

mf



EMPLOYMENT TRIBUNALS

Claimant: Mr B Allum

Respondent: Secretary of State for Justice

Heard at: East London Hearing Centre

On: 30 June 2017

Before: Employment Judge Martin

Representation

Claimant: Ms J May (Solicitor)

Respondent: Mr J Allsop (Counsel)

JUDGMENT having been sent to the parties on 17 July 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 The Claimant gave evidence on his own behalf. The Tribunal was provided with a bundle of documents marked Appendix 1.

2 The law which the Tribunal considered was section 6 of the Equality Act 2010, Part 1 and Part 2 of Schedule 1 of the Equality Act 2010. The Tribunal also considered the Guidance on matters to be taken into account in determining questions relating to the definition of discrimination dated 2011, in particular paragraphs C1-11 and D2, 3 and 11 thereof.

3 The Tribunal was provided with two extracts from Harvey's by the Respondent's representative being an extract relating to long-term and recurring effects in relation to disability; those are at paragraphs 165 and 172-174 respectively of Harvey's. The Tribunal was referred to the case of *J v DLA Piper UK LLP* [2010] ICR 1052 by the Claimant's representative and in particular where it was held by the EAT:

“that, while the first element of the definition of “disability” ... was whether the claimant was suffering from an impairment, in some cases, where identifying the nature of the impairment from which a claimant might be suffering involved difficult medical questions, it might be easier to leave aside that issue and first determine the second element, namely whether the claimant’s ability to carry out normal day-to-day activities had been adversely affected on a long-term basis; that if the tribunal found that the claimant’s ability had been so affected, in most cases it would follow as a matter of inference that the claimant was suffering from an impairment; ...”

4 The issue which the Tribunal had to consider was whether the Claimant was disabled within the meaning of the definition of the disability in section 6 of the Equality Act 2010. The main factors which needed to be considered in that regard was whether the Claimant is suffering from a physical or mental impairment, which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. The Tribunal also had to consider in that regard whether the impairment had lasted or was likely to last for 12 months and whether the effect of any medical treatment was substantial.

5 The Respondent is responsible for employing probation officers in the UK after taking over this responsibility from the Ministry of Justice.

6 The Claimant was employed in October 2005 as a Probation Officer.

7 The Claimant had an accident in 2013 which affected his back. He said that he had problems walking, getting changed and going to the toilet and that he required support. He went to see his GP.

8 The Tribunal notes that it appears from the Claimant’s medical records that he had some bowel problems which appeared to precede his back problem in 2013, as is noted at page 84 of the bundle. He is noted as being assessed for pain management in November 2013, when it is noted that his bowel problems had been ongoing for three to five years - page 82 of the bundle.

9 In evidence before the Tribunal the Claimant said that the problems with his bowels were related to his back because of the medication which he was taking.

10 Following the referral to his GP in 2013, the Claimant was referred for an MRI scan. An MRI scan was undertaken on the Claimant’s back in October 2013. Page 80 of the bundle shows the result from that MRI scan. It shows that there is a dissection of the L4-5 and L5-S1 intervertebral disks. It notes that a small posterocentral disk protrusion is noted at L4-5 level causing anterior indentation of the thecal sac. A broad-based left centro-lateral disk protrusion is noted as L5-S1 causing anterior indentation of the thecal sac and mild impingement of the left exiting nerve root with its far lateral component. This is also confirmed in the Claimant’s doctor’s notes at page 71 of the bundle.

11 The Claimant was referred in 2013 for physiotherapy and pain management. It appears at page 74 of the bundle that the Claimant missed a couple of appointments for pain management and physiotherapy, although he says that he then attended those appointments on another occasion.

12 In his claim form the Claimant states at paragraph 4 that he was free from back pain until he fell from his ladder at home on 2 November 2015.

13 He went to see his GP on 6 November 2016. In evidence before the Tribunal the Claimant said that he took over the counter pain relief until he could get an appointment to see his GP on 6 November 2015.

14 When he went to see his GP on 6 November it is recorded in his doctor's notes at page 72 of the bundle that he is suffering from pain. He was reviewed regularly then subsequently referred for a CT scan in January 2016. He was not referred for an MRI scan.

15 The results of the CT scan are at page 86 of the bundle. They show there was no evidence of bone injury. There was normal vertebral alignment; vertebral body heights; and intervertebral disc spaces and normal appearances of the sacro-iliac joints.

16 On 15 December 2015, the Claimant was referred by his employers to their occupational health advisors. He was interviewed by occupational health over the telephone. The report sent to the Claimant's employers from occupational health is at pages 57 to 58 of the bundle. It is noted that the Claimant is having difficulty in his daily living and he has been referred for an x-ray. It is also noted that he has not been referred for physiotherapy services but has been given exercises by his GP to undertake. There is also a reference in that letter, namely the last paragraph at page 57, to a similar injury approximately four years ago in similar circumstances from which it took the Claimant three months to recover but that he did not start recovering until he had commenced physiotherapy.

17 In cross-examination the Claimant was asked whether he accepted that injury referred to the injury in 2013. He was reluctant to agree that it did because he said that he did not recover in three months and that the incident was not four years ago. However, he did not indicate that there was any other injury which he had suffered to his back previously. It is also noted in that report that the occupational health adviser indicated that the Claimant should be referred back in four to six weeks if a return to work had not been achieved by then. She also stated that she did not think that the condition amounted to a disability under the relevant legislation.

18 The Claimant was referred for physiotherapy by his GP. He was also referred for pain management. He was also given pain relief medication, namely Naproxen and Amitriptyline which is noted at page 73 of the bundle.

19 In January 2016, the Claimant was offered physiotherapy through his employers. In evidence before the Tribunal the Claimant says that at that stage he had been referred for physiotherapy and pain management by his GP.

20 The Claimant attended the first assessment for the physiotherapy offered by his employers in January 2016, but he did not attend any further sessions as is noted at page 59 of the bundle.

21 In evidence before the Tribunal, the Claimant said that he was told that he could not have physiotherapy with his employers and with his GP. He said that both his employer's physiotherapist and his GP suggested that the physiotherapy which would be provided by his GP would be better because it included pain management.

22 The Claimant was reviewed by telephone by the Respondent's occupational health advisers in February 2016. This was by a different occupational health adviser. The report provided to the Claimant's employers is at pages 61-62 of the bundle. In that report the occupational health adviser indicates that the Claimant is not fit for work. She notes that he had an ultrasound scan and had been referred for physio through his GP. She also confirmed that she did not think that the Claimant was suffering from a disability.

23 The Claimant was referred back to his employer's occupational health advisers in March 2016. This was again by telephone and was with a different occupational health adviser. The report is at pages 63-64 of the bundle. The occupational health adviser notes that the Claimant is unfit to work, but that it is anticipated he will be fit once he has been provided with physiotherapy. The occupational health adviser also suggests a phased return to work. She goes on to indicate that she expects him to make a full recovery within the next two to three months and that there is no evidence that the condition will recur. She also indicates that she does not think that this condition would amount to a disability under the Equality Act 2010.

24 The Claimant gave evidence about the impact of this condition upon him. That evidence is set out at paragraph 6 of his statement. He said that he had difficulty walking; going to the toilet; had problems taking a shower; and that he could not pick up his young children.

25 The Claimant started his physiotherapy at the end of March 2016. He had his last session in late April 2016. He then had a number of sessions for pain management treatment as is noted at page 75 of the bundle. Those sessions ended in August 2016.

26 The Claimant said in evidence before the Tribunal that, after he had completed his physiotherapy, he had to undertake exercises at home. He stated that he started to be able to do more things about a couple of months after his physiotherapy sessions had concluded.

27 The Claimant was reviewed further by telephone by the Respondent's occupational health advisers on 24 August 2016. This time by a Consultant occupational health physician. The report provided by that occupational health physician is at pages 65 to 66 of the bundle. He refers to the incident where the Claimant fell in November 2015. He notes that no MRI scan was undertaken. The occupational health physician says that the Claimant believes that the symptoms might be due to a disc lesion in his lower spine. He also notes that the Claimant has been attending physiotherapy and pain management sessions and that the Claimant has noticed a gradual improvement in his symptoms and believes that he should be able to return to work in the coming weeks. The occupational health physician also notes that the Claimant's sick note expires on 22 September and then he is due to go on annual leave. The occupational health physician suggests a phased return to work. He notes that the Claimant ought to be able to return to work on a phased return with a phased increase to his working hours towards the end of September or the beginning of October 2016. The occupational health physician indicates that he does not think that the condition amounts to a disability under the relevant legislation.

28 The Claimant's sick note expired on 22 September 2016. In evidence before the Tribunal the Claimant acknowledged that he could have attended work on that day if he had not been on annual leave.

29 He actually returned to work on 4 October 2016, on a phased return to work. He said in evidence to the Tribunal that he travelled on public transport on the day he returned. In evidence before the Tribunal the Claimant said that he either drove to work or got the train. When he got the train, he had to change a number of times. He then had a 15 minute walk from the train station to his office or he could take a bus. The whole journey took about 1hour 45minutes each way.

30 The Claimant was dismissed from his employment on 4 October 2016, namely very shortly after he had returned to work. He was dismissed for persistent absences.

31 The Claimant's medical records show that from April 2016 the Claimant was suffering from various different medical conditions until his return to work. None of those appear to be referable to his back problems. The Claimant says that his bowel problems were related to his back problems and that the endoscopy referred to at page 72 was due to difficulties with his back.

32 In evidence before the Tribunal, the Claimant said that he had a chronic long-term back condition. He said that the problems he encountered in 2015 were an exacerbation of the problems which he had in 2013. He said that he had discussed this with both his GP and his physiotherapist. He said that he had received the same treatment on both occasions, namely physiotherapy, medication and pain management.

33 The Claimant's medical notes do not indicate anywhere that his back problems in 2015 were an exacerbation of his back problems in 2013. Page 69 of his medical notes show details of his significant medical history. There is no reference at all within that significant medical history to the Claimant's back problems.

34 The Claimant said in evidence before the Tribunal that he is continuing to undertake exercises and take medication for the pain in his back. The Tribunal observed that when the Claimant gave evidence before the Tribunal; he was able to sit down throughout his evidence. On the face of it he did not appear to have any difficulties, although the Tribunal noted that after he gave evidence, he did ask to stand up for a period of time.

35 The Respondent's representative filed written submissions. He submitted that this condition was not a disability as defined under section 6 of the Equality Act 2010. He submitted that the condition did not have a long-term substantial effect on the Claimant, nor was it a recurring condition. He submitted that there was no evidence to show that this back problem related to the Claimant's back problem in 2013. He further submitted that there was no evidence that it was likely to reoccur in the future. The respondent's representative produced some extracts from Harvey's. He argued that there was no substantive adverse effect on the Claimant on a long-term basis. He noted that the Claimant was able to come back to work within the 12 month period.

36 The Claimant's representative submitted that the Claimant's back condition was a disability. She said it was a physical impairment which had a substantial adverse long-term effect on the Claimant. She submitted that the back problem did relate to the Claimant's back problems in 2013 and that it was a recurring condition. She submitted that it had a substantial adverse effect on the Claimant and referred to paragraph 6 of the Claimant's witness statement. She also referred the case of *J v DLA Piper UK LLP*.

37 The Tribunal reminded itself that the burden of proof in relation to this matter lay with the Claimant.

38 Although the Claimant's back condition in 2015 could amount to a physical impairment, this Tribunal does not find that his back problem did amount to a disability, as defined under section 6 of the Equality Act 2010.

39 The Tribunal does not find that the back problem had a substantial long-term effect on the Claimant or met the requirements of long-term as defined.

40 The Tribunal finds that the condition did not last, nor is it or was it likely to last at least 12 months or more. The Tribunal notes that the Claimant clearly suffered some substantial adverse effects on his normal day-to-day activities for a period of time after his fall in 2015. However, on his own evidence, he acknowledged that about 8-9 months after the problem occurred in 2015, he was starting to improve following the physiotherapy, and certainly at the latest within 10/11 months he was largely able to undertake normal day-to-day activities – he agreed in evidence that he would have been able to go back to work in September 2016. However, he went on holiday instead. He was signed fit to return to work in late September 2016. When he returned from holiday, he went back to work in early October. He travelled to work on public transport, with a number of changes actually travelling on public transport for over three to four hours a day. Such travel would constitute normal day to day activities, which he did not suggest he was unable to do when he was signed fit to return to work in September 2016.

41 The Tribunal notes that the Claimant's own medical evidence does not suggest this is a long-term problem, rather the contrary. There is no reference to a long-term back problem in the Claimant's significant medical history as produced by his GP. She does not even refer to the problem as a prolapsed disc. Indeed the x-ray undertaken in 2015 suggests that it was not a long-term problem.

42 Further, none of the medical evidence suggests that the back problem in 2015 was a reoccurrence of the injury in 2013, nor is there any medical evidence indicating that the back problem is likely to reoccur. Indeed on both occasions the problems occurred from two separate accidents.

43 The Claimant has not produced any evidence showing that if he stopped taking the medication which he says he is taking for pain relief his back problem would have a substantial adverse effect on his normal day-to-day activities. The onus of proof was on the Claimant in that regard.

44 The Tribunal has also noted that four separate occupational health advisers, one being an occupational health physician, indicated that they do not think that the condition amounted to a disability under the Act.

45 Accordingly, this Tribunal finds that there is no evidence that the Claimant's back injury has lasted more than 12 months or is likely to last more than 12 months or is likely to reoccur.

46 For that reason this Tribunal finds that the Claimant is not disabled within the definition of the meaning of disability in the Equality Act 2010.

47 Accordingly his claim for disability discrimination is hereby dismissed.

Employment Judge M Martin

25 August 2017