



EMPLOYMENT TRIBUNALS

Claimant: Mr J Atherton

Respondent: Vita Cellular Foams (UK) Limited

Heard at: Manchester

On:

22 May 2019

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Ms D Holmes, Claimant's Partner

Respondent: Mr J Heath, Solicitor

JUDGMENT

At the material time the claimant was not a disabled person by reason of a physical impairment in the form of a back problem/injury, and therefore all his complaints of disability discrimination under the Equality Act 2010 are dismissed.

REASONS

Introduction

1. By his claim form presented on 4 December 2018 the claimant brought a number of complaints arising out of his dismissal in August 2018 from his post as a Machine Operator with the respondent, a post he had held since August 2000. His dismissal was a consequence of his record of absence on sick leave. He complained of unfair dismissal and of disability discrimination contrary to the Equality Act 2010.
2. By its response form of 15 January 2019 the respondent resisted all the complaints on their merits. It argued that there had been a fair capability dismissal. It also denied that the claimant had been a disabled person at the material time.
3. The matter came before Employment Judge Batten at a case management preliminary hearing on 15 March 2019. She directed that the question of whether the claimant had been a disabled person should be determined at a preliminary hearing. Directions were given for disclosure of a disability witness statement and relevant medical records by the claimant.

4. Having seen that information, on 26 April 2019 the respondent's solicitor Mr Heath notified the Tribunal and the claimant in writing that the respondent did not concede that the claimant had been a disabled person. The matter was therefore to be determined at this hearing.

5. Ms Holmes confirmed at the hearing that the claimant relied on the physical impairment described in his claim form as an "ongoing back injury". That included problems with his lower back and his rib area.

Evidence

6. The claimant had prepared a two page witness statement and in addition gave evidence in person. He answered questions from Mr Heath and the Tribunal, and was re-examined by Ms Holmes.

7. I also had a bundle of documents containing a variety of medical and other documents. Any reference to a page numbers in these Reasons is a reference to that bundle unless otherwise indicated.

Relevant Legal Principles

Legislation

8. The disability discrimination complaints were brought under the Equality Act 2010. Section 6 defines a disability as follows:

"A person (P) has a disability if

- (a) P has a physical or mental impairment, and**
- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."**

The section goes on to provide that any reference to a disabled person is reference to a person who has a disability.

9. The word "substantial" is defined in section 212(1) as meaning "more than minor or trivial".

10. There are some additional provisions about the meaning of disability in Schedule 1 to the Act.

11. Paragraph 2 provides that the effect of an impairment is long-term if it has lasted for at least 12 months or is likely to last for at least 12 months.

12. It also deals with cases where the substantial adverse effect recurs:

"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 to be treated as continuing to have that effect if that effect is likely to recur."

13. Under paragraph 5 of Schedule 1,

"an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if

- (a) measures are being taken to treat or correct it, and
- (b) but for that, it would be likely to have that effect.”

Guidance

14. Section 6(5) of the Act empowers the Secretary of State to issue guidance on matters to be taken into account in decisions under section 6(1). The current version dates from 2011.

15. Section D of the guidance contains some provisions on what amount to normal day-to-day activities, and paragraph D3 provides:

“In general day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. Normal day-to-day activities can include general work-related activities and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents and keeping to a timetable or shift pattern.”

Relevant Findings of Fact

16. Having heard the evidence and considered the documents, I found the relevant facts to be as follows.

Background

17. The claimant was born in June 1971 and was aged 47 when dismissed in August 2018.

18. He worked for the respondent from 2000. His normal job was to operate a machine which laminated sheets of foam. The sheets of foam were between 6mm and 50mm thick and could be as big as 2m x 1m in size. The biggest and thickest sheets would weigh 12.5 kilograms. He and a colleague worked on the machine. The colleague would feed the foam sheets onto the machine and when they came out the claimant would have lean over to cut the tape on them, and then lift the piece of foam from just below waist height and place it on a pallet on the floor behind him. The foam sheets would be stacked up on the pallet. The job therefore involved constant bending, twisting and lifting. He might have to do as many as 180 sheets of that size in a period of two hours 30 minutes. He had a little control over the job. He could control the rate at which the foam came through the machine, or occasionally swap with his colleague so they did each other’s job for a day or so. Sometimes there were bigger sheets which were too big for him to reach on his own so he would have help lifting those.

2013

19. The claimant’s back problems began in 2013. He developed back pain following an incident where he jumped into a children’s paddling pool. He was taken to hospital (page 12). He was off work for about a month between early July and 5 August 2013. When he returned he was on light duties for a week before resuming

his normal job. The eventual diagnosis was bruised ribs causing him back pain: there was no fracture.

20. Following his return to work and a week on light duties in August 2013 the claimant continued to do that job day in, day out. There was no record of absence due to back problems.

2014

21. In August 2014 the claimant attended hospital with chest pain around his ribs which was worse on movement (page 14). He told the hospital staff he had been in pain for two weeks. It did not appear that there had been any impact which had caused this onset of symptoms. He was x-rayed but no abnormality was detected. He was given codeine to take for the pain, but he could not take this and work as well. He did not have any time off at this stage.

22. When the codeine ran out about a week later he visited his GP on 11 August. The GP prescribed him Naproxen in the form of three tablets of 250mg each per day. It is medication which reduces inflammation and pain. The claimant had a supply of 56 tablets and when that ran out he did not renew it.

2017

23. In 2017 the claimant was due to go on two weeks of annual leave in the middle of June. He was due in work on the Monday before going on holiday on Tuesday. When he awoke on the Monday he was experiencing significant back pains. His partner drove him to work and he went in and arranged to have a day of annual leave instead of working that day. No sick leave was recorded. He returned to work as normal at the end of his two weeks of annual leave.

2018

24. Early on the morning of 1 June 2018 the claimant went to hospital complaining of back pain following an incident at a family event the previous day. Some children had been playing football and the ball had been kicked and hit him in the back.

25. The hospital record (page 30) recorded that he had fallen onto his back. An x-ray again showed no fracture (page 32).

26. The claimant was certified unfit for work by his GP because of a back injury between 2 July (page 24) and 5 August 2018. He saw his GP a number of times in that period. An entry for 11 July (page 34) recorded that the low back pain was "new", but the same description was used for a subsequent consultation on 14 August where the matter was plainly ongoing back pain.

27. The claimant returned to work on 6 August 2018. He had a return to work interview with his manager at pages 28-29. He signed the note the same day to confirm that the details were accurate. The information on the form confirmed that he considered himself fully fit for work, but he was also seeking some light duties.

28. The claimant was invited to a disciplinary hearing on 9 August. That was because of his absence record. On 9 August an Occupational Health report was

prepared (pages 22-23). It came from the Occupational Health nurse practitioner, Ms Furber. The material parts were as follows:

“John explained to me today that this was a twisting injury possibly caused whilst playing football at home. John reports that he went to A & E for review and x-rays did not reveal any bony injury. He was apparently advised that this was muscular strain. John also tells me that he has been advised that one possible causative factor towards ongoing musculoskeletal issues could be the movement he adopts at work when moving loads. This is something that he does all day long and I have suggested to him today that he needs to change his posture, share the load using both sides of the body and perhaps a rotation of his tasks would go a long way towards keeping him MSKD fit.

John looked well today and his mobility was also excellent. I have offered him advice about continuing to build up the strength in the upper limbs so that he can prevent further injury and also prevent further time off work, which he tells me today, he has had a lot of in the last 12 months.

John is fit to be at work carrying out his normal duties [and] hours of working.”

29. On 10 August 2018 the claimant was dismissed.

30. The claimant saw his GP again on 14 August. The entry appeared at page 35. It recorded ongoing back pain. He continued to suffer from back problems despite starting physiotherapy later in the year. Fit notes for the period between September and November 2018 appeared at pages 40-42.

Evidence of Symptoms and Adverse Effect

31. Looking back over this period the claimant distinguished between those periods when his back problem had flared up and those when it had not.

Outside Flare Ups

32. When there was no flare up he described symptoms as set out in paragraph 6 of his witness statement. He said:

“I am very careful with any activities I am doing. I cannot lift heavy objects. I can no longer help with things like household shopping because of the pressure the weight could put on my back., I can only help with light duty household cleaning. I regularly use a back support both in and outside of work as the nature of my job with Vita Cellular Foam included heavy objects and required me to be mobile. I cannot get involved in social activities where it would be a possibility my back could get damaged. My everyday limited capability means that if I was to be made worse it would make me immobile.”

33. In his oral evidence the claimant provided some further information. He was wary of lifting a bag of shopping from the floor for fear of damaging or hurting his back. Before 2013 when hoovering he would move a couch to clean under it but he had stopped doing that since then. In periods between flare ups he had a wraparound back support which he would wear for a few days every month or two. It was quite warm and uncomfortable and he would only wear it when he felt that his back needed the support. He would use anti-inflammatory creams or gels at the same time.

34. Mr Heath challenged the accuracy of this account because he said it was inconsistent with the claimant having no time off due to a back injury in-between the episodes described above. I will return to that issue in my conclusions.

During Flare Ups

35. The position was quite different during periods when his back flared up. He described his symptoms in paragraphs 7-9 of his witness statement. He said:

“When my back does flare up I am not capable of anything. These periods usually last between 2-4 weeks and my recovery time after that to get back to my now normal state can be anything up to eight weeks...When my condition flares up, it takes around 15 minutes to get in and out of bed and around five minutes to go from standing to sitting and vice versa. It takes around five minutes to get in/out of a car. I cannot walk more than 10 metres at a time and that distance would take me around 3-5 minutes. I cannot use my arms properly as the movement sends pains shooting through my back. I cannot do any activities that involve any kind of pressure to my back. I cannot shower myself and using the toilet is extremely difficult. I am uncomfortable and in pain regardless of the painkillers I use during these episodes.”

36. Elsewhere in his witness statement the claimant said that the three further occasions of flare ups over recent years had left him immobile.

Submissions

37. At the conclusion of the oral evidence each side made a brief submission to help me make my decision.

Respondent's Submission

38. For the respondent Mr Heath submitted that the definition of disability was not met. He emphasised that the claimant had been doing his job involving repetitive heavy lifting for over five years with no recorded absences for back problems. The fact he was able to lift as many as 180 loads of 12.5kg each over a period of less than three hours day after day was not consistent with what he described as his restrictions at home during the periods when his condition had not flared up. There could be no substantial adverse impact on day-to-day activities in those periods.

39. As for the flare ups, they were infrequent and the claimant had had time off work only in 2013 and 2018. There was no evidence that suggested that the substantial adverse effect recurred or was likely to recur in a way that would mean it should be treated as continuing.

Claimant's Submission

40. For the claimant Ms Holmes submitted that although the severity of the symptoms varies, this was essentially the manifestation of the same back problem on the occasions summarised above between 2013 and 2018. That was enough for the Tribunal to conclude that it was a recurring problem which should be treated as continuing.

41. Too much should not be made of the claimant's ability to carry on at work. He had a degree of control over how he lifted the foam from the machine and he had no choice but to do that if he wanted to keep his job. The restrictions he imposed upon himself outside work were reasonable given his concerns about the impact on his

back. Although not all his day-to-day activities were affected, there was still an impact which was more than minor or trivial. Further, the fact that the severe episodes kept coming back showed that they were likely to recur and should therefore be treated as continuing.

Discussion and Conclusions

42. The issue to be determined was whether the claimant met the definition of a disabled person in section 6 of the Equality Act 2010 at the time of his dismissal in August 2018. That definition has three main requirements. The first is that there must be a physical impairment. It was accepted by the respondent that there was a physical impairment in the form of back problems. In dispute were the second and third requirements: that there be a substantial adverse impact on day-to-day activities, and that such impact be long-term.

Substantial Adverse Impact

43. I reminded myself that the Equality Act defines “substantial” as meaning “more than minor or trivial”, and that it can be useful to have regard to the list of day-to-day activities contained in paragraph D3 of the Guidance. I also took into account the need to ignore the effect of any medical measures (including medication or other treatment) which the claimant is taking in assessing any such impact.

44. I was satisfied that there was a substantial adverse effect on day-to-day activities in the periods the claimant described as “flare ups”. His evidence about his state of health in those periods was not challenged. I found as a fact that when he was having an episode of a flare up he had the restrictions on his mobility recorded in paragraph 9 of his witness statement. Those restrictions were plainly substantial. There would be no possibility of him attending work in that condition.

45. However, I rejected the claimant's case that there was a substantial adverse effect on his capabilities in periods between flare ups of his condition. I agreed with Mr Heath that the description the claimant gave of the restrictions on him in paragraph 6 of his witness statement was not consistent with the physical demands of the job he was able to do for some years without any absence due to back problems. I did not doubt that the claimant was being truthful when he said that he avoided lifting shopping off the floor or did not move the couch when he was using the Hoover, or that he avoided social activities which might result in damage to his back. However, it seemed to me that those limitations were a matter of personal choice not warranted by his physical condition given his ability to undertake a physically demanding job involving repeated bending, lifting and twisting.

46. Further, the infrequent use of the back support and anti-inflammatory cream/gels, together with occasional use of analgesics, was not enough to make any significant difference. In reality when outside a period of flare up he was in the condition in which the Occupational Health report of 9 August 2018 described him: fit to do normal duties for normal hours and with excellent mobility.

Long-term?

47. The next question was whether the substantial adverse effect on day-to-day abilities which he experienced during periods of flare up was long-term.

48. The flare up in early July 2018 lasted for about six weeks at the most. He was no longer experiencing a substantial adverse impact when he returned to work on 6 August 2018. The substantial adverse impact had not already lasted 12 months by the time of dismissal. Nor was it likely to last for 12 months or more because it had already ended.

49. It was for those reasons that Ms Holmes relied on the suggestion that the substantial adverse impact was likely to recur. My task was to assess in the light of the information available in August 2018 whether a recurrence was “likely” in the sense it meant “could well happen”: see **SCA Packaging v Boyle [2009] ICR 1056** and paragraph C3 of the Guidance. This had to be assessed in the light of the information available at the time, not with the benefit of hindsight.

50. Ms Holmes argued that the substantial adverse effect was likely to recur because it had been recurring over the previous five years. There had been an episode in 2013, another in 2014, a third in June 2017, and then the material episode in the summer of 2018.

51. However, I rejected that on the facts. In 2014 the claimant had not had any time off work. He had not gone off work by the time he went to hospital on 3 August despite having been in pain for two weeks by that stage (pages 14-15). Nor had he had any time off after a further two weeks or so when he saw his GP on 11 August 2014. Even without the limited medication he took at the time I was satisfied there was no substantial adverse effect in this period.

52. I reached the same conclusion in relation to June 2017. Only one day at work was affected. The claimant went on annual leave for the two weeks that followed. He offered no evidence about any difficulties whilst he was on leave.

53. As a consequence I found as a fact that the substantial adverse effect had occurred on only two occasions: July 2013 and July 2018. On both occasions it was the consequence of an impact injury to his back. The first was the paddling pool incident and the second when he was struck by a football and fell over at a family gathering. Both incidents caused a period of severe symptoms for about six weeks or so before he returned to work. There was no medical evidence before me which suggested that a recurrence of these symptoms was likely in the absence of a further impact. That was not an inference it was appropriate to draw from two episodes five years apart both caused by a relatively unusual incident.

54. I therefore concluded that the claimant had not established that the substantial adverse effect on his day-to-day activities which he experienced in July and early August 2018 was likely to recur, and that it should therefore be deemed as having lasted or likely to last for 12 months or more.

55. It followed that the claimant had not been a disabled person at the material time and therefore all his complaints of disability discrimination were dismissed. The case will proceed as one of unfair dismissal alone.

Employment Judge Franey

24 May 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

03 June 2019

FOR THE TRIBUNAL OFFICE

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