



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE MORTON

**BETWEEN:**

Mr P Brown

Claimant

AND

Sky UK Limited (1)  
Mr S Porter (2)

Respondents

**ON:** 29 January 2019

**Appearances:**

**For the Claimant:** Mr S Martins, Legal Executive

**For the Respondent:** Mr J Green, Counsel

## **JUDGMENT**

The Claimant was at the material time a disabled person within the meaning of s 6 Equality Act 2010.

## **Reasons**

### **Introduction**

1. By a claim form presented on 5 December 2016 the Claimant presented to the tribunal a number of claims, including claims of disability discrimination under the Equality Act 2010 ("Equality Act"). The Respondent resisted all the claims and did not accept that the Claimant was disabled for the purposes of s6.

2. An open preliminary hearing was listed to deal with that question.
3. At the hearing the Claimant gave evidence on his own behalf and called no other witnesses. He had prepared an impact statement and I was referred to a two volume bundle of documents, the second volume of which contained medical evidence in the form of clinical notes, occupational health reports and fit notes signed by the Claimant's GP.

### **The issues for the hearing and the relevant law**

4. The issue for the preliminary hearing was whether at the material time the Claimant was a disabled person within the meaning of s6 Equality Act 2010 ("Equality Act"), that is whether he had a physical or mental impairment that had a substantial and adverse long term effect on his ability to carry out day to day activities. Both parties referred me to the test articulated in *Goodwin v The Patent Office* [1999] IRLR 4..
5. The impairments that the Claimant relies on are migraines and cellulitis. It is not disputed that these conditions are both impairments, or that they have adverse effects on the Claimant.
6. The Respondent however disputes:
  - a. That the Claimant's migraines had a substantial adverse effect on him ; and
  - b. That the Claimant's cellulitis was a long term condition as distinct from a condition that was intermittent. It submitted that at the material time the condition was not likely to recur. For this purpose I have regarded the material time as the period starting with the first appearance of the Claimant's cellulitis symptoms (which was August 2014 when he had a severe attack which required a week of hospital treatment and approximately 9 weeks of recovery time) and ending with the termination of his employment on 12 September 2016.

### **Findings**

7. I reached my conclusion on the basis of the Claimant's oral evidence, the documents to which I was referred and the parties' submissions.
8. As regards documents I had regard in particular to:
  - a. the Claimant's disability impact statement;
  - b. The medical report of Dr Michael Gross, a Consultant Neurologist, dated 21 May 2018;
  - c. The report of the Claimant's Consultant Neurologist, Dr Capildeo;
  - d. The Claimant's sickness absence record;
  - e. The Claimant's fit notes;
  - f. Occupational Health reports prepared in respect of the Claimant.

## Migraines

9. The facts are that the Claimant started to suffer from migraines in July 2012 when he experienced a disabling headache, following which his GP referred him to a specialist. He was under the care of a consultant neurologist, Dr Capildeo in August 2015.
10. As noted, the Respondent does not contest that the condition affected the Claimant adversely or that it was long term. It disputed that its effect on his ability to carry out day to day activities was substantial.
11. The Claimant's impact statement and oral evidence described the migraines as tending to occur after he had undertaken a run of shifts at work. His impact statement described the debilitating nature of the attacks when they occur. I am reliant on the Claimant's own evidence on this matter and I am mindful that the burden is on him to prove that the various elements of the statutory definition apply. I found Mr Brown a credible witness and I was inclined to accept his evidence that he suffered some attacks on days when he was not scheduled to attend work (with the result that they were not recorded in his sickness absence records) and that he self-certified a number of absences that were caused by migraines, but which did not appear as such in the Respondent's records.
12. The Respondent's schedule of sickness absences (page 268-9) contained a number of inaccuracies (it did not for example record the Claimant's absence in August 2014 as an absence by reason of cellulitis), but even though incomplete, it records a significant number of absences from work explicitly due to migraines in February and March 2013, November and December 2014, May, June, August, September, October, and November 2015 and February, March, June and July 2016. I accept also that a number of absences recorded as being for an "unknown cause" are on a balance of probabilities absences caused by migraines for which the Claimant self-certified.
13. The occupational health report of May 2015 (page 339) supports the Claimant's position on the seriousness of the condition, stating, "It is not possible to attend work during an acute attack of migraine and therefore there is likely to be intermittent absence because of this condition, even though he has appropriate treatment". The occupational health report at page 291 (April 2016) records that a change in the Claimant's work duties there was a reduction in the number of work absences, which one would expect. That report also supports the Claimant's account of the seriousness of the condition stating at page 290: "Mr Brown has a longstanding problem with headaches that have been diagnosed as migraine. He has seen a neurologist because of these headaches. Migraine is a recurrent disabling headache where each episode can be of a sudden onset. During an attack it is not possible to function in the work environment".
14. I accept Mr Brown's evidence that the migraines affected his functioning in

other environments – at home or whilst driving. An attack could be so painful as to make most day to day activities extremely difficult, if not impossible, for the duration of the attack. I did not accept the Respondent's suggestion that in fact the Claimant was exaggerating his symptoms because he had started working in Greece, leading flotillas of sailing boats. I accepted the Claimant's evidence that that had merely been an idea, never put into practice. I do so firstly because I accepted the Claimant's evidence as true and secondly because the document on which the Respondent relied in making this assertion, the report of Dr Gross, contained two contradictory statements about the Greece proposal, one suggesting that it had actually happened and the other that it was no more than a proposal. This was a not a credible basis for the Respondent's assertion on this point.

## Cellulitis

15. The issue in relation to cellulitis is whether the condition was long term within the meaning of Schedule 1, Part 1, paragraph 2 Equality Act. The first occupational health report, at page 338, was prepared in May 2015, approximately 9 months after the Claimant first had an attack of cellulitis and appears to me to address this point head on. The report says, "You referred Mr Brown because he is presently absent from work and I think this is from 13 April 2015. On this occasion it is because of cellulitis. This is a condition which is caused by an infection of the deep layers of the skin and underlying tissue and usually affects the lower leg which it has in this case. Unfortunately this is not his first episode of cellulitis and the previous episode has damaged the lymphatic drainage of the lower limb and therefore he has recurrent leg swelling. This in fact predisposes him to further bouts of cellulitis".
16. I deduce from this that the first episode of cellulitis, in August 2014 was responsible for damage to Mr Brown's lymphatic system so that he became predisposed to further attacks from that date onwards. Attacks of cellulitis were therefore likely to recur from 2014 onwards and the condition was therefore at that point in my judgment likely to last for at least 12 months. At the time of the report at page 338 there had already been two attacks, in August 2014 and April 2015 so the Respondent was aware that the condition had recurred. The occupational health report made it clear that there was a predisposition to further attacks and that that had been the case since August 2014. The test of likelihood of recurrence set out by the then House of Lords in *SCA Packaging Ltd v Boyle* [2009] UKHL 37, namely that a further attack could well happen, was therefore in my judgment met in this case with effect from August 2014.
17. Hence for the purposes of subparagraph 2(2) of Schedule 1 Part 1, although the condition of cellulitis ad ceased to have a substantial effect temporarily in the period between the two attacks, it was already likely to recur once an attack had happened, because another attack could well happen, as indeed it did.
18. As the Respondent did not dispute that the other aspects of the test in s 6

were met in relation to cellulitis I conclude that the condition of cellulitis was a disability at the relevant time.

**Conclusions**

19. For these reasons I find that the Claimant was a disabled person by reason his migraines from the onset of symptoms in 2012 and by reason of cellulitis from the time of the first attack in August 2014 onwards.

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Employment Judge Morton

Date: 5 February 2019