



EMPLOYMENT TRIBUNALS

Claimant: Ms H Walton

Respondent: B&Q Limited (1) and Lucille (Lulu) Barry (2)

Heard at: Norwich Employment Tribunal **On:** 15 October 2020

Before: Employment Judge KJ Palmer

Appearances:

For the Claimant: Ms Bradbury (Counsel)
For the Respondent: Mr Piddington (Counsel)

RESERVED JUDGMENT PURSUANT TO A PRELIMINARY HEARING

It is the judgment of this Tribunal that the Claimant is not a disabled person for the purposes of Section 6 of the Equality Act 2010. Her claims in discrimination arising from disability and harassment therefore fail and are dismissed.

REASONS

- (1) This matter came before me today as a preliminary hearing to determine the issue of whether the Claimant was a disabled person for the purposes of Section 6 of the Equality Act 2010. The Respondents dispute that the Claimant was so disabled.
- (2) Both parties were represented by Counsel.

History and background of this matter

- (1) The Claimant was employed by the First Respondent as a showroom adviser at the Hall Road Norwich store of the First Respondent from 16 July 2018 until 23 June 2019. The Claimant resigned her employment.
- (2) On 26 July 2019 the Claimant presented this claim to the Watford Tribunal.
- (3) Her claims consists of a claim for discrimination arising from disability under Section 15 of the Equality Act 2010 and a claim for harassment based on the protected characteristic of disability under Section 26 of the Equality Act 2010.
- (4) These are the only claims pursued by the Claimant. Both of her claims are entirely dependent upon her being a disabled person for the purposes of the Equality Act legislation more particularly Section 6 of the Equality Act 2010. If she is not disabled then her claims must fail.
- (5) The proceedings were served on the Respondents and a response was filed within the appropriate time limit. The Respondents dispute that the Claimant is a disabled person for the purposes of the appropriate legislation.
- (6) Pursuant to the filing of that response the file was referred to an Employment Judge who caused a letter dated 22 December 2019 to be sent to the Claimant with a copy to the Respondents.
- (7) I had that letter before me together with a very comprehensive bundle put together for the purposes of this hearing running to some 70 pages.
- (8) In that letter the Tribunal gave orders that the Claimant obtain a report from a qualified medical practitioner to deal with the question of disability under Section 6. It also went on to order that the Claimant produce a disability impact statement. It directed that pursuant to that disability impact statement and the medical evidence the Respondents should then revisit its decision as to whether it wished to continue to contest the issue of disability.
- (9) Attached to that letter was a very comprehensive standard detailed set of instructions of the kind usually made to a medical practitioner who would be instructed to produce a report. The Claimant did not fully comply with the letter of 22 December 2019.
- (10) There then took place a closed preliminary hearing on 23 March 2020 before Employment Judge Postle sitting alone.
- (11) Judge Postle listed the matter for a full merits hearing and made various other directions one of which was that the issue of disability which remained in dispute should be determined in a separate preliminary hearing which is the hearing before me today. He went on to set out the issues between the parties and made various directions both in preparation for this hearing and then more

particularly in preparation for the full merits hearing which is listed in February 2021.

- (12) He directed that any additional medical evidence together with witness statements and an impact statement should be served by the Claimant on or before 25 May 2020. He made a further direction that the Respondents shall have 14 days of receipt of that further evidence to confirm whether the issue of disability remained live. If they conceded it at that point there would be no need for this hearing.
- (13) So in essence that was the second time the Claimant had been ordered by the Tribunal to provide medical evidence and an impact statement to support her claim that she was disabled under Section 6.
- (14) The reason why this was necessary was because the only document the Claimant produced pursuant to the letter of the Tribunal dated 22 December 2019 ordering her to produce a medical report and an impact statement was the document that now appears before me at pages 55 and 56 of the bundle entitled "Claimant's Impact Statement" and dated 28 February 2020.
- (15) No medical report was obtained. As a result the Respondents were not able to consider whether they could concede the issue of disability at that time and it was necessary for the whole matter to be revisited in the preliminary hearing before Employment Judge Postle. Accordingly he made very similar orders.
- (16) Pursuant to Judge Postle's Order for medical evidence and an impact statement to be provided the Claimant produced only a further document which appears in the bundle at pages 61, 62 and 63 which is a letter from a Mr C S Pasapula a consultant orthopaedic surgeon which purports to be a medical report. The Claimant provided no further impact statement and relied upon the one produced on 28 February 2020.
- (17) It is necessary for me to make clear that the Claimant has been represented by solicitors throughout this matter.
- (18) Pursuant to that medical report and the earlier impact statement the Respondents have chosen to continue to contest disability and that is why the matters appears before me today.
- (19) In the Tribunal I had before me the Claimant and Mr Hubbard of the Respondent.
- (20) I heard evidence from both the Claimant and Mr Hubbard.
- (21) Prior to the commencement of hearing Mr Piddington, on behalf of the Respondents, argued that as the Claimant had done very little to comply with directions to provide information to support her claim she was disabled she should not be permitted to give further evidence. He said that she had ample opportunity to provide such evidence and had chosen only to provide evidence

that was wholly inadequate. She should not be permitted to enhance her position now. She had ignored largely the entreaties of the Tribunal in its letter of 22 December 2019. She had ignored the Order of Employment Judge Postle of 23 March 2020 and had ignored a further letter from the Tribunal dated 28 September in terms of providing further detailed medical evidence.

- (22) Ms Bradbury said that this was a hearing to determine whether the Claimant was a disabled person for the purposes of Section 6 and that all evidence including evidence provided in accordance with the Tribunal's directions and oral evidence was relevant.
- (23) Having considered those submissions I agreed with Ms Bradbury that the Claimant should be permitted to give oral evidence before this Tribunal and I would take that evidence into account with the written evidence before me and the evidence provided by the Claimant pursuant to the various Orders made by the Tribunal.
- (24) I would also hear evidence of course from the witness produced by the Respondents, Mr Hubbard.
- (25) I duly heard evidence from the Claimant and from Mr Hubbard.

Findings of fact

- (26) The Claimant was employed by the Respondents between 16 July 2008 and 23 June 2019 as a showroom adviser. She resigned her employment on 23 June 2019.
- (27) She pursues claims of disability discrimination as I have described above.
- (28) Those claims are more particularly set out in the Order in the summary of Judge VJ Postle dated 23 March 2020.
- (29) The disability on which the Claimant relies is a shattered talus bone. She therefore relies on a physical impairment.
- (30) In giving evidence she explained how she broke her talus bone on 13 July 2016 some two years before she started working for the Respondents. She explained in evidence that she was in a walker and that she had to go through two operations and that she remained in a cast for some 13 months. She said that the bone had never properly healed and the condition was degenerative.
- (31) I found her evidence of medication she had taken and was taking to be uncertain and faltering. She said that she had spent some time, two years in fact, taking Tramadol and Diclofenac. When pressed she said she came off Tramadol in July of 2018 and thereafter she took Diclofenac only but only sporadically when she needed it.
- (32) It is common ground that the material time to assess the Claimant's disability was 13 April 2019. This is the date of all the acts she relies upon in her

complaint. She said that in April 2019 she was taking Diclofenac regularly along with Paracetamol. I specifically asked her the question about whether she was taking Diclofenac in April 2019 again and her answer was uncertain and somewhat contradictory to her earlier answer. In answer to my question she said only when cramping.

- (33) She gave evidence to the effect that her job with the Respondents was to design kitchens and bathrooms and she had to show customers around the showroom however much of her job was undertaken whilst sitting down. She said that she did not climb the stairs to the office canteen because she found going upstairs difficult and would eat her lunch in her car. She said if she was having a bad day she would find coming down the stairs very difficult and she experienced a fear of falling.
- (34) She denied that there was ever any occasion for her to use steps or a stepladder and she said that when her job did require it she asked a colleague to use the steps. She said she had a noticeable limp and experienced stiffness. She was questioned about the evidence of Mr Hubbard who had said that as part of her role she had to attend briefings standing up, she said that she did stand and could stand but only for five minutes shifting her weight to support her.
- (35) When questioned she said she had not seen a doctor for some time, in fact since March 2018 in connection with her injuries.
- (36) Under cross-examination she admitted that she had been legally advised in connection with her claim since June/July 2019. She was asked why she had failed to deal properly through her lawyers with the Tribunal's letter of 22 December 2019. She said that she had provided the statement at page 55 which was before me. She was asked why she had not provided a medical report as requested by that letter and why she had not provided further medical evidence as ordered by EJ Postle. She said she thought she had provided enough.
- (37) Mr Piddington asked her why she had not sought to provide proper detail of the impact of her injury before today when she had given some live evidence as to the impact. He suggested that this was simply an attempt to enhance her chance of success when no such evidence really existed. She said she thought she had done enough and there was the impact statement at paragraph 55 and a medical report from Mr C S Pasapula.
- (38) She was asked why she had not seen anyone prior to a medical report being produced. That report in the letter from Mr Pasapula dated 20 May 2020 was based on a consultation he had with her some three years earlier. She admitted she had no consultation and had not discussed with him the impact on her of the injury and her day to day activities. She admitted that walking around for 30 minutes was not a problem and that standing for as much an hour might be possible.

- (39) She admitted that she had no absences during her employment with B&Q relating to her foot. She said she didn't need to. She was asked why Mr Hubbard in his evidence indicated that he had never noticed that she had a limp. She said that a limp to one person may not constitute a limp to another. She admitted that she had never said anything to B&Q and had never asked them to do a risk assessment. It was suggested to her that the reason for this was that it had little or no impact on her day to day activities as a result of the injury which took place many years earlier.
- (40) She said that she had raised the disability with the Respondents when she was asked to use a stepladder and had been told that someone else could do it. The Respondents dispute that that conversation took place. Mr Piddington pointed out that such level of detail did not appear in her impact statement. She admitted that she did not live in a bungalow and had to use stairs on a day to day basis at home. When pressed she admitted that she had used the stairs to go to the canteen because upstairs was also the training room and the HR room. She said that she found it manageable but that coming down was always difficult.
- (41) In his evidence Mr Hubbard said that he had never seen any evidence of the Claimant having difficulty in carrying out her day to day duties. He said that he was aware that the Claimant did sometimes take her lunch in her car but that many employees did that.

Submissions

- (42) Pursuant to the oral evidence I have heard and the documents before me I heard submissions from Mr Piddington and from Ms Bradbury.
- (43) Mr Piddington reminded me that the burden of proving the disability under Section 6 of the Equality Act was on the Claimant and that the key was that the Claimant had to prove that she was disabled at the material time. The material time was 13 April 2019. He pointed out that the accident had taken place in July of 2016 and the Claimant had never had any medical attention or seen her GP or any medical professional with respect to that injury after March 2018. He took me through the law and said that the difficulty was that there was very limited medical evidence which had been put forward by the Claimant in this case. He said that the Claimant had tried to enhance her position by giving oral evidence today but that the disability impact statement was inadequate and the only medical report produced was wholly inadequate. He said I should treat the oral evidence I have heard in addition today with extreme caution.
- (44) He reminded me that she has been represented by solicitors throughout so she would have been advised as to what was necessary to satisfy the test under Section 6. He said that she had overall completely failed to explain the effect of her apparent disability.
- (45) He said the evidence simply did not go far enough. He said only today did she descend into any kind of detail and that I should regard that evidence with some scepticism. He reminded me that when she applied she knew the job and she

knew that standing, walking and stock retrieval by use of ladders would be required. He reminded me that I could only reach a conclusion today on the evidence before me. There was no evidence to suggest that she was struggling to do the work, she had in fact increased her hours.

- (46) He asked me to consider that Mr Hubbard's evidence was clear and credible and that he had given evidence that at the material time there was no evidence to suggest that she was impaired. He said there was no limp. We referred me to the guidance on disability set out in the guidance on matters to be taken into account in determining questions relating to the definition of disability 2010 "the Guidance" as well as the relevant Sections of the Equality Act and the Equality Act 2010 Disability Regulations.
- (47) Particularly with respect of the Guidance he took me through B7, B9, B12, C9 and C11. He then addressed me on the paucity of the Claimant's medical evidence. All that she had produced was one report which really did not amount to a report. The report consisted of what appeared to be a cutting and pasting of the issues set out in EJ Postle's Case Management Summary posing the issues to be determined with responses slotted in by the consultant. It was common ground that the only evidence Mr Pasapula had before him when compiling that report was his notes from 2017. He says the failure for the Claimant to consult and be seen by Mr Pasapula renders a report wholly inadequate. He has reached certain conclusions on the basis of no evidence before him.
- (48) Ms Bradbury said that I should accept the evidence given orally today which had bolstered the medical evidence before me. She admitted that it was not the most comprehensive documentary evidence in such a case. She took me through the tests to be applied and also referred to the Guidance. She admitted that Mr Pasapula's report was not the most conventional report.

The Law

- (49) In order to pursue a claim in disability discrimination under the Equality Act a Claimant must satisfy the definition set out under Section 6 of that Act. Section 6 says as follows:

"6 Disability

(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.

(2) A reference to a disabled person is a reference to a person who has a disability.

- (3) In relation to the protected characteristic of disability—
- (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
 - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
- (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—
- (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
 - (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
- (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
- (6) Schedule 1 (disability: supplementary provision) has effect.”
- (50) I have also need to have due cognisance of the Guidance that I have mentioned above. Also where appropriate the Equality Act 2010 (Disability Regulations 2010).
- (51) It is necessary to establish when the material time is for establishing the disability and the material time is the date of the alleged discriminatory act. This is also the material time when determining whether the impairment has a long term effect.
- (52) I am also duty bound to take into account guidance in deciding authorities in particular **Goodwin v Patent Office 1999 ICR 302**. That was an EAT case and it set out that the Tribunal in such a case needs to look at the evidence by reference to four different questions or conditions. These are:
- 1. Did the Claimant have a mental and/or physical impairment (the “Impairment Condition”)?
 - 2. Did the impairment affect the Claimant’s ability to carry out normal day to day activities (the “Adverse Effect Condition”)?
 - 3. Was the adverse condition substantial (the “Substantial Condition”)?
 - 4. Was the adverse condition long term (the “Long Term Condition”)?
- (53) The burden of proof is on the Claimant and a Tribunal can only determine the questions it needs to determine on the evidence before it. Whilst the threshold

is only on the balance of probabilities the evidence still needs to be sufficient to enable the Claimant to discharge that burden.

- (54) I have also had due cognisance of the case of **J v DLA Piper UK LLP 2010 ICR 1052** and **Khorochilova v Euro Rep Limited 0266/19**.

Conclusions

- (55) The documentary evidence supplied by the Claimant during the course of this case is as poor as I have ever seen in such a case. The Claimant was ordered by the Tribunal on three occasions to provide adequate medical evidence including a report from a qualified medical practitioner to deal with the issues. The material date as I have identified and as was identified by EJ Postle in the preliminary hearing was 13 April 2019.
- (56) Despite those Orders from the Tribunal the Claimant through her representatives produced very little adequate documentary evidence.
- (57) The only evidence before this Tribunal were notes from some two and a half years prior to the material date and by the Claimant's Counsel own admission the wholly unconventional attempt at a medical report produced for the purposes of this hearing. That medical report was produced without any examination of the Claimant and was based on an examination of the Claimant some three years earlier and sought to answer a cut and pasted version of EJ Postle's list of issues setting out, amongst other things, the constituent parts of Section 6 to be determined. Also set out in that report were the issues of fact set out in Judge Postle's summary. I find myself in agreement with Mr Piddington that this report is wholly defective in that it provides no meaningful evidence to assist the Tribunal in determining whether the Claimant has discharged the burden on her to show she is disabled under Section 6.
- (58) The only other meaningful written evidence before me to assist me in determining whether the Claimant was disabled at the material date is the impact statement at pages 55 and 56 of the bundle. That was dated 28 February 2020 and is to say the least perfunctory. It really goes into no substantive detail about the effect that the broken talus bone has on the Claimant's ability to perform day to day activities. There is some mention of her having difficulty putting her full weight on her foot and it specifies that she walks with a very visible limp. It is almost wholly devoid of effective detail however.
- (59) Turning the Claimant's evidence before me today I am unimpressed with it.
- (60) She was uncertain and unclear particularly with respect to medication she took at the time of the accident and subsequently. Whilst she purported to add more detail to evidence of the impairment and its effect on her day to day activities I do not think she was able to do so in a convincing way. I accept Mr Piddington's submission that I should be very wary of this additional evidence. She was uncertain in her evidence about how she coped with standing at meetings and in whether or not she accessed upper floors.

- (61) The Claimant presented this claim to the Tribunal on 26 July 2019. She was advised by professional representatives throughout the whole process and would have been advised at the time she received the letter from the Tribunal dated 22 December 2019. She was represented by solicitors at the preliminary hearing before Judge Postle so would have been advised about the importance of complying with those directions and there was even a further letter to her advisers of 28 September 2020 reminding them of the Orders of Judge Postle. Yet little further was produced.
- (62) The impact statement was inadequate and the purported medical report was fundamentally inadequate.
- (63) Turning to the evidence I have heard today the Claimant has tried to improve upon the documentary evidence thus far produced but in my judgement without success. I have also heard from Mr Hubbard whose observations I accept. I do not think a huge amount turns on Mr Hubbard's evidence as quite frankly on her own evidence she simply has not reached the necessary threshold on the balance of probabilities to satisfy the Section 6 tests.
- (64) It is clear that she suffered a very significant injury in July 2016. There is no doubt that for some time thereafter she was severely incapacitated. The difficulty is that at the material date some three years later there is simply insufficient evidence to support a finding sufficient to satisfy the Section 6 tests.
- (65) Dealing with those tests:

1. Did the Claimant have a mental and/or physical impairment?

Applying the guidance and the tests in **Goodwin v Patent Office 1999 ICR 302** applying the evidence before me I am not satisfied that there was such an impairment at the material time. I am guided by the Judgment in **Khorochilova v Euro Rep Limited 0266/19** as to my approach.

2. Did any impairment affect the Claimant's ability to carry out normal day to day activities?

Applying the guidance and the authorities and the evidence before me I do not consider that this would have been the case in respect of any condition the Claimant was suffering from. I am unconvinced by the Claimant's evidence before me. She said she could walk for 30 minutes and could stand for up to an hour. I am minded to accept her evidence that she managed to do this by use of a coping strategy by shifting her weight or standing on her better leg. I therefore do not think on balance that this could amount to an impairment which affects her day to day activities. I was unimpressed by her evidence as to not using the canteen or ascending and descending the stairs to the upper level of the building where the training room and HR facilities were. I therefore could not

have found that there was a condition affecting the Claimant which affected her ability to carry out normal day to day activities.

3. Was the adverse condition substantial?

I do not find that any adverse condition could have been substantial on her evidence. She may have been suffering some residual difficulties pursuant to the accident three years earlier but this was clearly not apparent to Mr Hubbard. It was not substantial.

4. Was the adverse condition long term?

I simply do not have sufficient evidence in front of me to be able to determine that question and therefore I must find that it is unproven.

(66) I would like to stress that I do not take the decision that I have taken lightly. I am very conscious that the threshold is a relatively low threshold for an individual to pass the tests under Section 6.

(67) However I regard this case as somewhat exceptional in that the evidence before me is so inadequate that that test has not been passed.

(68) The reasons I have set out above therefore I do not find that the Claimant is a disabled person for the purposes of Section 6 of the Equality Act 2010.

(69) Therefore all her claims fail and are dismissed.

(70) The listing for the full merits hearing in this matter should now be vacated.

Employment Judge KJ Palmer

Date: 3 December 2020

Sent to the parties on:

4 December 2020

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For the Tribunal:

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