



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104658/2018

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Held in Glasgow on 18 September 2018

Employment Judge: J D Young (sitting alone)

10 **Mr B Robertson**

**Claimant
In Person**

Jarvie Plant Ltd

**Respondent
Represented by:
Christy Fletcher -
HR Advisor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant at the relevant time was not a disabled person as defined in section 6 (1) of the Equality Act 2010 and the claim is dismissed.

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REASONS

1. In this case the claimant presented a claim to the Employment Tribunal stating that he had been discriminated against on the grounds of disability under section 15 of the Equality Act 2010.

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2. The act of discrimination complained of is his dismissal. A preliminary hearing was fixed to determine whether the claimant was disabled in terms of the Equality Act.

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Documentation

3. At the preliminary hearing, there was produced by the respondent an Inventory of Productions paginated 1-79 (R1-79). There was also produced
E.T. Z4 (WR)

an article from 'Cleveland Clinic' on coronary artery bypass surgery. These productions included items produced by the claimant in response to the Order of the Tribunal of 3 September 2018 (R37-38).

The Hearing

- 5 4. At the hearing, the claimant gave evidence and answered questions in cross examination.
5. From the relevant evidence given and documents produced, I was able to make findings on the issue namely whether the claimant was a disabled
10 person as that is defined in section 6 of the Equality Act 2010. I have found it appropriate to outline the evidence before making a conclusion on the issue.

Evidence on the issue

- 15 6. The respondent operates from a yard in Grangemouth as a plant hire business. They supply various items of heavy and light machinery and equipment to the contracting industry ranging from 22-ton excavators, forklift trucks, mobile generators, mobile lighting, steel plates and the like.
7. The claimant was employed by them as a yard labourer in the period between 13 July 2016 and 23 February 2018. Until April 2017, he worked Monday –
20 Thursday, 8am – 5pm and on a Friday between 8am and 4.30pm. He also worked every second Saturday morning between 8am – 12 noon. His duties involved:-
- 25 (i) 'Picking' machinery/equipment and making it available for collection by customers. That would include loading the machinery/equipment onto lorries by means of forklift truck. He would also unload lorries as they arrived back from customers with the hired plant.
- 30 (ii) Valeting and fuelling the machinery which was returned and placing it in the carpark area ready for further hire.
- (iii) Ensuring that the yard was kept clean and tidy when not occupied with those other duties.

8. He and his wife have three adult children and six grandchildren all of whom live 'within a ten minute drive' of his home.
- 5 9. Outside work, his main interests were in his family and the grandchildren. He would walk his sons' dogs and enjoy outdoor activities with his grandchildren. Otherwise, he played snooker at his local club on a weekly basis.
- 10 10. On 10 April 2017, he suffered from chest pains and visited his GP who arranged for him to be taken to Royal Larbert Hospital where he was assessed as having suffered a heart attack. He was then transferred to the Royal Infirmary in Edinburgh on 13 April 2017. On 21 April 2017 he had a 'coronary artery bypass graft x3', commonly known as a triple bypass.
- 15 11. He was troubled with pneumonia and associated secretions after this operation and required some time in a high dependency unit prior to being admitted to a general ward. He was discharged from hospital around 7 May 2017. He was prescribed certain medication at that time, some of which he has not continued. The medication provided on discharge was:-
- 20 (i) Bisoprolol being a 'beta blocker' to slow his heart rate. He has taken that medication since discharge from hospital.
- 25 (ii) Amiodarone to thin his blood. This was taken for approximately six weeks after discharge and then he ceased with that medication.
- 30 (iii) Doxycycline to combat the pneumonia suffered after the operation. That medication ceased not long after discharge.
- (iv) Aspirin. This again to ease blood flow. He has continued with aspirin. He takes another medication to combat the side effects of aspirin on his stomach.

(v) Clopidogrel which ceased about three months after discharge.

(vi) Ruvistatin which he now takes to combat cholesterol and high blood pressure.

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12. Accordingly in February 2018, he continued with bisoprolol and aspirin (and the medication to combat side effects on his stomach) and rosuvastatin.

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13. After six weeks from discharge, he was assessed and advised that he was on course to recovery. Further assessment took place in September 2017 and then again around March 2018. In each of those assessments an angiogram was performed as well as a blood test and x-ray. The results did not disclose any issues. Around 3 weeks prior to the hearing he attended for an angiogram and no issues arose. In evidence in chief he indicated he had received follow up 'letters to say all ok' after these assessments but in cross examination denied he had said that.

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14. More recently he attended his GP to say that he had chest pain. He felt that the chest may be 'moving'. He had been for an xray and awaited the results.

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15. The report from the Royal Infirmary, NHS Lothian (R38) gave an account of the diagnosis/procedure on the claimant and medication prescribed and proposed follow up. The letter of 27 July 2018 from Consultant Cardiologist Allister Hargreaves at Forth Valley Hospital NHS (R37) advised that the appellant was assessed in September 2017 and pronounced 'free from angina'. It was stated that he was 'still having some problems with chest wall pain and fatigue'. The letter also indicated 'coronary artery bypass graft surgery is a major operation and it does take time to fully recover from this. In my experience this can take up to one year' It was also stated that 'the Cleveland Clinic produce literature for patients recovering from coronary artery bypass graft surgery and they would agree that complete recovery can take up to one year'.

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16. The claimant was assessed by Fit for Work Scotland on 29 June 2017 for his fitness to return to work. That assessment (R45/52) disclosed that the claimant's 'ability to perform work related tasks that require you to carry out any heavy lifting or exert upper body strength is currently reduced while you recover from your recent major surgery'(R45). His most common work tasks were stated as:-

(1) 'moving heavy plant equipment' and the 'perceived current difficulty' that his 'ability to perform work related tasks that require you to exert upper body strength is currently reduced while you recover from major heart surgery'

(2) 'manual handling /heavy lifting' and the perceived difficulty as in (1)

(3) 'use of power jet wash/vigorous machine wash' and it was stated 'you do not anticipate any difficulties carrying out this task'

(4) 'outdoor yard duties' which were stated as 'involving emptying skips with a forklift and generally keeping the area clean and tidy' and that he 'did not anticipate any difficulties carrying out this task'

(5) 'access into/out of large plant equipment' which required him to 'be able to pull yourself up into a high vehicle cab' and the 'perceived current difficulty' was as stated in (1)

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17. In light of the assessment a phased return to work was recommended to allow the claimant to rebuild his strength and stamina. For a minimum period of 4 weeks it was suggested the claimant work Monday – Friday 08.00 -12.30 but not work on Saturdays for the first month He made a return to work on 3 July 2017 on a phased basis. He advised this was over three days a week (Monday, Wednesday, Friday) on full time hours. However, he 'struggled' and so the hours were reduced from 28 July 2017 on the same three days a week between 8am – 3pm. Initially that phased work was limited until September 2017 but he found he was 'still struggling' and so that period was

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initially extended to 29 December 2017 and then to after the Christmas /New Year break when normal working was to resume.

- 5 18. He then returned to work as from January 2018 on a full time basis. There was no evidence that he advised he was not ready to return to full time working. He stated (although this was not admitted by the respondent) that he was told he could not ask for any other change of hours for a period of 12 months. He was dismissed 7 weeks later on 23 February 2018 for failure to perform satisfactorily.
- 10 19. He advised that at this time (January – February 2018) that he could not walk more than 100metres without requiring to stop for a rest. In his job he advised that there was quite a bit of walking around the yard. That might be because he had to ‘pick’ plant and machinery or after depositing a machine in the car park at the end of the yard walk back. The yard was about 0.2 miles in length. He stated he would ‘ have to stop a couple of times if walking one end of the yard to the other’ and ‘on the way to the car park are portakabins which go out on hire and need to stand against the cabin for 5/10 minutes’ and he had an ‘inhaler which helps to open the tubes’
- 15 20. Also, he stated he found that he was unable to climb into the very large machines and that he would do that with the assistance of a stepladder which a colleague provided. He also found it difficult to lift heavy objects such as the small buckets because of chest pain. He undertook that task with the assistance of colleagues.
- 20 21. He found it ‘tiring and fatigued to be on his feet all day’. He also found that he could no longer walk the dogs as he used to. Also general housework he found difficult. For example hoovering was no longer possible without becoming ‘painful and tiring’. In lifting heavy bags of shopping he would experience pain.
- 25 30 22. He also found it more difficult to climb stairs. He explained that his house was to be put on the market very shortly partly for financial reasons as he was now short of savings but also to acquire a house ‘on the flat’ so that he did not

have to climb stairs. He stated he was still unable to walk more than 100 metres without 'having to sit on a wall'.

5 23. After he had been dismissed by the respondent, he had found work as a forklift driver but he had not been able to perform the work 'quickly enough' and had been 'paid off'. He is unemployed at present and looking for appropriate work.

10 24. It was suggested to him that he had made application to Asda as a shelf stacker. He disputed that. He explained that he had made application with a facilities management company who he felt were contracted to Asda and that may be where the confusion lay.

15 25. He disputed the Cleveland Clinic Literature produced by the respondent which suggested recovery from his bypass operation would take about 'two months' and that a phased return to work was recommended. His position was that this document was about the recovery period those who went for treatment to the Cleveland Clinic could expect rather than being general information on recovery periods. He indicated that he had carried out an internet search on
20 Cleveland Clinic to find other separate general information which he considered was better informed than that directed to those who had attended the Cleveland Clinic. That information was not produced.

25 26. He explained that he had been a smoker but had not smoked since his operation in April 2017 on the advice that he had received at that time.

30 27. There was put to the claimant timesheets that he had completed in January 2018 showing his daily tasks (R55/66). It was suggested that these time sheets showed that he completed tasks of a similar nature in a similar time as a work colleague in a comparison of time sheets (R67/76). He explained that the times he had entered on his time sheets did not include the times that he had required to rest in the yard. He stated that if he had entered times for completing tasks including the rests he was required to take that would have 'been a disciplinary' matter. He explained that these timesheets therefore

did not accurately reflect the time that he took for particular tasks given the rest breaks he required.

28. As far as any comparison could be made with tasks undertaken by a colleague he explained that in any event many of these times entered for completion of tasks were 'guesstimates' rather than an accurate record.

Submissions

29. The claimant was content to rely on the evidence given to make his case.
30. The respondent had set out a 'response' (R43-44) giving reasons why it was disputed that the claimant was a disabled person. In essence reliance was placed on the comparison in the time sheets between the tasks carried out by the claimant and those of a work colleague who was not disabled to show they were similar. Neither was it considered that the manager could know the claimant was disabled at the relevant time given the information that he had been completing tasks and the manager would be unaware that the claimant had required to take rest periods.
31. It was denied that there was any substantial adverse effect on his ability to carry out day to day duties.

Conclusions

32. The protection from disability discrimination afforded by the Equality Act 2010 only applies in respect of those who fall within the Act's definition of a disabled person.
33. That Act defines a disabled person as a person who has a 'disability' - section 6 (2). A person has a disability if he or she has 'a physical or mental impairment' which has a 'substantial and long term adverse effect on [his or her] ability to carry out normal day to day activities' – section 6 (1). The burden of proof is on the claimant to show that he satisfies this definition.

34. The definition in section 6 (1) is the starting point but is not the only source that should be considered. Part 1 of Schedule 1 of the Equality Act 2010 contains supplementary provisions and the Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2010). This guidance does not impose any legal obligations in itself but Tribunals must take account of it where relevant.
35. Additionally, the Equality and Human Rights Commission (EHRC) has published a Code of Practice on Employment (the EHRC Employment Code) that has some bearing on the meaning of disability under the Equality Act 2010. Again, that guidance does not impose legal obligations but Tribunals should take it into account where relevant.
36. The time to which to assess the disability namely whether there has been an impairment which has a substantial adverse effect on normal day to day activities is the date of the alleged discriminatory act. In this case that would be the date of termination of employment of the claimant namely 23 February 2018. That is also the material time when determining whether the impairment has a long-term effect.
37. Evidence of the extent of someone's capabilities sometime after the act of discrimination may be relevant where there is no suggestion that the condition has improved in the meantime (**Pendragon Motor Company Limited t/a Stratstone (Wilmslow) Limited v Ridge EAT 962/00**). The general approach in determining whether an individual has an impairment serious enough to amount to a disability requires a Tribunal to look at the evidence by reference to four different questions:-
- (i) Did the claimant have a mental and/or physical impairment? (the 'impairment condition')
 - (ii) Did the impairment affect the claimant's ability to carry out normal day to day activities? (the 'adverse effect condition')
 - (iii) Was the adverse condition substantial? (the 'substantial condition')

(iv) Was the adverse condition long term? (the 'long term condition')

The 'impairment condition'

38. In the claim form, the claimant describes that he had to be admitted to hospital for a triple bypass operation on 21 April 2017; returned to work in July 2017 on a phased return on reduced hours; and that was extended on 19 September 2017 to the end of the year and then to 8 January 2018. He does not specifically say what problem he encountered in February 2018 when dismissal took place although he goes on to say that he was advised that because of the nature of his operation 'recovery time for a person my age was over a year but did not mean it could not take longer, I still struggle some days but it's the depression and stress of day to day caused by their decision hurts more than the operation plus the financial strain'.

39. After a preliminary hearing on 20 July 2018 the claimant was asked for further information (R34/36) and in the response to the questions asked including 'what is the impairment on which you rely?' he advises that this was 'recovery from heart attack resulting in a triple heart bypass'.

40. In answer to the question 'in what way that had a substantial and long term effect on ability to carry out normal day to day activities' he refers to the letter from Dr Hargreaves of 27 July 2018 (R37) and the 'Fit for Work document' sent to the respondent on 29 June 2017 (R45/52). Essentially those documents related to reduced strength and stamina as the claimant recovered from his heart surgery.

41. However these documents are dated June/July 2017. The time to assess the impairment would be the alleged discriminatory act in February 2018.

42. The evidence at that time is not convincing regarding impairment. The whole purpose of the heart surgery in April 2017 was to resolve a problem with the appellant. There is no doubt that is major surgery and time is required for recovery.

43. The letter from consultant Allister Hargreaves (R37) says time for full recovery 'can take up to one year'. In that respect therefore, it might be expected that full strength would not be available for the appellant before April 2018. The discriminatory act occurred shortly before that time and while there is no positive assessment of the claimant in February 2018, I would accept that he would have had an impairment at that time being that on balance he had not made full recovery of strength from his operation. The Fit for Work document stresses reduced upper body strength at end June 2017 and I would accept on the balance of probability that strength may not have been full recovered by February 2018.

The 'adverse effect condition' and 'the substantial condition'

44. I have more difficulty in relation to the 'adverse effect condition' and whether that was substantial ('the substantial condition') for the following reasons:-

(i) The particular evidence from the appellant was that he was unable to walk more than 100 metres before he required to rest up or take a breather for 'five or ten minutes'. That is a considerable recovery time for walking such a short distance. That length of recovery time every 100 metres is quite extreme. I had to consider if that was credible against the other evidence.

(ii) The Fit to Work assessment of June 2017 has no indication that the claimant cannot walk for more than 100m without taking a breather for 5/10 minutes. It concentrates on upper body strength as the issue. There are no issues reported as impacting on the claimant performing outdoor yard duties. A phased programme of reduced hours is envisaged for 4 weeks and then monitored. I would accept that at that time the claimant may have satisfied the definition of a disabled person but adjustments were put in place as regards his work commitments. This assessment does support the claimants position.

- 5 (iii) In the medical assessments described by the claimant as 2017 progressed there were no issues being reported. All seemed to be normal. He did indicate in his evidence in chief that he was told in writing there were no issues arising out of the monitoring. He later altered his evidence in cross examination to say that there was nothing in writing given. That may have been a simple mistake on his part that there was any written report but at the same time the substance was that there were no issues being reported to suggest that recovery from the operation was other than normal.
- 10 (iv) The Cardiologist evidence produced (R37) indicated that 'complete recovery' or to 'fully recover' could take up to one year but there was certainly nothing in that letter which indicated any examination of the claimant in early 2018 to establish his particular condition at that particular time or which would indicate the claimant was having difficulties in recovery. It is said that in September 2017 the consultant was pleased that the claimant was 'free from angina'. It was noted at that time he was still having 'some problems with chest wall pain and fatigue' but did not suggest that the claimant was unlikely to recover within the year from the operation. There is nothing about the claimant having difficulty walking more than 10m without a rest.
- 15 (v) The literature from the Cleveland Clinic would suggest that a recovery time of 6-8 weeks was likely from the operation. In the absence of evidence from complications, that literature would suggest that by February 2018 the claimant should have recovered more or less completely if not completely as he regained strength and stamina. A reading of the literature would not indicate that this advice was restricted to those who were in the care of Cleveland Clinic. It was referred to as a general source of information by Dr Hargreaves.
- 20 (vi) There is no evidence of complaint from the appellant that he was of such reduced strength but he could not return to full time working. He suggested there was no discussion with his manager in late 2017
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when it was suggested that instead of returning at the end of the year he would come back to full time working after the Christmas/New Year break. The claimant's position was that was put to him as a 'fait accompli'. At the same time there did not appear to be any complaint from him that he was unable to walk more than 100m without taking a 5/10 minute rest; that the yard working was beyond him on a full time basis and that he still required more time to recover from his operation.

(vii) Neither was there any evidence of complaint from the claimant in the period between return to work in early January 2018 and 23 February 2018 when he was dismissed for poor performance. Given the difficulty that he articulated in evidence it might be expected that he would have made some protest to his manager about full time working given the number of rests that he was required to take during the day and any inability to access high sided cabins.

(viii) The claimant also completed timesheets which would record the times taken of particular activities and he accepted that these timesheets would appear normal in relation to other employees of full strength and stamina. His explanation was that he falsified the timesheets otherwise he would have been facing disciplinary measures for taking too long to complete particular tasks. If that were the case then it might be expected that the claimant would make some protest to his manager or to HR that he was finding full time working beyond him rather than simply falsifying timesheets to make it seem as if he had no problems. It did not appear that the respondent had been unfeeling in their treatment to him from the time of his surgery given the acceptance of a phased return and the extension of the period of that return to full time working.

(ix) If the claimant had been as disadvantaged as he claimed when he was set to return to full time work, it might have been expected that he made a return to his GP so that he could have some evidence to indicate that he was not yet ready to undertake full time working from

the end of the year. Instead as indicated he seemed to make no protest.

5 (x) There was no statement or other evidence from any family member that the claimant was unable to carry out domestic chores such as Hoovering; lift heavy shopping; play with his grandchildren; take a seat on a wall if walking more than 100m; unable to walk the dogs; or had difficulty climbing stairs.

10 45. In all those circumstances while I could accept that there may be some impairment on the appellant in February 2018 given the evidence that the recovery period could take up to a year from the date of the operation I was not able to find that this had an adverse effect on day to day activities which was substantial. As indicated there is no doubt that the claimant had
15 undergone a serious operation in April 2017 but the medical evidence did indicate that there would be recovery over the course of the year back to full strength. There was a lack of any particular medical evidence as to the claimant's condition in February 2018. I was not able to make a finding that the claimant in February 2018 was unable to walk more than 100 metres
20 without a recovery period of 5/10 minutes which was the difficulty he stressed. I did not consider that claim or the claim that his upper body strength was substantially affected in February 2018 was made out. The weight of the evidence was that by that date there was no adverse effect on his day to day activities and certainly this was not a substantial adverse effect.

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30 46. Accordingly, the claimant does not meet the definition of a disabled person as that is defined in s6 of the Equality Act 2010 and his claim requires to be dismissed.

5 Employment Judge: JD Young
Date of Judgment: 08 October 2018
Entered in register: 11 October 2018
and copied to parties

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