



EMPLOYMENT TRIBUNALS

Claimant: Mr D Hill

Respondent: Swinton Park Golf and Country Club 2017 Limited

Heard at: Birmingham Employment Tribunal (by CVP)

On: 19 November 2021

Before: Employment Judge Mark Butler

Representation

Claimant: Mr Al-Malahi (Non-Legal Representative)

Respondent: Miss J Denton (Counsel)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because of the ongoing pandemic and all issues could be determined in a remote hearing.

JUDGMENT (OPEN PRELIMINARY HEARING)

1. The claimant did not have a disability within the meaning of s.6 of the Equality Act 2010, during the relevant period.
2. Therefore, the claims of discrimination arising from disability, and a failure by the respondent in its duty to make reasonable adjustments, are dismissed.
3. As these are the only claims being brought by the claimant, the final hearing listed 29, 30 and 31 March 2023 will not be needed and are vacated.

REASONS

Introduction

1. A Preliminary Hearing took place before Employment Judge Ross at Manchester Employment Tribunal on 08 July 2021. EJ Ross made a direction that the issue of disability would be considered and determined at a further Preliminary Hearing, this time held in public, on 12 November 2021. The impairment in question is a physical impairment to the claimant's right knee. This hearing was listed to be held on the Tribunal's Cloud Video Platform ('CVP').
2. The notice of hearing that is dated 29 July 2021 (at pages 50-51 of the bundle) confirmed that the Preliminary Hearing had been listed for 19 November 2021 (rather than the initial indication of 12 November 2021) and was 'to decide if the claimant is a disabled person'. This is that hearing.
3. At the start of the hearing I confirmed with the parties that my understanding of the issue to be determined at this hearing was limited to that of whether a physical impairment to the claimant's right knee was a disability for the purposes of section 6 of the Equality Act 2010 at the material time. The material time being between July 2019 and 20 March 2020. The parties confirmed that that was the issue to be determined at this hearing.
4. The parties had prepared a bundle to be used at this hearing. The bundle extended to 95 pages. Within these 95 pages, the claimant had produced a Disability Impact Statement. This statement ran to 16 paragraphs, and was in compliance with the direction made by EJ Ross for such a statement to be provided to the respondent by 02 September 2021 (although there is an error in that document with the date being laid down as 02 September 2020).
5. The claimant had brought claims for discrimination arising from disability, and a failure by the respondent in its duty to make reasonable adjustments.

The evidence

6. Mr Hill confirmed that he wished to give evidence and was happy to be cross examined on his statement.
7. Mr Al-Malahi did inform me that there were matters which were in the claimant's statement which the claimant wanted to correct, and sought permission to ask questions of correction. However, the questions that he then asked the claimant went beyond mere corrections. And instead sought to introduce matters that the claimant had not put in his statement. It was explained to Mr Al-Malahi that the questions he was asking did not relate to amending information. Mr Al-Malahi withdrew the questions he was asking.
8. Mr Hill Was cross-examined by Miss Denton. And gave his evidence.

9. A similar matter arose to that noted above when Mr Al-Malahi sought to re-examine the claimant. He asked a broad question which equated to asking the claimant to tell the tribunal everything he wanted to say about the material period. The broad nature of the question asked was discussed with Mr Al-Malahi, who again withdrew the question.

Closing Submissions

10. I heard closing submissions on behalf of both the respondent and the claimant. I do not repeat these here. However, these have been considered and taken into account when reaching a decision on this issue.

Law

Disability Status

11. Section 6(1) EqA provides:

‘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.’

12. Schedule 1 of the EqA contains supplementary provisions in relation to the determination of disability. Paragraph 2 states:

‘2(1) The effect of an impairment is long-term if-

- (a) it has lasted 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 life of the person affected.’

13. I note here that when considering the term ‘likely’, this means something that ‘could well happen’ (this was decided by the House of Lords (now called the Supreme Court) in a case called **SCA Packaging Ltd v Boyle [2009] ICR 1056**).

14. Paragraph 5 states:

‘5(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.’

15. The 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (the Guidance) does not itself impose legal obligations, but the Tribunal must take it into account where relevant (Schedule one, Part two, paragraph 12 EqA).

16. The Guidance at paragraph B1 deals with the meaning of 'substantial adverse effect' and provides:

'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.'

17. Paragraph B1 should be read in conjunction with Section D of the Guidance which considers what is meant by 'normal day-to-day activities'.

18. Paragraph D2 states that it is not possible to provide an exhaustive list of day-to-day activities.

19. Paragraph D3 Provides that:

'In general, day-to-day activities are things that people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.'

20. D16 provides that normal day-to-day activities include activities that are required to maintain personal well-being. It provides that account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, or personal hygiene.

21. The Equality and Human Rights Commission: Code of Practice on Employment (2011) at Appendix 1, sets out further guidance on the meaning of disability. It states at paragraph 7 that

'There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause.'

22. At paragraph 16 it states:

'Someone with impairment may be receiving medical or other treatment which alleviates or removes the effects (although not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if the substantial adverse effects are not likely to occur even if the treatment stops (that is, the impairment has been cured).'

23. In **Goodwin v Patent Office** [1999] IRLR 4, the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are:

- a. Does the person have a physical or mental impairment?
- b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
- c. Is that effect substantial?
- d. Is that effect long-term?

24. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability.

25. Miss Denton took me in particular to **Sullivan v Bury Street Capital Limited** [2021] EWCA Civ 1694, and particularly paragraph 93, in which the case of **McDougall v Richmond Adult Community College** [2008] ICR 431 was cited. I set out in full paragraphs 93, and, in addition, paragraph 94, which are relevant to the issue before me:

93. In **McDougall v Richmond Adult Community College** [2008] EWCA Civ 4; [2008] ICR 431 the Court of Appeal had to consider the phrase "likely to recur" in para. 2(2) of Sch. 1 to the 1995 Act. In reversing the decision of the EAT, this Court held that the question whether an employer had committed an act of disability discrimination had to be judged on the basis of the evidence available at the time of the act alleged to constitute discrimination and that, therefore, in determining whether the adverse effect of a person's impairment was "likely to recur", the ET should not have regard to subsequent events. As Pill LJ put it, at para. 23, the exercise involves "a prediction on the available evidence". In a similar vein, at para. 33, Rimer LJ said:

"... The evidence relating to the relevant time either will, or will not, prove the likelihood of recurrence. If it does prove it, evidence of subsequent events is unnecessary and irrelevant. If it does not prove it, evidence of those events cannot fill the gap. That is because it is fallacious to assume that the occurrence of an event in month six proves that, viewing the matter exclusively as at month one, that occurrence was likely. It does not. It merely proves that the event happened, but by itself leaves unanswered whether, looking at the matter six months earlier, it was *likely* to happen, a question which has to be answered exclusively by reference to the evidence then available. ..." (Emphasis in original)

94. In **All Answers Ltd v W** [2021] EWCA Civ 606; [2021] IRLR 612 this Court confirmed the legal position. In that case the ET had

fallen into error because it had looked at the position as at the date of the preliminary hearing before it. This Court confirmed that the relevant question is whether, as at the time of the alleged discriminatory act, the effect of an impairment is likely to last at least 12 months. That must be assessed by reference to the facts and circumstances existing at the date of those alleged acts.

Findings of Fact

I make the following findings of fact on the balance of probabilities. These findings are not intended to be a complete record of all of the evidence I heard read and observed during the hearing. I took all of the evidence into account (except where otherwise noted) but these findings are those material to my conclusions. Further, these findings are for the purposes of determining the preliminary issue only.

26. The claimant started to have niggles in his knee around 22 January 2020. Although the claimant in his statement gives an account of pain starting in his knee in November 2019, which continued during November, December and January, and with him collapsing in work on 12 January 2020, on balance I find any issues with the claimant's right knee started later than this. I have been provided with a number of medical documents, which appear to record the conversations that the claimant has had with his doctor about his knee. The first reference to any knee issue is following a GP consultation on 27 January 2020 (see p.93 of the bundle). It is recorded in the history section that

History seen with partner. pain behind right knee. started with few niggles few days ago and this am woke up with a lot of painbehind knee. worse on standing - pulls . no calf pain

Under cross-examination the claimant explained that this is what he probably did tell the doctor. Furthermore, following a further consultation on 19 February 2020 (see p.59 of the bundle), it is recorded that 'Knee pain started 3 weeks ago and has been getting worse'. Again the claimant accepted under cross examination that he was the source of the information recorded under the heading history. This is also consistent with the consultation on 17 March 2020, where it is recorded as knee pain that is progressively getting worse since the last 2 months and that there is no history of locking (see p.61 of the bundle). And consistent with the history that the claimant gave to the Consultant in the Orthopedic Department on 02 June 2020, where he explained that the pin had been continuing for about 4 months (see pp.74-75 of the bundle). All of these led me to the conclusion, that on balance, the knee problem affecting he claimant started in mid to late January 2020.

27. On or around 26 January 2020 the claimant suffered from disturbed sleep due to the pain in his knee. From this date the claimant was caused pain in his knee on standing. And difficulty with walking, and in particular he was walking with a limp. This impacted on his work duties. In reaching this conclusion, I accept the claimant's oral evidence (although the claimant's disability impact statement is very unclear on this), which is consistent with the medical records created at the time.

28. The claimant started to take Lansoprazole and naproxen as part of pain management on or around 27 January 2020. And around this time also started taking over the counter medication, in the form of ibuprofen.
29. It was explained to the claimant that the problem was a Synovial Cyst of knee/Baker's Cyst. And that usually the pain would settle with rest, ICE and analgesia (ss p.93 of the bundle). This was the expectation of the medical practitioner at the time in terms of the impairment being resolved. The claimant under cross examination accepted that he also reached this view having discussed the matter with the medical practitioner and having had discussions with colleagues at work.
30. On 19 February 2020, it was reiterated to the claimant that the problem remained a Synovial Cyst of the knee, and that rest and time off work was advised.
31. On 17 March 2020, the claimant was referred for further investigation. However, it was noted that on examination there was no tenderness over the knee, there was no swelling or tenderness in the calves, and there was a question over whether there was a medial meniscal strain, tear or injury. However, it was further commented that the claimant's x-ray was normal and that on examination his McMurray test is positive (that being a test commonly used to identify meniscal injury).
32. The claimant was signed off from work by his doctor due to his ongoing knee problems on the following dates:
 - a. from 19 February 2020 until 04 March 2020. With the doctor identifying a need for rest and time off work.
 - b. From 17 March 2020 until 31 March 2020 as he is not fit to work
33. At other periods during the material time in question the claimant was working.
34. The claimant got married in March 2020. And after having got married, the claimant and his partner went for a meal. The claimant was not housebound at this point.
35. During March 2020, the claimant had a holiday in the Maldives. The claimant had planned to visit other islands on excursions but was not able to do so due to the pandemic. Although the claimant explained in evidence that he was glad that the excursions had been cancelled, he accepted that he had not taken positive steps to cancel them. From this I conclude, on balance, that he would have been able to undertake such excursions to other islands had the pandemic not prevented him from doing so.
36. The claimant's impairment continued to worsen, and his knee became unstable. This was around 21 April 2020. The claimant explained that he explained to his doctor in a consultation on 21 April 2020 that he collapsed in the shower, which led to an entry of 'Knee feels very unstable'. In this consultation the patient is recorded as having described his pain as now

being severe and that is felt like being stabbed in the knee every time he took a step.

37. There is no evidence brought to support that this impairment will last the rest of the claimant's life.

Conclusions

(i) Did the claimant have a physical impairment, namely problems in his right knee during the relevant period (July 2019-20 March 2020)

38. It is common ground between the parties that the claimant's knee problems amount to a physical impairment.
39. This claimant had this physical impairment from around 20 January 2020. And this continued to be this case throughout the remainder of the relevant period.

Did the claimant's physical impairment have a substantial adverse effect on the claimant's normal day-to-day activities?

40. I have accepted that the physical impairment caused the claimant difficulties with sleeping, that it caused difficulties with standing and it caused difficulties with his mobility. Further, being prescribed with medication to try to manage the problem that he presented to his doctor, taking over the counter medication, and having periods of time where he was signed off work, as a whole supports the conclusion that the claimant's physical impairment did have a substantial adverse effect on the claimant's normal day-to-day activities.
41. However, this conclusion, as were the relevant findings above on which this conclusion is made, is a very narrow conclusion. The claimant's disability impact statement was far from ideal in presenting and explaining the impacts that the impairment was having on the claimant at the material time. The statement appears to focus more on the impact that the physical impairment was having on the claimant now, in circumstances where the claimant accepted that the impacts were getting progressively worse over time. This made it somewhat difficult to get a clear idea as to the impacts at the time on the claimant's normal day to day activities. Giving the claimant the benefit of the doubt, and accepting his oral evidence which helped clarify the impact on him, to a degree, which did appear consistent with documents that had been disclosed, the claimant narrowly convinced me that this part of the test is satisfied.

Has the impairment lasted for at least 12 months, or is the impairment likely to last the rest of the claimant's life?

42. Although I found that the claimant starting to identify an issue with his knee from around 20 January 2020, I also made the finding that the impairment was likely starting to have a substantial adverse effect on the claimant's normal day to day activities, namely sleep, standing and walking, from 26

January 2020. The material period only runs until 20 March 2020. The period 26 January 2020 until 20 March 2020 falls well short of having lasted 12 months at the time in question.

43. I add here that even if I had found that the claimant's impairment started to affect him in November 2019, this would still fall short of the impairment having lasted at least 12 months. So that finding has had little impact on this decision.
44. There is simply no evidence to support that the impairment will last the rest of the claimant's life, and so I conclude that it will not.

Was the claimant's impairment likely to last more than 12 months, as assessed at the material time?

45. I remind myself that I cannot take into account events after 20 March 2020, in helping me determine whether the claimant's impairment at the time was likely to last more than 12 months. And further, I remind myself that the test is one of asking whether the evidence at the time supports that the impairment could well have lasted for at least 12 months.
46. I conclude that the claimant has not satisfied the Tribunal that his physical impairment was likely to last more than 12 months. The evidence during the material period, when assessed, suggest that the impairment would resolve itself within a short period of time, and most likely within a matter of weeks at most.
47. The claimant was examined on numerous occasions, and there is nothing that supports that the impairment in question could well last for up to 12 months. Not only do the observations of the medical practitioners who examined the claimant at the time suggest that the impairment would be short term, but their actions also suggest it too. They advised him to rest for a short period of time. And on two separate occasions during the period that I am concerned with, they gave him a sick note that signed him off work for a period of 2 weeks. The impairment was thus, at the time in question, being viewed as one that would resolve itself over a short period of time. The claimant was candid in his evidence in explaining that that was his understanding at the time too.
48. I do have much sympathy for the claimant, in that the impairment did not resolve itself as expected, and he is unlikely to have the surgery to repair his right knee before January 2022. And it appears that the issues with his right knee has progressively worsened following the period of 20 March 2020. However, I would be falling into legal error if I was to take this into account in reaching this decision.
49. The burden to establish a disability pursuant to section 6 of the Equality Act 2010 rests on the claimant. The claimant has not satisfied this Tribunal that the physical impairment to his right knee is a disability pursuant to that section. Consequently, I find that the claimant does not have a disability for the purposes of a disability discrimination claim.

50. As the claimant is found not to have a disability, all disability discrimination claims in this claim therefore are dismissed. This is the entirety of the claim being brought by the claimant.

51. Consequentially, the final hearing listed for 29, 30 and 31 March 2023 will not be needed and is vacated.

Employment Judge **Mark Butler**

Date: 03 December 2021

JUDGMENT SENT TO THE PARTIES ON
7 December 2021

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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