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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113482/2019

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Held by CVP on 14 October 2021

Employment Judge S Cowen

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Mr Creaney

**Claimant
Represented by
Mr McGrade – solicitor**

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**Midland Steel Reinforcement
Supplies (UK) Limited**

**First Respondent
Represented by:
Mr Duffy - Solicitor**

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Mr Gerry Tralongo

**Second Respondent
In Person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is the claimant was a disabled person for the purposes of the Equality Act 2010

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REASONS

Introduction

1. This is a claim of disability discrimination, unfair dismissal and other payments. An order of 8 July 2021 set out that there was a preliminary issue over whether

the claimant was disabled within the definition of section 6 of the Equality Act 2010 (“the Equality Act”) and that this was to be determined as a preliminary issue at this hearing.

2. I apologise to the parties for the delay in sending out this judgment and have
5 ensured that a further telephone Preliminary Hearing is held to progress the matter further in the near future.
3. I received a joint bundle of productions, a witness statement from the claimant and his wife Mrs Theresa Creaney on his behalf. I also received a witness statement from Mr Hall on behalf of the First Respondent and Mr Tralongo as
10 the Second Respondent. I heard oral evidence from each of them. The respondent provided me with a written submission and both representatives made closing submissions.
4. I also received copies of the claimant’s medical records since 2006. The respondent provided written submissions and authorities.

15 **Relevant law**

5. Section 6 of the Equality Act provides a definition of “disability” as follows:
 - (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
20 effect on P’s ability to carry out normal day-to-day activities.
6. S212(1) of the Equality Act provides that “substantial” means more than minor or trivial.
7. Schedule 1 of the Equality Act gives further details on the determination of a disability. For example, Schedule 1 para 2(1) provides that the effect of an
25 impairment is long term is it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.

8. Para (5) provides that 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 measures are being taken to correct it and but for that, it would be likely to have that effect.
- 5 9. The Tribunal must take into account Statutory Guidance on the definition of Disability (2011) which stresses that it is important to consider the things that a person cannot do, or can only do with difficulty (B9). This is not offset by things that the person can do. This is also confirmed in ***Aderemi v London and South Eastern Railway Ltd*** 2013 ICR 391. Day to day activities are
- 10 things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This includes work related activities such as interacting with colleagues, using a computer, driving, keeping to a timetable etc (Guidance D2 – D7).
- 15 10. The Tribunal must consider the status of the claimant at the date of the discriminatory act; ***Cruickshank v VAW Motorcast [2002] IRLR 24***

Issues

11. The Tribunal had to determine the following issues:
- 11..1 Did the claimant have an impairment?
- 20 11.2 If so, did that impairment have an adverse effect on her ability to carry out normal day to day activities?
- 11.3 If so, was that effect substantial (as in more than minor or trivial)?
- 11.4 If so, was the effect long term?
- 11.5 If the impairment had ceased to have a substantial adverse effect at the
- 25 relevant time, was the substantial adverse effect likely to recur?
12. The parties agreed that the relevant time period for any disability would be 2 July 2019 to 28 October 2019 when the claimant was dismissed.

Findings in fact

13. The Tribunal makes the following findings in fact:

5 13.1. The claimant has worked in rebar steel factories for nearly all of his working life. He was a very fit man, having practiced karate for many years, he represented Scotland during his career. He maintained his fitness and trained regularly.

10 13.2. In October 2017 he went to see his GP as he had been experiencing fatigue and breathing problems. He was sent for tests and told to monitor his condition. He reduced the amount of exercise he was doing and retired from his football team and stopped his karate altogether, as he was not fit to continue. He did not inform his employers of his concerns.

15 13.3. In December 2017 the claimant underwent an Occupational Health review which was quite cursory but involved a lung function test and checks to his hearing. The claimant told the nurse that he was experiencing fatigue and shortness of breath, but her response was to joke that the claimant was ageing. The claimant was marked as fit for work as he was not experiencing any symptoms at that point which interfered with his ability to carry out his duties.

20 13.4. His condition deteriorated and around June 2018 he stopped cycling with his dog and gave his bicycle away to another member of the family. At his annual occupational health check he was once again passed as fit to work, despite his complaints about continuing fatigue.

25 13.5. In December 2018 he contracted a chest infection which did not relent. His breathlessness became worse and he felt he had to work harder to get enough oxygen in. He began to wheeze and was out of breath after small exertion such as showering and dressing, or walking upstairs. He continued to attend work and did not take time off.

13.6. By March 2019 the claimant was experiencing symptoms of tiredness, tightness across the chest, coughing and muscular pain in his neck and shoulders, as well as light headedness and breathing problems. His family were concerned about him and encouraged him to see his GP. He made an appointment and attended on 22 March 2019. The GP referred him for various hospital tests.

13.7. In January 2019 the respondent asked the claimant if he would work in Bishop Auckland. He had done so before and they needed him to go again. The claimant declined, sighting his health as the reason he would not travel. He was asked again in February, March and April 2019. Each time there was a conversation between the claimant and Lee Martin about the claimant's health preventing him from going. Lee Martin told the claimant that Mr Tralongo would not give up asking the claimant to go to Bishop Auckland, as the business was not going well and the claimant was needed to help sort it out. The claimant was therefore under pressure to perform at work.

13.8. Around this time the claimant had also taken the decision to have his garden covered with paving slabs in order to reduce the necessary maintenance, which he was struggling to manage.

13.9. In April 2019, the claimant spoke with Mr Tralongo, who mentioned to the claimant that he had had a similar illness, but recovered. Soon after Mr Tralongo met with the claimant to tell him of the problems at Bishop Auckland once again. He asked the claimant to work there. The claimant said that if he did go, he would need time off due to his medical appointments. This was agreed.

13.10. The Claimant worked in Bishop Auckland from May to August 2019. He lived in a flat there during the week and returned home each weekend, but was too tired to socialise.

13.11. By June 2019 the problems with breathing were increasing and he found that he could not walk far or fast. He returned to his GP to be told that

he had COPD a life-long condition. He was prescribed an inhaler and regular appointments with a COPD nurse. The inhaler did relieve his symptoms to some degree. During this period the claimant was under pressure to help overcome the problems in Bishop Auckland and continued to work there during the week.

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13.12. The claimant made adjustments in his work, asking others to walk around the factory for him each day, rather than inspecting the shop floor himself. Whilst he continued to carry out his work duties, he did not do so in the same way. He also adjusted his home life, choosing to shower and shave less as this was tiring for him and failing to carry out household chores.

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13.13. The claimant owned a large dog which he often took to work with him. Prior to his illness he would walk the dog at lunchtimes. From early 2019 the claimant had to adjust the way in which he exercised his dog, as he was not able to walk as far. He was not able to tidy up after the dog as much at home, and his wife took on this role.

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13.14. Within two weeks of informing Mr Tralongo of his diagnosis of COPD, the claimant was told that he was at risk of redundancy and was made redundant from his job and dismissed in October 2019.

13.15. After that the claimant continued to be treated with an inhaler until 25 February 2020 when he was contacted by his GP to be told that he had been misdiagnosed. At a meeting to explain this situation the consultant advised that the claimant had a Functional Breathing Disorder and that his diagnosis of COPD had been marginal. Further tests were required and management would be advised.

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Observation on evidence

14. The claimant and his wife both gave clear evidence. The evidence supports the fact that the claimant was previously a very active and fit man who took pride in his sporting abilities and achievements and was reluctant to acknowledge that these were slipping away from him. His dedication to his job

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and his attempts to cover up his increasing difficulties may have led to an under-reporting of his condition during the relevant period. I do not accept the respondent's submission that the claimant now seeks to exaggerate his condition. It was diagnosed as COPD by medical professionals and the claimant's account of his symptoms and day to day activities are corroborative of this.

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16. The evidence of Mr Tralongo reflects his experience of the claimant at work and acknowledges that he was not initially aware of the details of the effects felt by the claimant in his private life. His evidence reinforces my view that the claimant worked hard to ensure that his illness did not affect his work.
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Decision

16. The test is a functional and not a medical test, directed to what a claimant cannot or can no longer do at a practical level. "*Impairment*" bears its ordinary and natural meaning and may result from an illness or consist of an illness. Disability may include someone who is not in fact disabled if, without the medical treatment they are in fact receiving, they would suffer that disability.
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17. The burden of proving disability lies with the claimant. My assessment of his situation must be taken at the time at which he says the claims arose. It is therefore not relevant to consider what alternative diagnosis or treatment the claimant has obtained since.
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Did the claimant have an impairment?

18. Dealing first with the issue of impairment, I accept that the claimant first experienced difficulty in 2017, but that this did not significantly interfere with his life until mid 2018 when he began to alter his lifestyle. By then he was suffering from fatigue and some breathlessness on exertion. Having been a fit and healthy person and having undertaken a physical training regime for many years, this was a noticeable decline in his physical abilities. I consider that this amounted to an impairment which continued.
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Did that impairment have an adverse effect on his ability to carry out normal day-to-day activities?

19. I next consider the effect of that impairment on the claimant's day to day activities. The terms of the Statutory Guidance indicate that I must focus not
5 on what the claimant could do but what he could not do or only do with difficulty. I note that over the period from mid 2018 to October 2019 the claimant was able to attend work and undertake his work tasks and travel to his work, but these are not definitive in my assessment. I also note that he had difficulty in gardening, walking long distances or uphill, carrying out
10 household chores and walking his dog. These are normal day to day activities and are the ones which must be considered in deciding the issue of disability. The claimant was able to do these things to some extent, but only with difficulty and in some he required assistance from others. I consider that there was an adverse effect on his ability to do these activities.

15 *Was that effect substantial?*

20. The seriousness of the effects varied over the relevant period. The claimant referred to his symptoms as improving slightly when he was provided with an inhaler in June 2019, and that they then plateaued. Although the symptoms were not so substantial that the claimant missed work, they did have a
20 significant effect on his ability to carry out domestic tasks and ultimately his own personal hygiene as well as the care of his pet dog. On the basis of the claimant's evidence, together with that of his wife and his medical records I consider that throughout the period from 2 July 2019 until his dismissal on 28 October 2019, his impairment had an effect on his day to day activities as
25 described above, that was more than minor or trivial.

Was the substantial adverse effect long term?

21. I must also consider whether the substantial adverse effect was "long term". As noted above, I consider that the substantial adverse effect started around
30 June 2018. I am asked to consider specifically the period from 2 July 2019 as

5 this was the point where he was diagnosed with COPD. The period is one of
only 4 months and therefore does not meet the statutory criteria for being
considered as long term. However, I must also consider whether it was likely
to last for 12 months; Based upon the evidence that he had suffered
increasing symptoms over a longer period, had been prescribed medication
and that his diagnosis was of a life-time condition of COPD, I consider that it
was likely that the symptoms would continue for a further 8 months or more.
There was no evidence to support the suggestion that he would have made
a significant improvement within a short period of time. I therefore consider
10 that he would meet the criteria of a condition which was likely to last more
than 12 months.

22. In conclusion, I consider that the claimant did have a disability and the claim
can proceed.

Further procedure

15 23. The Tribunal will contact the parties separately about further procedure in this
claim. For the avoidance of doubt, the findings in fact in this judgment relate
only to the issue of disability status. They would not bind a future tribunal
dealing with the merits of the claim and considering issues such as knowledge
of the respondent.

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Employment Judge: Sally Cowen
Date of Judgment: 15 February 2022
Entered in register: 16 February 2022
and copied to parties

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