



EMPLOYMENT TRIBUNALS

Claimant: Mr S Abbas

Respondent: Mitie Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central (by CVP)

On: 1 November 2024

Employment Judge: Employment Judge Henderson (sitting alone)

Appearances

For the claimant: In Person

For the respondent: Mr T Finn (Counsel)

JUDGMENT

The claimant has not shown (to the requisite standard of proof) that he is a disabled person within the definition of section 6 of the Equality Act 2010.

The claimant's claims of disability discrimination under sections 15,20,21, 26 and 27 of the Equality Act 2010 are accordingly dismissed.

The remaining claimant's whistleblowing claims remain and will proceed to a Final Hearing scheduled for 6 days starting on 20 January 2025.

REASONS

Introduction

1. This was a Public Preliminary Hearing (PPH) (as ordered in the Case Management Order of EJ Brown on 16 April 2024) to determine whether the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 (EQA) by reason of all or any of his alleged conditions of gout, plantar fasciitis, scoliosis, and depression.
2. The PPH had been postponed from 24 July 2024. There is a Final Hearing scheduled for 6 days from 20 January 2025.
3. The claimant was employed by the respondent as a Security Officer from 22 August 2022 to 21 June 2023 (**the relevant period** for the claimant's disability discrimination claims under the EQA: sections 15 (Disability Arising from Discrimination), 20 and 21 (Failure to make Reasonable Adjustments), 26 (Harassment) and 27 (Victimisation). The claimant also brought claims for whistleblowing detriment and automatically unfair dismissal.

Conduct of the Hearing

4. There was an Agreed Bundle in electronic form (206 pages) which included (at pages 72 and 73) the claimant's disability impact statement dated 29 May 2024. The claimant confirmed that he relied on this as his witness statement for today's PPH. The claimant confirmed that impact statement as his evidence in chief on oath.
5. However, he said that although he had some legal advice in preparing that impact statement, his legal advisor had given him no guidance about today's hearing and that he wished to add supplemental oral evidence to that statement. I allowed him to do so, which additional evidence took just under an hour. The claimant gave evidence including cross-examination and Tribunal questions from 10.30 to 1.30 with several short breaks, as the claimant said he could not sit for too long and needed to move about.
6. I then heard oral submissions from the parties. The respondent relied on the email dated 2 July 2024 from its solicitors disputing the claimant's disability status (pages 74-75) as the only written submission. Neither party cited any legal authorities. The hearing ended at 4pm and I reserved my decision.

Relevant Law

7. The key issue was whether the claimant had a disability at the relevant time/period as defined in section 6 EQA:

“A person 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”

8. It was agreed that also relevant was **Schedule 1 EQA Part 1 Determination of Disability**. This stated (paragraph 2 (1)) that an effect is “long-term” if it has lasted or is likely to last for at least 12 months. Paragraph 2 (2) says that if an impairment has ceased 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 such effect if it that effect is likely to recur. Paragraph 5 says that any medical treatment for the condition should not be taken into account when determining the substantial adverse effect on normal day to day activities.
9. The **2011 (as amended) Guidance of the Definition of Disability** should also be considered. Paragraph B1: a substantial effect is one that is more than minor or trivial. Paragraph D3 in general day-to-day activities are things done on a regular or daily basis such as washing and dressing, preparing and eating food, walking and using public transport, shopping, household tasks and socialising.
10. The burden of proof is on the claimant to show that he falls within the definition of a disabled person, the standard of proof is on the balance of probabilities.
11. The parties did not cite any case law or other legal authorities in their oral submissions.

Findings of Fact

12. I shall make only such findings of fact as are necessary to determine the issue(s) identified for this PPH.

The Claimant’s Evidence

Disability Impact Statement

13. In his Disability Impact Statement, the claimant said that he had been suffering from Gout and Plantar Fasciitis since Feb 2021. Scoliosis had been diagnosed in 2019 and depression was diagnosed after a car crash in April 2022.
(paragraph 2)
14. The claimant said that his gout caused him “intolerable pain” and sudden acute attacks “often” developed during the night or in the early hours of the morning. Such attacks made even the “touch of bed clothes” on the affected joints unbearable, but that relief could be obtained by rolling an ice bottle over the joint and placing it in an ice bucket for hours.
15. The claimant was cross examined on the inconsistency of these two statements in that if the touch of bed clothes was unbearable how was he able to rub an ice bottle on the affected joint. The claimant said that he had mixed up the order of events: he would immerse the joint in an ice bucket first and then roll the ice bottle. He accepted that his impact statement had not made this clear.
16. The claimant said the severity of his gout also affected his sense of wellbeing and exacerbated his stress and depression. There was no indication of timing of the alleged effects: when they started or how long they lasted.

17. The claimant said that plantar fasciitis gave him “persistent pins and needles” in his heels so that he could not walk bare foot or run without having thick insoles in his shoes. The scoliosis gave him constant pain and stiffness in his lower, upper and mid back when bending or standing for long periods of time.
18. The claimant said that this physical impairment had adverse effects on his day-to-day activities – but he did not specify what these were in his impact statement, nor did he give any details of when these adverse effects occurred.
19. The claimant said that his depression had adverse effects such as nervousness during a job interview (no specific timing/example was given) where the claimant would be speechless through lack of confidence. This does not appear to be a day-to-day activity -and many people may experience nerves and lack of confidence in an interview situation. The claimant also said that his depression made him appear irritable and stressed. His depression also affected his sleep and he had been prescribed sleeping pills in the last 2 months – but that would be outside the relevant period of his employment with the respondent.
20. Based on this statement, the respondent challenged the claimant’s status as a disabled person under the EQA (pages 75-76) saying that the claimant had not given examples of the normal day-to-day activities he was unable to undertake and had not given details of timing of the alleged adverse effects.

The claimant’s additional oral evidence

21. At the PPH the claimant gave the following oral evidence.
22. As regards his Scoliosis: he said he struggled to wash his face/brush his teeth or bathe/shower as he could not bend forward. He also had problems going to the toilet and needed friends to help him. He had problems standing and walking and needed help to put on his socks and shoes. The claimant did not specify dates as to when this happened but said it was sometimes 2-4 days per week when he would have to stay in bed all day. There had been no mention of this in his impact statement. There was no evidence from his friends to support this evidence.
23. I asked the claimant about incidents during the relevant period. He referred to GP notes at pages 123,125 and 143. Page 123 was a request from the claimant to his GP dated 26 September 2022 asking for a letter to be sent to his employer. The request from the claimant made no mention of scoliosis (but only of gout and plantar fasciitis). Page 125 was the GP’s response to this request and was dated 30 September 2022. This mirrored the wording of the claimant’s request and referred to “multiple body and joint pains” since his road accident in April 2022. There was reference to his treatment (for over a year) for gout and plantar fasciitis but no reference to scoliosis. Page 143 was an appointment letter for a Physiotherapy appointment. This was dated 31 May 2023 but contained no reference to scoliosis or any other condition.

24. The claimant agreed in cross examination that his reference to a diagnosis of scoliosis in 2019 was to page 96, a medical note which referred to “kyphoscoliosis of the thoracic spine”.
25. The claimant was referred to his post-offer questionnaire completed in August 2022. He accepted that he had replied “no” to the question “*Have you ever suffered from back problems or any Musculo-skeletal disorder?*” and had made no mention of scoliosis. The claimant said that he had been told by ACAS that he did not need to disclose any disabilities when applying for a job. He did not appear to understand the difference of disclosure post-offer of employment from disclosure on application for a job.
26. The claimant also said that he did not believe that he had been dishonest in completing that questionnaire – it would only have been dishonest if he had not disclosed his conditions during his probation period. He said that he had told his manager by email on his first day of employment that he needed time off as he had prescheduled appointments for his various conditions but had received no response. I found the claimant’s evidence in this regard to be disingenuous and self-serving. He must have realised why he was being asked these questions in the post-offer questionnaire by his prospective employer and he chose not to give full and frank answers.
27. The claimant said that he had not wanted to disclose his scoliosis to the respondent in the OH report (26 February 2023) as he had not mentioned the condition in his health questionnaire upon taking up employment and so had not asked his doctor to mention it. The claimant’s evidence on this point was vague, rambling, unclear and inconsistent.
28. As regards his Depression: the claimant said this was diagnosed in July 2022 after his car crash in April 2022. However, the claimant also said that his depression was linked to the severity of his gout, plantar fasciitis, and scoliosis and so his evidence is unclear as to when depression was diagnosed, and indeed whether it is essentially an impairment in its own right or a situational consequence of his other conditions (and the effects of the car crash). The claimant also mentioned being depressed after his father died in June 2021.
29. I asked the claimant about how the depression affected his normal day to day activities in the relevant period (August 2022 to June 2023). He said his anxiety levels were high; he suffered from lack of sleep and so was tired and fidgety. He felt bad about himself and had poor appetite. His personal hygiene was affected, and he was not cleaning or doing his laundry. He was not going out or building up social relationships.
30. I noted that the claimant had not included any of this evidence in his impact statement and he could not point to any medical evidence to support his description of his symptoms relating to depression over the relevant period.
31. As regards his gout: the claimant said that when he had a severe attack, he could not get out of bed; he could not shower or go to the toilet on his own without friends to help him. Again, I note that the claimant made no mention of

this in his impact statement. There was no supporting evidence from the claimant's friends/

32. I asked about the timing of his severe attacks. The claimant said he had a flare up on 29 and 30 November 2022, when he was limping severely. However, this suggested that he was able to walk and so the attack was not so extreme that he was unable to move without assistance. There were also attacks in March 2023 and July 2023. I noted that the claimant had left employment on 21 June 2023, so the July 2023 date was outside the relevant period.
33. As regards his Plantar Fasciitis: the claimant said this also adversely impacted on his mobility. He could not walk or take any exercise or play sports. However, the dates given by the claimant were all after his employment ended.
34. The claimant accepted that all the documents he had added to the agreed bundle since the postponed hearing in July 2024 related to incidents after he had left employment and so were outside the relevant period. He accepted that the medical evidence he had produced, and the matters referred to in his Disability Impact Statement did not relate to only the relevant period but included conditions diagnosed before and after that period. The claimant said he blamed the respondent for the worsening of his condition because they had failed to allow him reasonable adjustments.

OH Report dated 24 February 2023 (pages 136-138)

35. The claimant agreed that the Report contained an accurate summary of what he had told the OH Advisor (Mrs Archer). The claimant had never challenged the contents of the OH Report. The claimant had referred to his gout and plantar fasciitis but said that his symptoms were well managed although prolonged standing resulted in pain in his foot. He was able to walk for about an hour before needing to rest and could drive and kneel without problems.
36. The gout affected only the big toe on his left foot – there was no reference to the gout affecting his joints. Flare ups caused him pain and discomfort, but his daily medication helped to manage his symptoms. As with the plantar fasciitis he was able to walk a good distance, sit, climb stairs and drive without issues. The report described the claimant as “fully independent with all activities of daily living” – his only issue being standing for long period of time.
37. There was no reference to the adverse effects on his mobility which the claimant referred to in his additional oral evidence.
38. The report referred to the possibility of future flare ups of the claimant's gout, but Mrs Archer was unable to predict when these may occur. I asked the claimant when he said there had been flare ups of his gout. He said he had 17 incidents from February 2021 to January/February 2022, He accepted these were all before he started employment.
39. He also referred to flare ups in March 2023; July 2023; September 2023 and March 2024. He accepted that only the first of these was during his employment,

Claimant's Medical Evidence

40. There was minimal medical evidence provided by the claimant relating to the relevant period namely 15 August 2022 to 21 June 2023. The majority of the evidence related to after this period and the claimant blames the respondent for the worsening of his conditions.
41. In June 2022 (two months before he commenced employment) the claimant attended the Dept of Rheumatology at King George Hospital, Ilford. The report (pages 114-115) notes that his painful ankle and big toe was typical of a gout attack. The claimant had continued to have gout attacks in the left big toe at least every month until recently before June 2022– his last attack had been in March 2022 and was not as severe as previously. This demonstrates a likely recurrence of the gout symptoms.
42. A letter from the claimant's GP dated 26 October 2022 refers to back pain and difficulty in standing for long periods and refers to the claimant previously suffering from gout and plantar fasciitis. There is no reference to scoliosis.
43. I note that a Fit Note for the claimant's inability to work as at end February 2023 refers to hypertension (and to none of the claimant's alleged conditions). There was no Fit Note produced during the relevant period which referred to any of the claimant's alleged conditions.
44. A report from the Physiotherapy Service at King George Hospital dated 8 December 2023 (pages 159-160) refers to the claimant's 2+ years chronic bilateral plantar fasciitis and also a "long past history with gout" which can randomly flare up.
45. A letter dated 1 May 2024 from Queens Hospital Romford (page 180) refers to Bilateral heel plantar Fasciitis and the claimant struggling with heel pain for "2 to 3 years" ie from May 2021/2022.
46. All the medical evidence relating to CBT and stress management post-date the claimant's employment by a considerable period.
47. The claimant's GP notes (pages 195-197) refer to the Kyphoscoliosis and scoliosis mentioned in September 2019 but there is no further reference to any need for treatment until 28 July 2023 (which is after the relevant period).

Claimant's credibility

48. Much of the claimant's evidence was unclear, inaccurate, and rambling. He did not answer the questions asked and he frequently appeared to evade giving answers at all. I make allowances for the fact that the claimant is a litigant in person and that giving evidence is a stressful experience for any witness, let alone a claimant giving evidence about alleged disabilities. However, I found that the claimant did not come across as a wholly honest witness and I could not rely on the accuracy of many of his responses.
49. I also note that the claimant's disability impact statement contained none of the information which the claimant added as oral evidence at the PPH.

50. EJ Brown's Case Management Order (at page 62) asked that the claimant "*send the Respondent a disability statement, setting out his evidence in respect of his gout, plantar fasciitis, scoliosis and depression conditions, including the substantial effects of those conditions on the Claimant's ability to carry out normal day to day activities, when those effects started, how long they lasted and what the effects would have been had the claimant not been receiving any relevant treatment*". The claimant agreed that this wording was clear and non-legalistic. He gave no explanation as to why he had not followed EJ Brown's instructions, especially as he had said that he had some legal assistance in preparing the impact statement. His disability impact statement was dated 29 May 2024. The PPH in July 2024 had been postponed. The claimant had over 3 months to update his impact statement; contact friends to support his evidence about the severity of his symptoms etc.
51. I find that the claimant's additional oral evidence was not supported by any documentary medical or other evidence. I found his evidence to be often contradictory, self-serving and to exaggerate the effect of his ailments, when compared to his medical notes. I also note that the claimant, on his own evidence, was prepared to withhold information about his medical condition (as in the post-offer questionnaire) when it suited him to do so. This also impacts on his credibility.

Conclusions

52. I will look at each of the claimant's alleged conditions in turn.

Depression

53. There was no evidence of any diagnosis of this condition. The claimant's own description indicated that it flowed from situational circumstances, such as his father's death, his gout and plantar fasciitis, his car accident in April 2022. I find that the claimant has not shown on a balance of probabilities that he had a mental impairment of depression. As such, I do not have to go on to consider the other elements of the section 6 definition. However, I note that the claimant's additional oral evidence about the substantial adverse effects of this condition concerning job interviews did not relate to normal day to day activities, in any event.

Scoliosis

54. There was reference to kyphoscoliosis in March 2019 with the symptoms of mid back pain. This could be a physical impairment. However, I find that the claimant has not shown on a balance of probabilities that this impairment had a substantial adverse effect on his normal day to day activities.
55. For the reasons set out above, I do not accept the claimant's evidence about the impact of this impairment on his day-to-day activities. The claimant may well have had some back pain during the relevant period, but not such as to amount to a disability within the section 6 definition.

Gout and Plantar Fasciitis

56. There are references in the medical evidence to the claimant having both these conditions from around 2021. There is reference in the OH Report of February 2022 to both these conditions and other medical references to chronic plantar fasciitis and gout. I accept that the claimant has both these physical impairments.
57. I find that both conditions are long-term in that there is medical evidence to show that they are likely to recur (such as the OH Report of February 2022).
58. The question is then about whether these impairments have a substantial adverse effect on the claimant's normal day to day activities. I have already stated that I found the claimant to be an unreliable witness on this point. None of the medical evidence supports the evidence which the claimant gave about the extent of these two conditions on his day-to-day activities. It does appear that the claimant's evidence was exaggerated as to the effect on his day-to-day life.
59. I also note that, even if it could be relied on, much of the claimant's evidence about the substantial adverse effect of these conditions on his normal day to day activities did not relate to the relevant period in any event.
60. I find that the claimant has not shown on a balance of probabilities that he is a disabled person for the purposes of the EQA. His claims for disability discrimination are accordingly dismissed.

Employment Judge Henderson

JUDGMENT SIGNED ON: 15 November 2024

JUDGMENT SENT TO THE PARTIES ON

21 November 2024

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AND ENTERED IN THE REGISTER

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FOR THE SECRETARY OF THE TRIBUNALS