



## EMPLOYMENT TRIBUNALS

Claimant

**Mr M Ismail**

v

Respondent

**One Stop Recycling Limited**

## PRELIMINARY HEARING

**Heard at: Birmingham**

**On: 16 June 2017**

**Before: Employment Judge Broughton**

**Appearance:**

**For the Claimant: in person**

**For the Respondent: Mr G Bealey, consultant**

## JUDGMENT

The claimant was not disabled as defined by the Equality Act 2010 as at September 2015.

### Reasons

Findings of Fact

2. The claimant gave evidence orally and by way of an impact statement. I also considered the limited medical documentation made available.

3. The claimant suggested in his statement that the condition from which he suffered was plantar fasciitis. That is a condition which causes pain in the heel and is, as I understand it, one which is generally able to be resolved relatively swiftly. In this case the evidence was that the claimant suffered from this condition from around March 2015 to September 2015 whereupon it was remedied, not least because the claimant was able to wear appropriate footwear following his dismissal. Accordingly that condition would fail the “long term” aspect of the relevant test for these proceedings. There was no evidence it was likely to recur.

4. There was also medical evidence and a photograph relating to athlete’s foot but that appears to have been swiftly treated and so would not give rise to a substantial adverse effect, nor a long term one.

5. The claimant's impact statement was produced in April 2017 and, on the face of it, indicated a considerable adverse effect on his normal day to day activities in relation to his knees at that time. It was, however, his case that his condition had significantly worsened since his dismissal and so his statement was of limited value.
6. He produced evidence of an MRI scan in March 2017 that indicated early osteoarthritis but also that the condition of his knees was otherwise "unremarkable".
7. The claimant also produced a fit note from September 2014 that indicated pain and swelling in his knee at that time when he was signed off for a week.
8. There was a short letter from the claimant's GP dated 7 April 2017 that referenced the review in September 2014 which was believed to relate to gout. I heard that this had been treated by alterations to the claimant's diet and was no longer an issue. There was reference to an x-ray in October 2014 that revealed degenerative changes with possible small joint effusion ("water on the knee"). The latter is, again, generally a short term condition, relatively easily remedied.
9. In 2015 and 2016 the only references to the GP were in relation to plantar fasciitis and athlete's foot.
10. The claimant's next medical visit regarding his knees was, therefore, in March 2017, it would appear following the preliminary hearing in this matter. At that stage he reported bilateral knee pains that he said had been long standing, intermittent and had worsened. It seems likely that it was this which caused the referral for an MRI scan.
11. The only other piece of documentary evidence of assistance was an internal note from 11 March 2015 in which the claimant complained of aching legs after a long shift without a break on a busy day.

#### Issues and Law

12. I had to consider the following issues which arise when considering s6 Equality Act 2010 (EqA) and applying Schedule 1 of that Act and the relevant guidance:
  - 12.1. Did the claimant have a physical or mental impairment?
  - 12.2. If so, did the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?
  - 12.3. If not was the condition progressive in nature such that it was likely to have such an effect in the future?
  - 12.4. If so, was that effect long term? In particular, when did it start and:
    - 12.4.1. did the impairment last for at least 12 months? If not
      - 12.4.1.1. is or was the impairment likely to last at least 12 months or
      - 12.4.1.2. was it likely to recur after at least 12 months
      - 12.4.1.3. and, if so, from which date?

I note that in assessing the likelihood of an effect lasting 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. See the Guidance on the definition of disability (2011) paragraph C4.

- 12.5. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?
- 12.6. The relevant time for assessing whether the claimant had/has a disability (namely, when the discrimination is alleged to have occurred) is August / September 2015.

### Decision

13. In his oral evidence the claimant gave several examples of how his knee condition had significant adverse effects on his normal day to day activities today. For example, he indicated that from earlier this year he has been unable to play with his children in the park or pick them up.

14. Nonetheless, I must consider the position as at September 2015. I heard that the claimant attended work up to that point, often working 10 hour shifts. At that time he was primarily on his feet all day and he was often engaged in heavy duties, such as pulling trolleys weighing 100kg. That is beyond what could be considered a normal day to day activity.

15. However, I heard that he could only do so by being reliant on paracetamol, taking twice the recommended daily maximum. He also suggested he relied on saunas and regular massages from his wife and that when he was not working it would take him time to recover such that his normal day to day activities were impacted as a result.

16. His evidence was that he continued being able to play with his children in the park up until this year and that he struggled with shopping bags of 10kg.

17. I do not accept that he would have had difficulty with the shopping when he was coping with far heavier duties at work. I do not accept that he was in constant pain as he had no medical appointments in relation to his knees for 2.5 years and even when he attended for the purposes of these proceedings he only reported intermittent pain.

18. Moreover, I was informed that he qualified as a lifeguard in October 2015 which would require considerable mobility and fitness both in and out of the water. That was contrary to the position advanced before me.

19. In those circumstances I am not satisfied that the claimant's knee condition was such that it had a substantial adverse effect on his mobility and normal day to day activities as at September 2015. I would accept, however, that it does now.

20. I would further accept that, with the benefit of hindsight, it appears that his knees have been worsening, slowly and intermittently, such that his condition may have been progressive in nature.

21. I need to consider the position as at the relevant time and must remember that the burden is on the claimant to establish disability. I note the guidance on the definition of disability (2011) at paragraph B19. This states that a person who has a progressive condition will be treated as having an impairment with a substantial adverse effect from the moment his condition has some adverse effect, provided that in the future the adverse effect is likely to become substantial. Medical prognosis of the likely impact of the condition is the normal route to establishing protection.

22. It seems to me that at the relevant time the claimant was able to carry out extremely heavy work, on his feet for most of the day, working long shifts. He was able to do so with the occasional aid of mild painkillers, when also suffering from temporary heel pain. He did not report any problem with his knees to his GP between September 2014 and March 2017, despite visits in relation to other matters.

23. In those circumstances I would accept that if his knees were having an adverse effect on his normal day to day activities it was not a substantial one at the relevant time. This appears to be confirmed by him passing his lifeguard qualification the following month.

24. The question then is whether the claimant's knee condition was likely to have a substantial adverse effect on his normal day to day activities in the future. I need to consider what was known at the time of the alleged discrimination in August / September 2015.

25. The claimant only received a diagnosis of osteoarthritis (OA) in April 2017. At that time it was expressly stated that the condition was in the early stages. There was no medical evidence to support the proposition that the claimant had OA in 2015, nor that it was likely to progress to cause substantial adverse effects at that stage.

26. Accordingly, whilst I have considerable sympathy for the claimant, and hindsight suggests that there was at least a possibility that he may have been suffering from the very early stages of a long term knee problem by September 2015, he has failed to meet the evidential burden upon him.

27. Specifically, he has failed to provide persuasive evidence to support the proposition that at the relevant time his knees caused a substantial adverse effect on his normal day to day activities, even though they do now. His ability to do long hours of very heavy work confirms my finding as does his ability to pass his lifeguard certification. He has failed to provide medical evidence that, when viewed from September 2015, would confirm that he had a diagnosable knee condition, let alone one that was progressive in nature such that it was likely to cause the significant adverse effect he suffers now.

28. In those circumstances, the claimant's claim that he met the statutory definition of disability at the relevant time must fail.

29. On a number of occasions the claimant appeared to suggest that he believed that his condition had been caused by his work or at least that his working conditions and equipment had contributed to his difficulties. That may or may not be the case but it is not a matter within this tribunal's jurisdiction.

30. The parties should note that issues around the claimant's ability to perform his work or other duties at the respondent's site may remain relevant to the issues that remain in this case, specifically in relation to the unfair dismissal claim

Employment Judge Broughton

20 June 2017

Sent to the parties on

3 July 2017

C Campbell