



EMPLOYMENT TRIBUNALS

Claimant: Mr P Ennis

Respondent: DPD Group UK Limited

Heard at: Nottingham **On:** Thursday 11 June 2020

Before: Employment Judge Hutchinson (sitting alone)

Representatives

Claimant: In person

Respondent: Mr J Gidney of Counsel

JUDGMENT

The Employment Tribunal Judge gave judgment as follows: -

1. The Claimant does not have a disability as defined in Section 6 Equality Act 2010 and his claim of disability discrimination fails and is dismissed.
2. The hearing set for 21, 22, 23 and 24 September 2020 is hereby cancelled.

REASONS

The claim

1. The Claimant presented his claim to the Tribunal on 17 May 2019. He has been employed by the Respondent from 9 January 2017 and he still works for them. He is employed as a Delivery Driver. His original claim was for disability discrimination and age discrimination. The claim of age discrimination was dismissed by my colleague Employment Judge Adkinson on 23 October 2019 on withdrawal by the Claimant.

Case management hearing

2. On 23 October 2019 Employment Judge Adkinson also gave directions for the listing of the final hearing of this matter on 21-24 September 2020. He identified the issues and clarified that the Claimant's claims were as follows: -

- Discrimination arising from disability
- Failure to make reasonable adjustments

3. He was also able to identify that the Claimant asserted he was disabled because of a small umbilical hernia that the Claimant said impacted on his ability to bend and lift heavy weights. He made directions for the determination of this as a preliminary issue and the Preliminary Hearing to determine that was due to take place on 22 April 2020.

The Preliminary Hearing of 22 April 2020

4. The planned attended hearing had to be converted to a telephone hearing as part of the response to Covid19. The Respondent had applied for that hearing to go ahead but the Tribunal was not able to list the hearing to be dealt with remotely at that time. Employment Judge Clark who dealt with that hearing noted that the Claimant was keen to have the matter determined and the parties agreed that the open Preliminary Hearing should be dealt with remotely today. The hearing would take place via the Ministry of Justice Cloud Video Platform (CVP) and the parties were provided with details of the log in process.

5. A telephone conference code was available as a backup if either party had difficulties in accessing or using CVP and that they could dial into the telephone conference. He gave further directions for the hearing to be conducted.

The hearing today

6. Mr Gidney of Counsel appeared for the Respondent and could use the CVP and I was able to see him and hear from him. Unfortunately, Mr Ennis did not have access to a computer and so he dialled into the hearing. I asked him at the start of the hearing if he was sure that he wanted to proceed. He again said that he was keen to have the matter determined and we agreed to proceed with the hearing in the circumstances.

Purpose of the hearing

7. As per Employment Judge Adkinson's directions the purpose of the hearing today was for me to determine whether at the relevant time the Claimant suffered from a disability as defined in Section 6 of the Equality Act 2010. In this case he relied on the impairment of the umbilical hernia that was referred to by Employment Judge Adkinson.

8. I had to determine whether this amounted to a physical impairment and whether that impairment had a substantial and long term adverse effect on his ability to undertake normal day to day activities.

9. The burden of proof is on the Claimant to establish that he suffered from a disability in accordance with the provisions of Section 6 Equality Act (EQA). It was agreed that I should also consider the guidance on matters to be taken into account in determining questions relating to the definition of disability issued in April 2011.

10. I repeat that the only physical impairment identified was the umbilical hernia.

11. I heard evidence from the Claimant only. There was an agreed bundle of documents which included medical evidence and the Claimant's impact statement. I also had written submissions provided to me by both parties.

Relevant facts

12. At the time that the Claimant presented his claim to the Tribunal he was 52 years old. He has had since birth a small umbilical hernia which measures 113 mm and is therefore tiny.

13. The hernia has never warranted surgery and the Claimant has never received any treatment in respect of it. Indeed, he was not aware of it until 2017.

14. It is clear from the medical evidence that the Claimant has other medical issues regarding his general fitness.

15. In his claim form he only referred to issues with regard to heavy lifting. In his impact statement (pages 63-4) he refers to several symptoms and in particular: -

- Lower back pain
- Urinary incontinence
- Discomfort in body movement
- Stomach distension (bulging)
- Discomfort while lifting and bending and sitting
- Difficulty obtaining a comfortable sleeping position

16. The umbilical hernia was identified because of a scan undertaken on 7 March 2017 (page 65/6).

17. The Claimant was referred to occupational health and I have seen the report of Dr John W Brennan dated 10 September 2018 (pages 67-70). The report confirms the identification of the small umbilical hernia and confirms that it was not considered severe enough to warrant a surgical referral. He goes on to say:

“The swelling does not appear to have changed significantly but Mr Ennis does experience some discomfort across the lower abdominal area and in his lumbar spine on heavy lifting or repetitive/bending/reaching/stretching.”

He goes on to say:

“On examination today, there is a small umbilical swelling. Mr Ennis does not have good abdominal muscle tone but we discussed ways of addressing this.”

18. Dr Brennan refers to the Claimant having some “underlying health conditions and goes on to say:

“They would seem not to be particularly serious and the problem is more linked to his physical robustness and an underlying health problem.”

19. The Claimant was referred to Dr Wendy Telling, Consultant Occupational Physician who saw the Claimant on 21 March 2019. Her report is at pages 75-7.

20. In it she says as follows:

“PE links localised pain around his belly button when lifting to his umbilical hernia. However, he also describes having lower back pain when he lifts too. He told me he does not like to seek medical assessment so no formal diagnosis or discussion about treatment options has been made regarding his back pain. He also reported having “flat feet” due to loss of his arches which he described having difficulty walking with from time to time. I understand there has been no formal diagnosis or medical assessment or advice.”

21. On the question of whether Mr Ennis had a condition that is recognised as a disability she said:

“It is difficult to provide an opinion as to whether he would have a physical/mental impairment and corresponding functional impairment that would be likely/unlikely to be deemed a disability.”

22. Mr Ennis then saw Dr John Brennan for a further occupational health report which is dated 11 April 2019 (pages 78-81). Dr Brennan was asked whether Mr Ennis suffered from a disability. His reply was:

“I can only answer that question as Dr Telling answered it. It is still uncertain and in fact as we have already pointed out, it is a legal rather than a medical decision. I think more importantly Mr Ennis, for whatever reason (and I must stress this is not a criticism of him) has not been back to his GP and followed up following that scan 3 years ago and there may be a simple solution offered to him, potentially surgical, but he may or not choose to go down his path. I would rather put the answer to that question on hold until Mr Ennis has spoken to his GP and any possible next steps have been taken.”

23. The final report is again from Dr Brennan on 20 January 2020 (pages 86A-C). By now Dr Brennan had received a report from the Claimant’s GP dated 20 September 2019. I have not seen that report and it was not produced to me today but Dr Brennan quotes the GP from it as follows:

“I have not really seen Mr Ennis myself and cannot really comment on any limitations. He has not been seen at the surgery for some time. The last sick note was issued some time ago. He seems to have been seen in January for a fracture and had another fracture the same left wrist in April... There was mention of a tiny umbilical hernia and diversification of recti muscles on a post scan. There have been no referrals. He has not had any analgesia from us.”

24. I have seen the letter from Dr Brennan dated 30 January 2020 (pages 87-8). He says as follows:

“On the balance of probabilities, I must stress, once again a legal decision, but I am struggling to see how this gentleman will be considered disabled but once again I must stress that this something that will be considered

fully potentially by a Tribunal.”

The law

25. As Mr Gidney points out I must refer myself to Section 6 Equality Act 2010 which provides: -

“(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.”

The burden of proof is on the claimant to show on the balance of probabilities something in the nature of an impairment, whether it is a mental or physical condition. It is not necessary to consider how the impairment was caused; what must be determined is its effect.

26. The 2011 guidance that I have referred to above deals with the meaning of “substantial adverse effect” in paragraph B1. It says:

“A substantial effect is one that is more than minor or trivial effect.”

Paragraphs 8 – 9 of appendix 1 to the EHRC’s Employment Code of Practice goes on to state that:

“the requirement that an effect must be substantial reflects a general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people. Account should also be taken of whether a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of loss of energy or motivation”

27. The meaning of impairment is dealt with in paragraph A3 which says:

“The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effect.”

28. The term “normal day-to-day activities” means activities that are carried out by most men and women on a fairly regular and frequent basis such as walking, driving, typing and forming social relationships.

29. An impairment is “long-term” if it has lasted for 12 months, is likely to last for 12 months or for the rest the person’s life. If it has ceased to have that effect but is likely to recur that is treated as long term.

30. The relevant time to consider whether a person was disabled is the date of the alleged discrimination and not the date of the Tribunal hearing.

31. Mr Gidney referred me to the following cases: -

- **Dunham v Ashford Windows** [2005] IRLR 608
- **Morgan v Staffordshire University** [2002] IRLR 190
- **McNichol v Balfour Beatty Rail Maintenance Limited** [2002] IRLR 711
- **Boyle v SCA Packaging Ltd** [2009] ICR 1056
- **McDougall v Richmond Adult Community College** [2008] IRLR 227

32. In his submissions to me Mr Ennis referred me to the case of **Donelien v Liberata UK Limited** and **Banaszyk v Booker Limited** [2016] UK EAT/0132/15/RN. His contention to me is that the effects on his ability to undertake normal day to day activities are affected in a substantial way, i.e. in a more than trivial way.

My conclusions

33. As Mr Gidney said I should treat Mr Ennis's own evidence with some caution. The Claimant's evidence on its own is naturally self-serving. There is plenty of medical evidence. I am satisfied that Mr Ennis mistakenly believes that other unrelated conditions are being caused by his hernia. There is no evidence at all that is hernia is causing him any problem at all. Indeed, he has only recently become aware of it and it is not necessitated any treatment in respect of it. Mr Ennis has not sought any advice treatment or painkillers from his GP in the 3 years since he discovered the hernia.

34. This is a tiny hernia. The medical evidence states that it has no impact on his day-to-day activities at all. Whilst I acknowledge that a substantial impact means more than trivial I am satisfied that the hernia has no impact on his day-to-day activities. I am not satisfied that the Claimant has established that his umbilical hernia amounts to any physical impairment or that it has any effect at all on his normal day to day activities. There is no evidence that the umbilical hernia has affected any of the activities that he says that he has some difficulty with. There is, in particular, no evidence that the hernia has had any effect on his ability to lift weights at any time.

35. Mr Ennis has other conditions, including his lumbar spine, some of which are related to his general level of fitness. The medical evidence indicates that that is likely to account for any restrictions that he has told his medical advisers that he has. It is his case that it is the hernia amounts to the physical impairment and I am not satisfied that it does amount to any physical impairment or that it has any effect at all on his normal day-to-day activities.

36. His claim therefore fails and is dismissed.

37. The hearing therefore set for 21 to 24 September 2020 is hereby cancelled.

Date 21 August 2020

JUDGMENT SENT TO THE PARTIES ON

24 August 2020

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FOR THE TRIBUNAL OFFICE

Notes

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