



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

Miss Laura Heggadon

AND

**Respondent**

LiveWest Homes Limited

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter

ON

9 December 2019

EMPLOYMENT JUDGE N J Roper

### Representation

For the Claimant: In person

For the Respondent: Mr G Probert of Counsel

## JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claims for age discrimination and sex discrimination are dismissed on withdrawal by the claimant; and
2. The claimant was a disabled person at the material times and accordingly her claims for disability discrimination may proceed.

## RESERVED REASONS

1. This is the judgment following a preliminary hearing to determine whether the claimant was a disabled person at the material times. The claimant had also brought claims of discrimination on the grounds of both her age and her sex, but these claims are now withdrawn by the claimant and are dismissed by this judgment.
2. I have heard from the claimant. The respondent did not adduce evidence, but Mr Probert on their behalf questioned the claimant and made submissions as to the alleged disability.
3. There was a degree of conflict on the evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The claimant Mr Laura Heggadon was born in 1995. After a number of joint difficulties she was referred for an MRI scan during 2016 and the results of that scan were discussed with her by Dr Earl, a consultant rheumatologist in February 2017. Dr Earl's report dated 2 March 2017 confirmed that the claimant suffered from "a combination of bilateral Chondromalacia Patellae which is more significant on the left side ... Her kneecap is not gliding smoothly and this is causing problems with the cartilage behind the knee and also a degree of pinching the fat pad around the knee. Both these problems should be correctable with physiotherapy to improve strength around the knee and also consideration of taping of the patella to correct the malalignment ... Laura mentioned that the right knee tends to swell posteriorly when she is walking ... I encouraged Laura to pursue the physiotherapy and warned that in the early stages this might make symptoms worse and it may take a number of months to see an improvement."
5. In July 2017 a physiotherapist reported that the claimant had complained of "a constant aching pain at the back of her knees that was eased with anti-inflammatories or icing. At this stage she had problems with the pain keeping her awake at night. She demonstrated a fairly global lower limb weakness, left and right". The report had suggested that the claimant worked hard on a home exercise programme, but had recently failed to attend two sessions, and it was assumed that she had improved sufficiently not to need any further advice.
6. Dr Earl then wrote a subsequent report dated 22 August 2017 which confirmed her rheumatology diagnoses to be: "joint hypermobility syndrome; bilateral knee pain likely injury related with evidence of mild chondromalacia patellae on the left knee and interior knee impingement with lesser findings on the right knee". The suggested medication was paracetamol and ibuprofen. Suggested interventions were a referral back to physiotherapy for further assessment and considering referral to the "knee team" if symptoms failed to settle after ongoing exercises. The report also stated: "she has complied with exercises but usually rests once a week. On the positive side, Laura is able to do stairs and is standing for longer periods... Laura does still struggle with pain in her knees at night ... On examination today, she had tenderness around the posterior aspect of the knees. She had hypermobile patellae. There was no evidence of any fusion in the knee joints. Although the strength around Laura's knees has improved she still has weakness around both knees." Referral to the knee team, which is effectively referral to surgery, was suggested to be the last resort to be considered only after the claimant had undergone "intensive physiotherapy".
7. The claimant also adduced a physiotherapy discharge report dated 11 September 2019, which referred to "previous physiotherapy for long-standing knee problems. Recent flare-up of symptoms where patient attended A&E due to pain. Patient has

- been referred to a knee specialist for further physiotherapy input and possible brace assessment to help manage symptoms longer term ...”
8. The claimant did not adduce any evidence of notes or examinations involving her GP. The claimant did however rely on a statement as to the impact which her knee condition has upon her normal day-to-day activities (her “impact statement”). She states that during her first placement with the respondent in March 2017, during which she had a desk on the fourth floor, she rarely left her desk because of her knee condition, but that over a period of time was able to walk up the first flight of stairs, and then catch the lift, and subsequently up to the second floor, and then the third, before catching the lift. At the relevant time of application for the Building Surveyor’s Apprenticeship in September 2018, she agreed that she was stronger than she had been for a long time but still considered herself to be disabled and still struggled at different times. Although she had no difficulty driving, she always used the visitors’ bay to park in which was nearer than the disabled bay so that she did not have to walk very far to her office. She had a desk on the first floor and would try to walk upstairs, but often had to use the lift. On a good day she was able to walk and stand up without causing her condition to flare up, but on bad days struggled to stand or walk and was unable to kneel down or bend her knees. She struggled then and still struggles with day-to-day tasks such as pushing a supermarket trolley, particularly if it becomes too heavy, and she also finds hoovering difficult. Effectively the claimant applies coping strategies, such as planning her activities so that if one day of strenuous exercise is likely to cause subsequent pain, she ensures that she has recovery time available.
  9. Having established the above facts, I now apply the law.
  10. The claimant alleges discrimination because of the claimant's disability under the provisions of the Equality Act 2010 (“the EqA”). The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P’s ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
  11. I have been referred to and I have considered the case of Richmond Adult Community College v McDougall [2008] IRLR 227.
  12. The respondent concedes that the claimant has a physical impairment which is long-term in the sense that it has lasted for more than 12 months. However, the respondent asserts that (applying Richmond Adult Community College v McDougall) the relevant time for assessing whether the claimant is a disabled person is the time of the interview process of which the claimant complains namely September 2018. The respondent asserts that there is no evidence of any substantial adverse impact on the claimant’s day-to-day activities as at that material time and accordingly the claimant was not a disabled person at the time that she complains of the discrimination. The respondent also refers to Schedule 1 Part 1 EqA paragraph 2(2) which provides: “if an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur” and that there is no evidence of any recurrence.
  13. I agree with the respondent’s criticism that the claimant has adduced limited medical information to support her claim, and the absence of any GP notes is surprising. However, it is clear from the reports from her consultant rheumatologist and her physiotherapists that the claimant has been suffering from a knee condition from at least 2016 until 2019, and that the claimant has undergone physiotherapy

- to try to remedy the painful symptoms with the “knee team” or surgery being very much the last resort.
14. The claimant has also described in her impact statement continuing adverse impact on her day-to-day activities (particularly mobility) even during the relevant period of September 2018. This includes having to park as near to her office as possible to reduce walking; having to take the lift instead of walking upstairs; being unable to bend; encountering pain; having difficulty pushing trolleys; and all during the relevant period.
  15. It seems to me the only question to be determined is whether the claimant suffered a substantial adverse impact on her normal day-to-day activities at this time. Substantial means more than “minor or trivial”. In my judgment the impact on the claimant’s day-to-day activities, and the fact that she had to apply coping mechanisms to seek to avoid them, with limited degrees of success, show that the impact on the claimant’s normal day-to-day activities (particularly mobility) was more than minor or trivial and was therefore substantial.
  16. In short therefore at the relevant time the claimant had a physical impairment, it was a long-term impairment, it had recurred and can be said to be likely to recur, and its impact on the claimant’s day-to-day activities were substantial in the sense that it was more than minor or trivial.
  17. I therefore conclude that the claimant was a disabled person by reason of her knee impairment at the relevant times, and her disability discrimination claims may proceed.
  18. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 8; a concise identification of the relevant law is at paragraphs 10 and 11; how that law has been applied to those findings in order to decide the issues is at paragraphs 12 to 17.

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Employment Judge N J Roper

Date: 9<sup>th</sup> December 2019