EMPLOYMENT TRIBUNALS

Claimant: **Miss S Hudson**

Respondent: **Jack Petchey Foundation Limited**

Heard at: **East London Hearing Centre (by CVP)**

On: **4 October 2022**

Before: **Employment Judge Feeny**

Representation
Claimant: Mr Effiong (lay representative)
Respondent: Mr Horan (HR advisor)

JUDGMENT having been sent to the parties on 10 October 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1. This was a preliminary hearing to address two issues in this claim. The first is whether the Claimant was a disabled individual and if so the relevant period that she was disabled. Secondly, whether the Respondent had knowledge of the Claimant's disability and again, if so, for what period of time.

2. The Claimant was dismissed by the Respondent on 24 September 2020 following the expiry of her notice period, the reason given was redundancy. The Claimant has brought complaints of unfair dismissal, direct disability discrimination, discrimination arising from disability, and victimisation. Those last three complaints are brought under the Equality Act 2010 ("EqA"). Of those EqA complaints, my findings in this Judgment are relevant to the claims of direct disability discrimination and discrimination arising from disability.

The Hearing

3. This was an open preliminary hearing which took place by CVP. There were no technical problems and I was satisfied that everyone had been able to participate fully in the hearing.

4. I heard evidence from the Claimant and Ms Trudy Kilcullen MBE for the Respondent. Both witnesses had submitted written statements and were cross examined on the contents. Following the oral evidence of the two witnesses, I heard brief submissions from the parties' representatives and I was able to give a judgment with reasons orally at the end of the hearing.

5. I was not provided with a paginated bundle of documents for the hearing but instead the Respondent had sent to the Tribunal a zip file of individual documents which could be navigated from a hyperlinked index document. This worked tolerably well during the hearing but I did notify the Respondent's representative at the end of the hearing that preparation of a single paginated PDF for use at the final hearing would be preferable.

Findings of fact

6. At the material time the Claimant was employed by the Respondent as an Events Manager. A substantial element of her duties was to arrange, set up, and present events at various locations.

7. On 9 April 2019, the Claimant was seriously injured in a car accident. She suffered several fractures to her leg and had surgery on those injuries the following day. She was an in-patient in hospital for around six days. Following discharge she was still bed-bound for quite some time. She was called back into hospital on 8 May 2019 for surgical revision which led to a further in-patient stay, with her being discharged on 13 May 2019.

8. On 28 May 2019, the Claimant returned to work, albeit working from home only. She in fact remained non-weight bearing until July 2019. On 6 August 2019, the Claimant provided a fit note from her GP which indicated that she may be fit for a "return to work", as in a return back to the office doing physical duties with various reasonable adjustments in place.

9. The Respondent wrote to the Claimant's orthopaedic consultant for a report as to her state of health, asking a number of questions including the question as to whether she was likely to be considered a disabled individual. That letter was written by the Respondent on 8 August 2019 and a reply was received from Mr Bannerman, who was the Claimant's consultant, on 18 September 2019. The salient parts of Mr Bannerman's report are as follows.

> "The fracture is now clinically and radiologically healed and she has undergone rehabilitation with knee bracing and physiotherapy and is now mobilising without a brace. However she still has weak quadriceps muscles causing about 15 degrees extensor lag and knee flexion of 100 degrees with some residual leg swelling. These should hopefully improve with continued exercises."

Under the prognosis section of the report, Mr Bannerman wrote:

> "Sasha is doing well and has begun to work partly from home and is likely to experience some discomfort in the knee for the medium to long-term.
>
> Our main concern is the very much increased risk of developing premature arthritis

> in the knee simply because of the nature of the fracture. We have cautioned that this could be accelerated by compressive forces on the knee. The time scale for any arthritis developing or the amount of stress on the knee which could accelerate this are wholly unpredictable."

Under the heading "Advice going forward" he wrote:

> "Sasha has been advised to exert her knee judiciously and minimise her activities where this can be helped e.g. working from home whenever possible and appropriate and use of helping assistant whenever feasible.
>
> I think she should be able to return to work with the following considerations.
>
> 1. She should be able to commute to work by public transport probably initially using a walking aid for safety and hopefully to secure her seating by considerate fellow passengers and extra travelling time be considered for her until such time she feels fully confident.
>
> 2. She should be able to sit at her desk but may find this tiring for long periods initially but this should improve.
>
> 3. She should be able to walk around at work and climb stairs again with some difficulty initially and may be a bit slow and will need a phased return to work.
>
> I cannot predict if she will revert to her full pre-injury mobility, however early indications from her are promising and as previously mentioned she is advised to be judicious with her activities and work within pain tolerance."

10. There was then a meeting convened between the Claimant and the Respondent on 12 September 2019 at the Claimant's home. Many of the things said and done at this meeting are relied upon as acts of discrimination for the EqA complaints.

11. Following that meeting, the Claimant wrote a letter to the Respondent dated 3 October 2019 setting out in detail what reasonable adjustments she said she required. These reasonable adjustments – which it appears were implemented - were essentially that the Claimant would have the benefit of physical assistance from colleagues when attending events. This would include help from a colleague loading up the boxes of items and equipment that needed to be taken to the venue, lifting those boxes from the office into the car, unloading those boxes out of the car and then unpacking them at the event venue, help putting up and taking down banners, and a chair provided for her to sit on during the presentation on the basis that she was unable to stand for long periods. It was also requested, and agreed, that the Claimant's commute to the office would be varied so she would avoid the rush hour. The Claimant told me in evidence that that was on account of pain in her leg using the clutch in congested traffic.

12. The Claimant attended her first event on 17 October 2019. She was unable to do the lifting at that event and she sat in the chair on the stage to deliver the presentation. She was able to drive to and from the event, which she told me was because the route was straightforward and the traffic was not congested.

13. On 5 November 2019, the Claimant was discharged from her physiotherapist and she was told to continue with her exercises which she did. From that point onwards she was no longer under any active care or treatment from any medical professional.

14. On 13 December 2019, the Respondent held its Christmas party in Westminster. The Claimant attended that party but she took crutches with her because she was concerned about her ability to walk long distances and indeed stand for a lengthy period of time. The party was on a boat which obviously caused some issues because of the lack of stability. Ms Kilcullen confirmed to me that the Claimant had experienced some difficulty at that event in terms of mobilisation. Ms Kilcullen gave an illustration of these difficulties during her evidence when she described the other guests attempting to incorporate the Claimant in some dancing at the party because the Claimant was not able to freely participate as she would have liked.

15. Moving forward in the chronology, there was then a review meeting between the Claimant and the Respondent on 20 December 2019 when the Claimant's symptoms and restrictions and indeed the adjustments were reviewed. The notes of that meeting record that the Claimant "highlighted the following":

- SH said she was doing well and had improved a great deal but that her full recovery is taking time.
- Pain level was much lower/ no longer routinely taking pain killers.
- Going down stairs was still a little painful.
- Generally no pain while resting.
- No longer having physio but was taking time to do prescribed exercises.
- No longer requires walking aid.
- SH said she was ok with driving although longer journeys can on occasion be tough.
- SH was trying to do more loading and unloading as appropriate. **TK/PA confirmed that she should not over estimate what she can do with JPF team will still be able to offer assistance with this.** (original emphasis)

16. The Claimant clarified in evidence that the reference to "pain killers" in the above note was to paracetamol, which the Claimant would take on occasions if she suffered pain due to over-exertion or activity. Although she had some remaining co-codamol from when she was more seriously injured, she tried to avoid taking this.

17. At the same meeting, it was agreed there were no further office adaptions needed for the Claimant.

18. To summarise the position in terms of the Claimant's condition at that point and its

impact on her work (i.e. December 2019): She did not take pain killers every day although she did on some days. As is recorded in the notes, the Claimant was experiencing problems walking downstairs and she explained in evidence that this was due to knee pain. It appears that the Claimant did not report problems walking upstairs at this meeting. As already noted, it was agreed between the Claimant and the Respondent that the assistance at events would continue, such as the help with lifting and carrying and a chair being available for sitting on stage during presentations. These adjustments stayed in place until March 2020. At that point the national lockdown caused by the coronavirus pandemic intervened and from then on there were no longer any physical events taking place.

19. As for impact outside of work, the Claimant lives in a flat without stairs and she drives a manual car. She went to the gym before the accident to do classes and other activities. She said in evidence that she still does some exercises after the accident, including swimming, but she is unable to do the more active exercise classes such as Zumba, due to the impact of, and difficulty in, jumping.

20. It is also of note that by February 2020 the Claimant had developed hip pain. Treatment for this was also interrupted by the national lockdown but the GP records show that in July 2020 the Claimant asked for a referral to see the physiotherapist to address this.

21. The focus of my findings of fact so far have been on the position from December 2019 onwards. That is because it is not realistically disputed that the Claimant had significant problems with her condition, in particular her mobility, prior to December 2019. For instance, in late summer/early autumn 2019 she was still mobilising using crutches.

22. From December 2019, it is fair to say that there had been a reasonable level of recovery. However, the symptoms that the Claimant still experienced from that point forward were as follows: she could not walk down stairs without experiencing pain, she could not manage the clutch in her car repetitively in congested traffic without pain, she could not lift boxes or heavy objects for the events, she could not stand for a long period of time, she had difficulty dancing at the Christmas party, and she could not undertake exercise classes which involved activities such as jumping.

23. Those problems continued until February 2020, in particular there was not significant improvement or at least not sufficient improvement so that she was in a position to tell the Respondent that she no longer needed the assistance for events with lifting and carrying and so on. I also find as a fact that those problems, steady as they were in February 2020, continued from March 2020 up until September 2020 which is the last date that I need to consider for the EqA allegations.

24. In terms of the second issue - the Respondent’s knowledge of disability - the relevant findings of fact are as follows. The Respondent was aware that the Claimant experienced the problems as I have enumerated above in substantially the same way as I have set them out. Ms Kilcullen had observed the Claimant experience problems at work, which she had agreed to make adjustments for. This included the mobility problems which impacted on her ability to participate at events, and which required the adjustments mentioned above, and, of course, the problems evident at the Christmas party.

25. The Respondent continued to provide the adjustments until the events stopped being held in March 2020. Although in her written statement Ms Kilcullen suggested that after the December 2019 meeting adjustments were no longer made to help the Claimant with events, other than perhaps putting banners up, her oral evidence was slightly different. Ms Kilcullen confirmed to me that most the adjustments were still made, but that she felt this was done more to be supportive than due to a genuine need of the Claimant's.

26. However, the Respondent had left it to the Claimant to notify it if she had recovered to the point where the adjustments were no longer required and the fact is that the Claimant had not done so by the time the pandemic intervened. The Claimant was keen to recover from her injury and, in my judgment, would have declined adjustments if she genuinely felt they were no longer needed.

27. It is the case that the Respondent was unsighted on any ongoing issues from March 2020 because it had no further face to face contact with the Claimant. All meetings, events, etc. were carried out remotely and, indeed, the Claimant was furloughed. However, there was no communication from the Claimant, or other evidence, to suggest that the Claimant's symptomology, and restrictions, had substantially changed.

The Law

28. Section 6 EqA defines disability in the following way:

> "a person has a disability if the person has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day to day activities."

29. The word "substantial" is defined in section 212(1) EqA as meaning "more than minor or trivial". As for "long-term", Schedule 1, para 2 EqA says:

> "(1) The effect of an impairment is long-term if—
>
> (a) it has lasted for 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 the life of the person affected."

30. The word "likely" means "could well happen" (*Boyle v SCA Packaging Ltd* [2009] ICR 1056, HL).

31. In coming to my decision, I have had regard to the statutory guidance on disability ("Guidance on matters to be taken into account in determining questions relating to the definition of disability", published in 2011) and three sections in particular. The first is section B7, the relevance part of which is as follows.

> "Account should be taken of how far a person can reasonably be expected to

> modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities."

32. I have also had regard to C4 which is as follows.

> "In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age)."

33. D3, on the meaning of normal day to day activities, is as follows.

> "In general, day to day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing. Having a conversation or using a 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. Normal day to day activities can include general work-related activities and study and education-related activities such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern."

34. In respect of the law on the employer's knowledge, the relevant part of the EqA for this claim is section 15(2). This relates to discrimination arising from disability and is as follows.

> "Subsection (1) does not apply if [the employer] shows that [the employer] did not know, and could not reasonably have been expected to know, that [the employee] had the disability."

35. I have had regard to the Court of Appeal judgment in *Gallop v Newport County Council [2014] IRLR 211, CA* which makes clear that I should assess the employer's knowledge by reference to the facts underlying the statutory test, it is not a question of legal knowledge per se. In other words, it does not matter if the employer did not realise that the legal definition of disability was met, it is sufficient that they perceived the facts that would meet that definition were in existence at the relevant time.

Conclusion

36. In respect of disability itself, the first question is whether there was an impairment. This is not realistically in question. It is obvious the Claimant had a physical impairment, initially affecting her left leg but resolving to an issue affecting left knee. Although the Claimant did raise in evidence the possibility of an ancillary mental impairment, namely PTSD, she told Judge Housego at the previous hearing that she was not relying on it for this hearing. In any event, the Claimant accepts that there is insufficient medical evidence before me to make a determination to draw any conclusion in this regard. So, I have limited my conclusion to the physical impairment.

37. The next question that I have to consider is whether it had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities. As I have already indicated, I consider there was no doubt that the impairment had this effect prior to December 2019. The key question is what was the position from December 2019 onwards?

38. From this point on, the Claimant had an ongoing issue with pain and discomfort in her left knee. It meant that she could not walk downstairs without difficulty, she had to use a handrail, and she could not lift bulky items such as boxes. At this point I should say that I note in her letter dated 3 October 2019 that the Claimant referred to a difficulty lifting "heavy items" and the statutory guidance suggests that lifting heavy items may not fall under normal day-to-day activities. However, I note that the Claimant was able to do that lifting before her injury and there was no suggestion before me that the setting up of physical events involved lifting any particularly heavy items. Moving on, the Claimant could not drive in congested traffic without experiencing pain in her leg operating the clutch. She could not jump or dance without restrictions.

39. All of those issues are, in my judgment, normal day-to-day activities. The Claimant could not do them or she could only do them with difficulty and whilst experiencing pain. That, in my judgment, is sufficient to satisfy the test. There was an adverse effect on her ability to carry out normal day-to-day activities and that adverse effect was substantial. I find that it was present throughout the material time, including as at December 2019 and up until September 2020 (and presumably thereafter, although of course I do not need to, and am not, making any findings to the position beyond September 2020).

40. The final question that I need to consider is when did those substantial adverse effects become long term?

41. I have had regard to the letter from Mr Bannerman dated 18 September 2019. This was five months after the index accident. The prognosis at that time was that the Claimant would experience some discomfort in her knee in the medium to long term. However, there is an unhelpful lack of precision as to what he meant by that prognosis period. It is also unhelpful that Mr Bannerman did not directly answer the question, asked of him by the Respondent, as to whether the statutory definition of disability was likely to be satisfied.

42. So, unfortunately, Mr Bannerman's letter is not of great assistance to me in determining whether at this point the condition was likely to be a long term one. He cannot predict whether the Claimant will return to full pre-injury mobility but he does say that the early indications are promising. It also appears that there is an indication in this letter that the effects of this treatment, which was still ongoing at this point, could lead to a permanent resolution of the Claimant's symptoms. It therefore appears that the permanent resolution (i.e. full recovery) may well be within 12 months of the accident. Put another way, I cannot say at this point in time (18 September 2019) that it was likely that the substantial adverse effect was likely to last for more than 12 months. So the Claimant did not meet the statutory definition then.

43. However, by December 2019, the Claimant's symptoms had plateaued somewhat but still with restrictions that affected her ability to carry out normal day-to-day activities in the way that I have outlined. At this point, the period of time is now some nine months. I

have considered further the position as at February 2020. At this point in time there had been 10 months of symptomology and the Claimant had still not recovered sufficiently, such that the adjustments made to her work still remained in place.

44. Accordingly, in my judgment, on 1 February 2020, just approaching the 10 month mark, it was now likely that the substantial adverse impact caused by the Claimant's condition would last for more than 12 months. My conclusion is therefore that the Claimant did meet the definition of a disabled individual from 1 February 2020 and remained so throughout the remainder of her employment.

45. In terms of knowledge, the matters that I have outlined in respect of the restrictions on the Claimant's ability to carry out normal day-to-day activities were essentially within the Respondent's knowledge because they were aware of the restrictions, they continued to make adjustments for the physical events and, furthermore, Ms Kilcullen gave evidence as to the problems the Claimant had experienced at the Christmas party. Although I appreciate that matters did not get worse after December 2019 there was little evidence that they were improving and therefore the Respondent continued to be aware of the limitations on the Claimant's ability to do her job.

46. The Respondent knew from Mr Bannerman that the prognosis was guarded and although there had been some recovery, there had not been a full recovery. This remained the case as at 1 February 2020. Going forward, there was no further medical evidence put before the Respondent to clarify the situation. On the one hand the Respondent says that it were entitled to believe that the Claimant's symptoms were continuing to resolve, and therefore the disability was not likely to last for 12 months. But on the other hand, there was no evidence that the symptoms had improved from where they were at February 2020, with the Claimant still needing some assistance with the events.

47. It seems to me that the only reasonable conclusion open to the Respondent at that point, i.e. as at 1 February 2020, is the same conclusion that I have reached, namely that the condition was likely to last for 12 months and therefore the statutory definition was met.

48. Accordingly, my finding in respect of the second issue mirrors the first, namely the Respondent had knowledge that the Claimant was a disabled individual from 1 February 2020 onwards.

Employment Judge Feeny
Dated: 28 November 2022