



EMPLOYMENT TRIBUNALS

Claimant

Mr G Moat

Respondent

v The International Exhibition Co-operative Wine Society Limited

PRELIMINARY HEARING

Heard at: Watford

On: 12 July 2019

Before: Employment Judge Manley (sitting alone)

Appearances:

For the Claimant: Ms I Ferber, Counsel

For the Respondents: Mr L Wilson, Counsel

PRELIMINARY HEARING RESERVED JUDGMENT

1. The claimant was disabled within the meaning of the Equality Act 2010 from January 2018 due to his back pain and/or a combination of his back pain and depression from that date. The respondent has conceded that he was disabled within the meaning of the Equality Act 2010 in relation to his depression from May 2017.
2. The hearing listed in Watford between 16 and 18 December 2019 by agreement will be relisted once the parties have supplied their dates for availability.

REASONS

Introduction and issues

1. This matter was listed for an Open Preliminary Hearing to determine whether the claimant was disabled from May 2017 and/or January 2018 due to back pain and/or depression.
2. Orders were made for bundles of documents, impact statement and so on and these were complied with.

3. Before this hearing the respondent wrote to say that they conceded that the claimant was a person with disability with respect to depression at the material time. We have all assumed that to be during the claimant's employment with the respondent which was January 2017 to May 2018.
4. The respondent did not accept that the back pain suffered by the claimant amounted to a disability. Its case is that it was not substantial or long-term or that it had an adverse effect on his ability to carry out normal day-to-day activities.
5. The issue for me to determine was therefore whether the claimant can show that he was disabled with respect to back pain at the material time. Although this had not been fully appreciated, it emerged in the hearing that the question of what material time is, is in some dispute. The respondent's case is that the material time for the reasonable adjustment claim must cease in January 2018 when the claimant went on sick leave and did not return before the end of his employment in May 2018.
6. The other questions which I must consider in the light of the evidence before me is whether the claimant had a physical impairment which had substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

The hearing

7. The hearing was listed for 1 day and in the light of relatively detailed submissions I decided to reserve judgment.
8. At the hearing I heard from the claimant, who had prepared an impact statement as ordered, and from Mr Cleary, who is the Warehouse and Supply Chain Manager of the respondent and who had also prepared a statement. I also had a bundle of documents, the most relevant of those would seem to be the claimant's medical records and the health assessment questionnaire which the claimant completed when he took up the job in January 2017.

The facts

9. The claimant appears to have worked in a warehouse environment for many years. This is clear from the medical records which I have seen going back to 1986. The first mention of backpain is recorded on 15 May 2007 (page 86) where there is reference to the details of that backache, including tingling in leg, pins and needles etc. There is further reference to pain in his back in a record on 29 April 2008 and then again in March 2012, it refers to pain in the left scapula region radiating to left side of neck. He was given a Fit Note for one week with respect to that.
10. The claimant applied to work as a Warehouse Co-Ordinator for the respondent and began in January 2017. He completed with a Human Resources Advisor, a health assessment questionnaire which appears at pages 66 through to 71. That questionnaire makes it clear that lifting or carrying heavy items is one of the duties of the job. And at page 68 the claimant ticks No to the question "Do you have any illness/impairment/disability (physical or psychological) which may

affect your work; as well as “have you ever had any illness/impairment/disability which may have been caused or made worse by your work”. The claimant did say, yes, to the question about whether he was having any treatment but, no, to the question about adjustments. With respect to the answer about treatment, the claimant says this:

“I suffered with depression three years ago. This lasted around 14 ?? months and that was caused by a series of personal issues. I have been taking Citalopram 40mg since diagnosis. I have been well for the last 18 months or so.”

11. At page 71 there were a series of tick boxes with Yes and No and the claimant ticked NO for “have you ever suffered from back pain or disorder”. When the claimant was asked in the tribunal about that he agreed that he had ticked that because it was “not fresh in his memory” (or said Yes absolutely) (page 3 of my notes).
12. In May 2017, there was an incident where the claimant injured his back at work. He visited the doctor and there is a note about this at page 78. There is reference to pins and needles in the thumbs but also to some sciatica and it is believed that he took a few days away from work because of those effects. The claimant’s evidence is that he also took some leave to deal with back pain but it is not clear whether the respondent was aware of that at the time.
13. There is no further reference to back pain in the medical records until 19 January 2018 where it is recorded as “Back pain again. Was lifting cases of wine all day”. And again, on 24 January “Back pain ongoing. Mid /upper back PT reports” (page 77). And again, on 26 January 2018.
14. Although I have not heard details of what occurred in January but Mr Cleary gave evidence that there was an incident at work where the claimant had clearly injured his back in January 2018. Mr Cleary told me that he had driven the claimant home and he accepts that he was very stiff. He said he was debilitated and that he could see that it was a significant impairment and the claimant was restricted in his movements.
15. The claimant remained on sick leave, visiting the doctor in February and March with a Sick Note provided by the GP up to 21 March which said, “Back pain and depression”. The claimant’s case is that his sickness at that period was predominantly with respect to depression but that he also did have back pain which was improving.
16. **NOTE TO IM: This bit has got to go back chronologically – I am going to add something from 2017.**
17. When he returned to work in May 2017 the claimant spoke to his Line Manager, Mr Reynolds. He explained to Mr Reynolds that he had hurt his back. He said that he did not tell Mr Reynolds that he had no pain but referred to some ongoing pain and he was put on a reach truck for a short period of time.
18. Mr Cleary gave evidence that he had a discussion with the claimant around this period of time. Mr Cleary was aware the claimant was moving with some

stiffness and that he saw that from on or around two or three occasions between May 2017 and January 2018. He also reported a time when he had a discussion with the claimant who was sleeping on a sofa so that his daughter had a bedroom and he could not recall whether the claimant made reference to the effect on his back pain issues but seems to have assumed that that was being referred to. Mr Cleary also said that the, in common with many others employees, would often refer to being a “bit tired” and commenting how busy they were.

19. In the claimant’s impact statement, he wrote between paragraphs two and five, what was said to be the effect of his back pain on his normal day-to-day activities. The way in which he described is all in the present tense so that, for instance, the claimant says at paragraph two, “in relation to my back pain, I have difficulty walking for long periods resulting in what I would describe as severe back pain after walking for long periods”. This goes on with him describing his ability to carry out his day-to-day tasks at paragraph three. He gives an example of it being “extremely difficult at times to put on socks”, he refers to driving for long periods causing pain and discomfort etc. There is no date upon which the claimant says these effects were in place. However, when he was cross-examined, he agreed with the respondent’s representative that what he was describing there were the effects after the incident in January 2018. Later in his witness statement he does refer to the impact of the bad back on his depression and vice a versa? So, at paragraphs 12 to 16 he describes having various aches and pains and the pain beginning shortly after May 2017. He said he was keen to avoid depression so he returned to work and that he asked about the work that he was doing as he believed as warehouse co-ordinator, he was doing more ‘picking’ than he should have been doing.
20. The respondent’s case is that they did not notice anything about the claimant having back pain except that as described by Mr Cleary and that he continued to ‘pick’ as many items as his colleagues. After the claimant went on sick leave in January 2018, a grievance procedure was entered into but there was no satisfactory conclusion for the claimant to that and his employment came to an end in May 2018. There is a dispute between the parties as to whether that was a dismissal or a resignation which I will not be determining today.

The Law

21. The law with respect to the question of whether the person is disabled at the material time is contained within section 6 and schedule 1 of the Equality Act 2002.
22. Tribunals seek guidance with respect to the definition of disability, in the Guidance of Disability 2011, Miss Ferber for the respondent, also took us through an explanation of the various aspects of the law from the IDS Employment Handbook, which makes reference to guidance from a number of cases on each part of the test.
23. There is no question that ... as defined in section 212 EQA is “more than minor or trivial”. Nor there is any dispute that, where there is more than one

impairment, the question of whether there is a substantial adverse effect on normal day-to-day activities must take account of the impairments taken together. There is no real dispute about what normal day-to-day activities means except Ms Ferber reminded me that I should concentrate on what the claimant cannot do rather than what we could do, which was referred to in Mr Cleary's statement.

24. Much of the disagreement between the parties is whether the impairment either had lasted, or is likely to last for 12 months, or is likely to reoccur. I was reminded that the case of Boyle v SCA Packaging Limited 2009 ICR 1056, said that it is likely to happen if it "could well happen". Ms Ferber submitted that I could take account of the fact that the claimant had worked in a warehouse setting where he had had back pain issues before, as shown in the medical notes but Mr Wilson believed that that was not necessarily relevant to this determination.
25. The central dispute between the parties was what the date of the material time was. The respondent's case is that the claimant cannot go later than January 2018 because he was not at work after that time. Although Mr Wilson accepts that that would be relevant for the section 15 discrimination arising from claim, it would in that his claim for reasonable adjustments could not proceed as most of the evidence that we have for adverse effects is from January 2018 onwards.

Conclusions

26. It is clear to me that the claimant did have an impairment. Giving that word, it's a meaning, it seems to me that back pain is indeed an impairment.
27. Turning then to the question of substantial adverse effects on the normal day-to-day activities, I accept that these need to be more than minor or trivial and, although I accept that the impact statement is not particularly helpful in this regard because it only describes the effects from January 2018, I do accept that what is described there are a combination of substantial adverse effects on the claimant's normal day-to-day activities from that date. I also would be bound to find that the combination of the effects because of taking together his depression and his back pain, would be bound to mean that from January 2018, the claimant was clearly a person with a disability.
28. I cannot find that he was disabled before that date. I accept that he had depression and that he had some intermittent problems with back pain. This is not particularly surprising given that he has chosen to work in warehouses. However, I do not believe there is sufficient evidence for me to determine that he was disabled because of his back pain between January 2017 and January 2018. The effects he already had from his depression. The claimant was disabled because of his depression for the whole of his employment but he was only disabled because of a combination of the back pain and the depression or indeed the back pain alone from January 2018.

- 29. I am of the view that that would be either a long term effect or that it would be likely to reoccur. Although the period of time in which the respondent was involved was only January 2018 to May 2018, given the description the claimant gives in his impact statement in May 2019, it seems to me clear that this difficulty with his back, given a relatively severe episode in January 2018, is likely to reoccur.

- 30. The material time he is clearly right up to the date the claimant's employment came to an end in May 2018. It cannot be argued that there was no duty on the respondent to make reasonable adjustments because the claimant was on sick leave and, as I have said, am of the view that from January 2018 the claimant was disabled because he could show substantial adverse effect on his normal day-to-day activities related to his pack pain because it was likely to reoccur, having reoccurred at earlier times and given the nature of the relatively serious incident in January.

- 31. This means that the claim will proceed to a hearing on the basis of the claimant being disabled because of his depression from January 2017 to the end of his employment and with respect to back pain and/or depression from January 2018 also to the end of employment.

Employment Judge Manley

Date: 21 August 2019

Sent to the parties on:

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For the Tribunal:

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