



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Elliott

Respondent: Royal Mail Group Limited

Heard at: Watford - video platform **On:** Thursday 23 November 2023

Before: Employment Judge A Matthews

Representation:

Claimant: Mr D Bharrat - CWU representative

Respondent: Ms S Griffiths - Solicitor

JUDGMENT

(1) Mrs Elliot was not, at the relevant time, a disabled person within the meaning of section 6(2) of the Equality Act 2010.

(2) Accordingly, Mrs Elliot's claims of disability discrimination are dismissed.

REASONS

INTRODUCTION

1. This Judgment was read to the parties on 23 November 2023. At the request of the Claimant's representative, written reasons are provided.
2. Mrs Jeanette Elliot brought claims of disability discrimination and for wages, against the Respondent Company.
3. The Company does not accept that Mrs Elliot had a disability at the relevant time and otherwise defends the claims.

4. This is a Preliminary Hearing listed in Orders of Employment Judge Manley made on 25 September 2023 and sent to the parties on 30 October 2023 (the “Manley Orders”). The Manley Orders can be seen in the bundle at 35-37.
5. The Manley Orders set out the matter for determination at this hearing as:

“Whether the claimant was a disabled person as defined in Equality Act 2010 at the material time.”

6. The issue has now been further refined and is:

“Whether the Claimant was a disabled person by reason of a left knee injury within the meaning of section 6(2) of the Equality Act 2010 on 27 January 2023.”

7. That issue is dealt with in this Judgment. The Tribunal moved on to further case management and this is dealt with in separate orders.
8. The relevant, but very limited, evidence before the Tribunal was as follows:

- A photograph of the first page of a letter from the Department for Work & Pensions to Mrs Elliot dated 3 November 2022 (the “DWP November 2022 Letter” - 32).
- A photograph of the first page of a letter from the Department for Work & Pensions to Mrs Elliot dated 6 January 2023 (the “DWP January 2023 Letter” - 31).
- What appears to be an impact statement from Mrs Elliott within a document headed “Impact Statement & Schedule of Loss - 23rd October 2023” (the “Impact Statement” - 40-41).
- An occupational health report from a Doctor/ Occupational Physician at Optima Health addressed to the Company dated 17 July 2023 (the “Optima Report” - 42-43). This report was not available on 27 January 2023. It is relied on only so far as it records events predating 28 January 2023.

9. A feature of this case is the absence of Mrs Elliot’s GP’s notes, suitably redacted if necessary.

10. There was an “electronic” bundle of documentation consisting of 47 pages. References in this Judgment are to pages in the bundle unless otherwise specified. Ms Griffiths produced written argument.

FACTS

11. Mrs Elliott worked out of the Hayes Delivery Office in Middlesex at an Operational Postal Grade. On 19 August 2023, whilst on delivery duties, Mrs Elliott sustained an injury to her left knee. The Optima Report records the medical position at and shortly afterwards. Presumably this comes either from sight of Mrs Elliot’s GP’s records or, more likely, what Mrs Elliot told the Doctor/Occupational Physician at the time. The relevant extract is:

“Her absence dated 20/8/22 was due to a to tibial fracture to the left knee. She was advised to remain non-weight bearing for four months.”

12. It seems that Mrs Elliot did not return to work between 20 August 2022 and 28 January 2023.

13. The Optima Report also records that Mrs Elliot had a history of anxiety and depression. Mrs Elliot had also had surgical treatment for colon cancer in 2021 that had left Mrs Elliot with an underlying bowel condition. These are mentioned because they may have some bearing on Mrs Elliot’s day to day activities as of 27 January 2023 and were recorded as the reason for absences from work on some occasions prior to that.

14. The DWP November 2022 Letter (32) records that Mrs Elliot had made a claim for industrial injuries disablement benefit. The letter included the decision that the accident on 19 August 2022 was an industrial accident and recorded:

“Jeanette Elliott a post person was looking for an address with parcels in her arms, she stepped forwards and started to fall. She had fallen over a metal bollard and landed sharply on her left side. Injuring her left leg.”

15. Mrs Elliot had a medical examination for the purposes of assessing her claim for industrial injuries disablement benefit on 29 November 2022. This is evident from the DWP January 2023 Letter (31). That letter included:

“We have decided that the industrial accident on 19 August 2022 has caused you a loss of faculty. By loss of faculty we mean some loss of power or function to a part of your body.”

- *The loss of faculty is painful and restricted movements in her left knee*
- *You have been assessed as 17% disabled from 01/12/22 to 28/11/23*

We made this decision after looking at all the information we have, including the report from your medical examination on 29/11/22.

Your disablement assessment is a provisional assessment. We will ask you to go for another medical examination before this assessment ends.”

16. It seems that Mrs Elliot had a further assessment at the beginning of November 2023. The result is awaited. In any event, this assessment will post date 27 January 2023 by a considerable period.

17. Mr Bharrat says that the Impact Statement results from a conversation Mr Bharrat had with Mrs Elliot. Presumably, that conversation was after 27 January 2023. It is short on the point and it is easiest to set out the relevant extracts in full:

“From the date of 19/8/2022 the claimant was unable to perform shopping roles, walking long distances, getting washed, and dressing. Sleep deprivation was/is prevalent.”

....

“The dates of the impact of injury are from the 19/8/2022”

“Medication is over the counter pain killers”.

APPLICABLE LAW

18. Section 6 of the Equality Act 2010 (the “EA”), so far as it is relevant, provides:

“6 Disability

(1) A person (P) has a disability if-

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.”

“(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).”

“(6) Schedule 1 (disability: supplementary provision) has effect.”

19. The Government has issued “Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)” (the “Guidance”) under section 6(5) EA.

20. Section 212(1) of the EA, so far as relevant, provides:

“(1) In this Act-”

““substantial” means more than minor or trivial”

21. Paragraph 2(1) of Part 1 of Schedule 1 to the EA provides:

“2. Long-term effects

(1) The effect 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.”

22. Paragraph 5 of Part 1 of Schedule 1 to the EA, so far as it is relevant, provides:

“5. Effect of medical treatment

(1) 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.”

23. The Tribunal was referred to *Goodwin v The Patent Office* [1999] IRLR 4, *Cruickshank v VAW Motorcast Ltd* [2002] IRLR 24 and *Woodrup v London Borough of Southwark* [2003] IRLR 11.

CONCLUSIONS

24. Mrs Elliot’s case is that, as of 27 January 2023, Mrs Elliot had a physical impairment because of the injury Mrs Elliot had suffered to Mrs Elliot’s left knee and that it had a substantial and long-term adverse effect on Mrs Elliot’s ability to carry out normal day to day

activities. It is for Mrs Elliot to show that Mrs Elliot satisfies the statutory definition.

25. Did Mrs Elliot have a physical impairment?

26. It seems clear from the DWP January 2023 Letter that Mrs Elliot's knee injury was a physical impairment when medically examined on 29 November 2022. It is reasonable to infer that this remained the case on 27 January 2023. The Company does not dispute this.

27. Did that impairment have a substantial adverse effect on Mrs Elliot's ability to carry out normal day-to-day activities?

28. Having identified that Mrs Elliot had a physical impairment on 27 January 2023, the Tribunal must now consider whether it adversely affected Mrs Elliot's ability to carry out normal day-to-day activities and whether any effect was substantial. Here the focus is on what Mrs Elliot could not do, rather than on what Mrs Elliot could do.

29. The Appendix to the Guidance includes this:

*“An illustrative and non-exhaustive list of factors which, if they are experienced by a person, **it would be reasonable** to regard as having a substantial adverse effect on normal day-to-day activities.”*

“Difficulty in getting dressed, for example because of physical restrictions,”

“A total inability to walk, or an ability to walk only a short distance without difficulty; for example because of physical restrictions, pain or fatigue.”

*“An illustrative and non-exhaustive list of factors which, if they are experienced by a person, **it would not be reasonable** to regard as having a substantial adverse effect on normal day-to-day activities.”*

“Experiencing some tiredness or minor discomfort as a result of walking unaided for a distance of about 1.5 kilometres or one mile.”

30. The Guidance, amongst other things, has this to say on the meaning of “substantial adverse effect”:

*“**B1.** The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going*

beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.”

31. The evidence about substantial adverse effect on normal day to day activities is thin. Accepting the Impact Statement, the adverse effects amount to an inability to perform shopping roles, walk long distances, wash and dress. Except, possibly, for walking long distances, these are all normal day to day activities. However, without more, it is difficult to say that any of the adverse effects was substantial. On the evidence they might be, or they might not. For example, does the inability to perform shopping roles mean that Mrs Elliott could not go shopping at all? It would seem not, as Mrs Elliott was able to walk short distances. The burden of proof is on Mrs Elliot in this respect and the Tribunal does not consider that Mrs Elliot has sufficiently made out her case. In reaching this conclusion, the Tribunal has taken account of the DWP January 2023 Letter. The Tribunal does not consider that a DWP ruling that Mrs Elliot was 17% disabled helps Mrs Elliot show substantial adverse effect. If anything, it points in the other direction. The Tribunal has also taken account of the fact that Mrs Elliot may have been taking over the counter pain killers at the time. (The evidence is not clear on when these were taken.)
32. The Tribunal’s conclusion is that, on the evidence, the adverse effect on Mrs Elliot’s ability to carry out day-to-day activities was not substantial.
33. Was that effect long-term?
34. If the Tribunal was wrong about that, it would go on to consider the question of whether any substantial adverse effect was long-term, as seen as of 27 January 2023.
35. It is the case that the DWP January 2023 Letter had described Mrs Elliot as 17% disabled from 2 December 2022 to 28 November 2023. However, whilst a factor to consider, that is not conclusive.
36. On the other hand, the circumstance noted in the later Optima Report’s comment that Mrs Elliot “*was advised to remain non-weight bearing for four months*” might have been discoverable, had enquiry been made on 27 January 2023. That, of course, points in a different direction to the DWP January 2023 Letter.
37. There was no other evidence on the subject, which might have been available on 27 January 2023. As of that date Mrs Elliot had had the impairment for just over 5 months. An impairment of the sort discernible on 27 January 2023, if not already resolved, might or

might not resolve itself within a further period of just over 6 months. Without more it cannot be said that it was likely to last for at least 12 months, or it was likely to last for the rest of Mrs Elliot's life as of 27 January 2023.

38. For these reasons, Mrs Elliot was not a disabled person within the meaning of that term in the EA by reference to the effects associated with Mrs Elliot's left leg knee injury.

Employment Judge A Matthews

23 November 2023

JUDGMENT SENT TO THE PARTIES
ON 13 December 2023

FOR THE TRIBUNAL OFFICE

Notes

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>