The claimant suffered a “constellation” of symptoms, without pathological process, involving obesity and functional overlay. Tribunals were reminded to look at the impairment, not the cause of it. Obesity itself is not a disability, but it can cause impairment that can amount to a disability. The European Court of Justice reached the same conclusion in **Karsten Kaltoft (2015) ICR 322**.
29. The test of disability is a functional one – **Ministry of Defence v Hay (2008) ICR 1247**. It must be assessed as at the time of the discriminatory acts alleged. If an illness is being treated, the tribunal must look at the deduced effect, without treatment.
30. Long-term means 12 months or more. If a short-term substantial impairment is likely to recur, it is treated as long-term.
31. The respondent asks the tribunal to consider⁴ in particular the statutory Guidance on Disability (2011) on treatment stating:

B 16 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. (See also paragraph C11, regarding medical or other treatment that permanently reduces or removes the effects of an impairment.

C11 If medical or other treatment is likely to permanently cure a condition and therefore remove the impairment, so that recurrence of its effects would then be unlikely even if there were no further treatment, this should be taken into consideration when looking at the likelihood of recurrence of those effects. However, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stopped, as is the case with most medication, then the treatment is to be ignored and the effect is to be regarded as likely to recur.

Discussion

32. The respondent argues that the back pain is related to her obesity, and not a physical impairment, and that the expert does not consider that the back degeneration by itself gives rise to substantial adverse effects. This argument however overlooks that his view is that neither condition by itself would give rise to back pain, but in combination they lead to the reported symptoms.

33. The respondent's subsequent argument is that there was no evidence of substantial adverse effect for the vast majority of the period up to March 2020. With two exceptions she made no complaint about back pain after the reference to occupational health in July 2005. The first exception is the report in March 2017 that she was experiencing discomfort when using another chair. The second exception is the mention of back pain in the telephone occupational health consultation in December 2019, although the referral to occupational health was made because of knee pain. In all that time she had not been to see the GP. Although the claimant says this is because she was stoic and wanted to keep going to work and did not want to take tablets, she had not been reluctant to see the doctor about her knee in November 2019, or about her back when suddenly in pain on 31 May 2020. This suggests that those two episodes were very different in severity. Sometimes in this period she had no chair (at Walworth in December 2019). When she had no chair in March April May 2020, although she reported in an email of 21 April that she was moving and sitting in constant pain, she did not consult her GP or occupational health about this. Here, the respondent argues, relying on the 2011 Guidance, that the provision of the chair had in fact procured a permanent improvement, or that the back condition was unlikely to recur.
34. The tribunal does not accept that the claimant's back pain during this period was so reduced that its effect on her ability to conduct normal day-to-day activities was trivial. Her report of alleviating symptoms by moving about fits a classic model. It is puzzling that in January 2020 the chair was found to not be providing lumbar support at all, but in the absence of documents showing what was ordered and delivered, it is difficult to draw conclusions about the new chair and how it differed from the old, apparently satisfactory one. I accept that when she worked without a special chair at Holborn in 2017 she soon regretted it and asked for the old chair to be transferred. The adequacy of her old chair, and what chair was provided after the January 2020 assessment are probably matters that should be left to the liability hearing, when assessing whether any lack of the chair in 2020 led to substantial disadvantage, or whether there was a failure then to make a reasonable adjustment for disability. I accept her argument that at Walworth she could sometimes find a useful chair and in any event she was not there very long, so she managed without one and did not experience worse pain. I draw no conclusions about her failure to see the GP when symptoms were supposedly worsening in March to May 2020. At the beginning of the pandemic many much more seriously ill people did not consult their doctors because of lockdown. She went to see doctors about acute conditions (the Baker's cyst in November 2019, and sudden episode on 31 May was that was so painful that she called an ambulance), both different in character to the ongoing low back pain experienced over several years.
35. In her evidence this ongoing low back pain did interfere with her ability to carry out normal day-to-day activities. She was to carry out desk work for the greater part of her working day, her symptoms were in part alleviated by a posture chair, but still required regular walking about to give relief. At home she got to the point where she could not and did not carry shopping. She avoided activity that required lengthy sitting, such as attendance at adult services at church, or long bus journeys on school trips. Other than that she seems to have maintained most daily activities as she could move about and change her

position. I note that at home she used ordinary chairs when she did sit down, and has only ordered special chairs following the acute strain on 31 May. The need for special chairs at home may also have arisen from working from home because of the pandemic. Until then she could avoid long periods of sitting. Up to March 2020, the physical impairment from the back condition in combination with obesity did interfere with her ability to carry out normal day-to-day activities in a way that was more than trivial. She was therefore disabled within the meaning of the Act. It was also long-term.

36. The claimant has developed coping mechanisms to alleviate her symptoms, such as avoiding long periods of sitting outside work, and not carrying heavy weights. There is however no sign that her symptoms have improved to the point where she could carry shopping or sit for long periods.
37. I add that the evidence of the medical records is that that the episode on 31 May 2020 was a sprain, not part of the much lower level of symptoms that have been ongoing for some years. It could not have been predicted that this was a long-term impairment. It does not seem to have been a flareup of her existing symptoms, but a separate event.

Employment Judge Goodman

Dated : 20th Oct 2022

JUDGMENT AND REASONS SENT to the PARTIES ON

26/10/2022

FOR THE TRIBUNAL OFFICE