



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Hassanin

**Respondent:** Asda Stores Limited

**HELD AT:** Manchester

**ON:** 21 February 2018

**BEFORE:** Employment Judge Cox

## REPRESENTATION:

**Claimant:** Mr I Ahmed, counsel

**Respondent:** Ms A Niaz-Dickinson, counsel

## REASONS

1. Mr Hassanin presented a claim to the Tribunal alleging that he had been discriminated against by reference to his disability and religion. In particular, he said that he had been the subject of disability-related harassment in September to October 2016 and that the Respondent (“the Company”) had failed to meet its duty to make reasonable adjustments on his return to work in February 2017. The Company did not accept that he met the definition of a disabled person at the relevant time, being September 2016 to February 2017, and a Preliminary Hearing was therefore held to decide that issue.

2. Under Section 6 of the Equality Act 2010 (the EqA), a person has a disability if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Schedule 1 EqA provides further detail. The effect of an impairment is to be viewed as long-term if it has lasted at least 12 months or is likely to do so. If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is treated as continuing to have that effect if that effect is likely to recur. An impairment is to be viewed as having a substantial adverse effect on a person’s day-to-day activities if it would have that effect if they were not taking measures to treat or correct it. For these purposes, “measures” include medical treatment. In deciding whether a Claimant meets this definition, the Tribunal must take into account the “Guidance on the definition of disability” issued by the Secretary of State (para. 12 of Schedule 1).

3. It is for the person who alleges that they are disabled to establish that they meet the definition on the basis of the evidence before the Tribunal. Mr Hassanin alleged that he was a disabled person from September 2016 onwards as a result of

“sciatica”. He relied on an “impact statement” on the effects of his sciatica. He provided no GP records or other medical report on his condition; the only medical evidence he produced on his condition in the relevant period were notes and a discharge summary relating to his overnight admission to hospital in October 2016 with suspected cauda equina. (The Tribunal was provided with no evidence on what cauda equina is.)

4. The only evidence before the Tribunal on the nature of sciatica was a print-out the Company provided of the relevant text from the “NHS Choices” website, a website run by the NHS to give the general public information about the nature of and treatments for health conditions. From this the Tribunal learnt that sciatica is the name given to a cluster of symptoms arising from irritation of the sciatic nerve. In Mr Hassanin’s case the symptoms were pain in his lower back, right hip and leg. The NHS text states that “sciatica usually gets better in 4 to 6 weeks but can sometimes last longer”. It also states that the causes of sciatica include: a slipped disc, when a soft cushion of tissue between the bones in the spine pushes out; spinal stenosis, the narrowing of part of the spine where nerves pass through; spondylolisthesis, where one of the bones in the spine slips out of position; and back injury. The possible treatments include exercises and stretches, painkillers, physiotherapy and psychological support to cope with the pain. Suggested actions to reduce the chances of getting sciatica again are listed as taking regular exercise, using safe lifting techniques, maintaining a good posture when sitting and standing, and avoiding being overweight.

5. Mr Hassanin is a Produce Colleague at the Company’s Fleetwood store. His job includes stocking shelves and so involves bending and lifting and carrying products. He was off work from 31 July until the end of August 2015 with a condition described as “sciatica” and “lower back pain” in his GP’s sick notes, after lifting a bag of onions. He was in significant pain that restricted his mobility and his ability to sleep. He was prescribed painkillers by his GP; the Tribunal was not told what description or strength these were. His GP also advised him to do stretching exercises. He returned to work at the beginning of September but was advised to avoid lifting weights of over 10 kilos and to use a safe lifting technique. He gave no evidence that restricting the weight of the loads he lifted to 10 kilos or below would have a substantial adverse impact on his day-to-day activities.

6. From the end of August 2015 to September 2016 Mr Hassanin had three short periods of between four and seven days when his back pain recurred but he took painkillers and the condition resolved itself. Mr Hassanin gave no detail on what the effect on his day-to-day activities was during this time.

7. On 22 September 2016, Mr Hassanin had a further incidence of sciatica after lifting a sack of potatoes. He gave no details on the weight of the sack or whether he was using a safe lifting technique. He was on sick leave from this date until 7 February 2017 because of back pain. He had substantial pain in his lower back, right buttock and leg that led to him being unable to sleep, sit on the toilet, leave his bed without difficulty or shower or bathe. He was prescribed strong painkillers by his GP, which the Tribunal deduced from the October 2016 hospital admissions prescription were Tramadol and co-codamol. He was admitted to hospital overnight on 31 October 2016 after reporting symptoms of difficulties with urination, to check whether he had cauda equina. The discharge summary recorded that his MRI scan had revealed a “very minor disc bulge at L5-S1, unlikely to be cause of symptoms. No

nerve root compression. Bony spinal canal, normal diameter. No cauda equina.” He was prescribed codeine, paracetamol and ibuprofen. By 14 January 2017 he wrote to the Company saying that his pain had improved greatly during the past week and he was withdrawing from his medication. An Occupational Health report for the Company dated 17 January 2017 confirmed that Mr Hassanin had said “he is managing to do his daily activities without issue now, his pain generally gets worse at night”. The report concluded “back pain can recur however if he remains [compliant] with his exercise regime and maintains his manual handling procedures then further absences with this ailment should be reduced.” Mr Hassanin had stopped taking medication for his back completely by the time he returned to work on 7 February 2017.

8. Mr Hassanin clearly had a physical impairment that caused him pain with a substantial adverse effect on his day-to-day activities for around a month in August 2015. He also had a physical impairment that caused him pain with a substantial adverse effect on his day-to-day activities from the end of September 2016 to February 2017. As neither of those periods of substantial adverse effect had lasted continuously for 12 months or more by the relevant period of September 2016 to February 2017, the Tribunal needed to decide whether at any point, and if so when, it became likely that the adverse effects would recur beyond 12 months after the first occurrence in August 2015. A substantial adverse effect is likely to recur if it could well happen again (para. C3 of the Guidance).

9. It was not necessary for the Tribunal to establish the cause of Mr Hassanin’s impairment (Paragraph A3 of the Guidance). Nevertheless, if the Tribunal had known the cause of Mr Hassanin’s impairment, it would have been in a better position to assess whether and when it became likely that the effects of it were likely to recur. (Paragraph A3 acknowledges this when it states that it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.) The Company’s Occupational Health report dated 17 January 2017 stated that Mr Hassanin had been diagnosed with a slip disc but it is unclear what that statement was based on and there was no other evidence of such a diagnosis before the Tribunal. When the Tribunal asked Mr Hassanin whether he had had a diagnosis of the cause of his sciatica, he said that his GP had diagnosed him with sciatica and told him he had a weak lower back. The hospital discharge summary of 31 October 2016 stated that a “very minor disc bulge” was “unlikely” to be the cause of his symptoms.

10. The Tribunal did not consider itself qualified to decide, without the assistance of medical evidence, that it became the case that Mr Hassanin’s sciatica could well recur at any time in the relevant period. According to the NHS website, one of the possible causes of sciatica is a back injury. Given the circumstances in which they began, both of Mr Hassanin’s bouts of sciatica could have resulted from back injuries. If so, the Tribunal was not satisfied that at the time of the August 2015 episode it was clear that the adverse effects could well recur: Mr Hassanin could avoid a recurrence by taking normal precautions like using safe lifting techniques, avoiding lifting unduly heavy loads, stretching and taking exercise. As Paragraphs B7 and C9 of the Guidance make clear, a person can be expected to adopt reasonable coping or avoidance strategies to prevent the adverse effects of an impairment or their recurrence. Mr Hassanin had a further episode of sciatica in September 2017. This episode could also have been caused by a back injury. The Tribunal was not satisfied, in the absence of medical evidence, that Mr Hassanin had

an underlying condition such that the adverse effects could well recur even if Mr Hassanin took normal precautions. (Paragraph C6 of the Guidance gives an analogous example of a woman with two periods of depression, and states that the woman would meet the definition of a disabled person only if there was evidence that the two episodes were part of an underlying condition of depression the effects of which were likely to recur beyond the 12-month period.)

11. In summary, the Tribunal was not satisfied on the evidence with which it was presented that Mr Hassanin had established that he met the definition of a disabled person at the relevant time. His allegations of harassment related to disability and failure to meet the duty to make reasonable adjustments, which both depended upon him being able to establish that he was a disabled person, were therefore dismissed.

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Employment Judge Cox

Date: 29 March 2018

REASONS SENT TO THE PARTIES ON

19 April 2018

FOR THE TRIBUNAL OFFICE