



EMPLOYMENT TRIBUNALS

Claimant: Mr A Hassanin

Respondent: Asda Stores Limited

JUDGMENT

The Claimant's application dated 2 May 2018 for reconsideration of the Judgment of 21 February 2018 is refused.

REASONS

1. Under Rule 71 of the Tribunal's Rules of Procedure, a party may apply for a Judgment to be reconsidered on the ground that it is necessary in the interests of justice to do so. On 2 May 2018 Mr Hassanin applied for the Tribunal to reconsider the Judgment it reached on 21 February 2018. Rule 72(1) provides that an application under Rule 71 shall be considered by an Employment Judge. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application shall be refused. Employment Judge Cox has conducted a preliminary consideration of Mr Hassanin's application under Rule 72(1).
2. The Judgment of 21 February 2018 was that Mr Hassanin did not meet the definition of a disabled person set out in the Equality Act 2010 at the relevant time. His application for reconsideration of this decision is based on his assertion that four occupational health reports on his case carried out on the Company's behalf and dated 11 November 2015, 12 September 2016, 1 December 2016 and 23 December 2016 were not disclosed to Mr Hassanin until after the Preliminary Hearing that led to the Judgment.
3. Mr Hassanin says that as he was not, through no fault of his own, able to submit these reports in evidence to the Tribunal at the Preliminary Hearing, it is in the interests of justice for the Judgment to be reconsidered. He says that, if the Tribunal were to take these documents into account, there is a strong chance that it would find that Mr Hassanin met the definition of a disabled person.

4. The Tribunal has assumed for the purposes of this application, but without finding, that the Respondent should have disclosed all four of the occupational health reports before the Preliminary Hearing but did not. The Tribunal also accepts that all four reports are relevant to the issue of whether Mr Hassanin was a disabled person. The Tribunal does not consider, however, that there is any reasonable prospect of its Judgment being varied or revoked as there is no reasonable prospect that the Tribunal would reach a different conclusion even if it were to reconsider the issue in the light of these documents.
5. The specific content upon which Mr Hassanin relies in support of his reconsideration application comprises three statements in the reports of 11 November 2015 and 23 December 2016.
6. The first statement is in the 11 November 2015 report. Under the heading "Management Advice", it reads: "His back condition may recur from [sic] time to time but with education and support this can be minimised". It is unclear what is meant by "this". Taken overall, the Tribunal considers that this sentence is to the same effect as that part of the NHS Choices guidance set out at Paragraph 4 of the Reasons, which the Tribunal took into account when reaching its Judgment.
7. The second statement upon which Mr Hassanin relies appears in the 23 December 2016 report under the heading "OH Opinion" and reads as follows: "In terms of re-occurrences, following a slipped disc there is always a danger of a recurrence of the problem, the most common reason for this is insufficient rehabilitation (physiotherapy)". In reaching its Judgment, the Tribunal took into account the content of the Occupational Health report of 17 January 2017, which also proceeded on the basis that Mr Hassanin had been diagnosed with a slipped disc and that that had led to his symptoms. The Tribunal noted in its Reasons in relation to the 17 January report that it was unclear what information this statement of Mr Hassanin's diagnosis was based upon. The Tribunal would have had the same concerns about this reference in the 23 December 2016 report, which also assumes that Mr Hassanin's condition was referable to a slipped disc, had this report been before the Tribunal. The medical evidence the Tribunal had from those directly treating Mr Hassanin was a hospital discharge summary of 31 October 2016 which stated that Mr Hassanin had a "very minor disc bulge" but this was unlikely to be the cause of his symptoms.
8. Further, whilst the effects of treatment such as physiotherapy should normally be disregarded on assessing the effects of an impairment, Paragraph C11 of the Guidance on the definition of disability states that if treatment is likely to permanently cure a condition, so that a recurrence of the impairment's effects is unlikely even if there were no further treatment, this should be taken into account when looking at the likelihood of the impairment's effects recurring. Even if the Tribunal had been presented with reliable evidence that Mr Hassanin's impairment was caused by a slipped disc, this second statement in the 23 December 2016 report indicates only that there would be a danger of recurrence of his symptoms if he had insufficient physiotherapy. The Occupational Health report of 17 January 2017, which was before the Tribunal, confirmed that Mr Hassanin

was receiving weekly physiotherapy, as well as doing daily back strengthening exercises.

9. The third statement upon which Mr Hassanin relies is also in the 23 December 2016 report and appears under the heading "Management Advice". The relevant paragraph reads: "A true prognosis cannot be given at this time as further investigations and treatment are planned, however a date for this has not been confirmed. Given the history it is likely [Mr Hassanin] will remain symptomatic until further interventions, the business may need to consider options regarding his on-going employment." It is not entirely clear what the reference "given the history" means. It appears likely to be a reference to the length of time that Mr Hassanin had already been in pain and off work. The reference to "further interventions" appears to relate to statements earlier in the report that Mr Hassanin had been referred for electro conduction nerve studies and, depending on the outcome, might require treatment with physiotherapy. The overall meaning therefore appears to be that Mr Hassanin was likely to continue to be in pain until he had physiotherapy, if that were to be prescribed. This does not, however, affect the basis for the Tribunal's conclusion that it was not qualified to decide, without the assistance of medical evidence, that it became likely at any point in the relevant period that Mr Hassanin's sciatica could well recur.
10. For these reasons, Employment Judge Cox does not consider that Mr Hassanin has any reasonable prospect of establishing that the Judgment that he was not a disabled person should be varied or revoked. His application is therefore refused on an initial consideration under Rule 72(1).

Employment Judge Cox
Date 25 May 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

6 June 2018
FOR THE TRIBUNAL OFFICE