



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr P Ofosu

v

Lidl Great Britain Limited

Heard at: Watford

On: 28 October 2019

Before: Employment Judge Skehan

Appearances

For the Claimant: In Person

For the Respondent: Ms Jennings

JUDGMENT

1. The claimant does not have a disability as defined within the Equality Act 2010. The claimant's claim for disability discrimination is unsuccessful and dismissed.
2. The claimant's claim for discrimination on the grounds of marriage is unsuccessful and dismissed as it was not presented within the statutory limitation period as set out within S123 of the Equality Act 2010 and it is not just and equitable for the time to be extended until the date/time of the presentation of the claimant's claim form.
3. The claimant's remaining claims of unfair dismissal, wrongful dismissal and unpaid holiday entitlement will proceed to a final hearing currently listed for 14 April 2020.

REASONS

Disability Issue

1. The claimant produced a written impact statement, this was accepted as his evidence in chief to the employment tribunal and the claimant was cross-examined. The claimant's evidence can be summarised as follows:
 - a. The bad times started between 15 August 2015 -15 December 2015 and ended when he was due to come back to work in the store. He complained of pain on many occasions prior to this. The claimant conceded during cross examination that he had no back pain between 2012 and 2016.

- b. He visited his GP in February 2016 and his sick notes started at about that time. He was placed under the care of a physiotherapist. Even though he was not recovered, he agreed with the GP to go back to work and was advised that light duties would be best for him.
 - c. The claimant said that during that time he was not able to do any of his normal physical activities. He had stayed in bed for the majority of his time at home. He was still receiving physiotherapy treatment and doing his best to recover so he could get back to work. He relied upon friends and family to help with things like shopping washing and cooking. He needed regular help.
 - d. The claimant says he was unfit to work from January/February 2016 until sometime in September 2016. From September 2016, he was able to do light duties.
 - e. The claimant says that he has still not fully recovered from his back pain. He is better and well enough to carry on an administration role even though he needs regular breaks. He stressed during course of cross-examination that he had learned to live with back pain. He was given exercises to deal with it and there was no reason to go to his GP for back pain. Some days are worse than others.
 - f. The claimant says that he does not do any sport as he is not confident to do so. He has been advised by his physio to run short distances and run up to a distance of 1 km at least once a week. He has not done that recently because of work and other commitments. The claimant said during the course of cross-examination that he last visited the physiotherapist at the end of 2016.
2. I was referred to medical evidence including:
- a. A letter from Dr Sarah Yassine dated 11 August 2016. This can be summarised as:
 - i. The claimant has presented on several occasions reporting back pain. He has a good range of movement and reports stiffness and discomfort when bending, lifting and moving things.
 - ii. He was previously discharged in December 2012 and reports that the symptoms he has are recurring.
 - iii. The pain affects daily activities in that the claimant is cautious with movement. It appeared that his pain is chronic and it is uncertain how long it will last.
 - iv. He is not confident to continue with his current job.
 - b. A letter from MK Occupational Health Ltd dated 1 December 2016. This can be summarised as:
 - i. The claimant felt that the repetitive bending, twisting and lifting had exacerbated his symptoms. He was attending physiotherapy session at 2 to 4 weekly intervals and was finding it helpful

- ii. it is recorded that the GP records note the claimant's pain in daily activities, he is cautious of how he moves and he does not confide the new with his current job requirements;
 - iii. there was no indication of any other illness and he takes regular anti-inflammatory medication;
 - iv. He was able to walk for 10 minutes, stand for 30 minutes and 10 minutes although with appropriate back support he is able to sit longer;
 - v. He had stopped running and playing football over the last two years as a result of his ongoing symptoms;
 - vi. He was unable to bend his lower back at all due to the likely pain that this would cause and although apprehensive, he had a good range of movement in his neck;
 - vii. bending twisting and lifting exacerbate his symptoms and should be avoided along with lifting weights of over 5 kg;
 - viii. the usual outcome from back pain is said to be a full recovery. Concern is expressed in respect to the recurring nature and the GP indicating that pain has become chronic, and noting that 'it is uncertain how long it will last'.
- c. A letter from MK Occupational Health Ltd dated 23 April 2018 this can be summarised as:
- i. the claimant has returned to work with a different organisation in an administration role since December 2016;
 - ii. he indicated that the last time he was seen by a physiotherapist was about eight months earlier and he had not seen the GP for back pain for a similar period of time;
 - iii. there was no indicator as to any underlying cause for the pain previously experienced. He was taking no regular medication. He was driving and undertaking his normal day-to-day activities. He avoids shopping;
 - iv. He had managed to run 1 km about three weeks previously;
 - v. Within the opinion section it is noted that the claimant experienced long-term problems with reported back and neck pain and a likely diagnosis appears to be that of mechanical back pain which refers to pain in the absence of any underlying pathological cause;
 - vi. he fears exacerbating his pain by returning to his former role
 - vii. modern management of back pain was discussed encouraging early mobilisation to return to normal function;
 - viii. he would struggle to return to a role that required repetitive bending twisting and lifting.
3. The claimant has produced his GP records, relevant to his claim. These include references to back pain and ongoing back pain on 26 February 2016, 5 April 2016, 5 August 2016, 2 November 2016. Since 2 November 2016 the claimant has attended his GP for other reasons, unconnected with back pain, in June 2018 and March 2019.

Deliberations and Decision on Disability Issue

4. The definition of disability can be found in section 6(1), Equality Act 2010:

"A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities". "Substantial" means "more than minor or trivial". If an impairment ceases to have a substantial adverse effect on a person's ability to carry out day-to-day activities, it is to be treated as having that effect if that effect is likely to recur (paragraph 2(2), Schedule 1, 2010). The test is whether the particular effect (not, strictly speaking, the impairment) is likely to recur.

5. The Equality Act 2010 Guidance suggests that if a person can reasonably be expected to modify their behaviour to reduce the effects of an impairment on their normal day-to-day activities, they might not be considered disabled. In some cases, a coping or avoidance strategy might alter the effects of an impairment to the extent that they are no longer substantial. If so, the person will no longer meet the definition of disability. The Guidance clarifies, however, that account should also be taken of "where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation". It states that it would not be reasonable to conclude that a person who employed such an avoidance strategy was not a disabled person (*paragraph B9*).
6. The claimant made a reference to a history of back problems and the documentation makes reference to back problems in 2010/2012. While the GP letter refers to recurring symptoms on the claimant's part, the claimant mentioned previous episodes of back pain but did not provide any evidence relating to any negative effect it may have had on his ability to carry out his day-to-day activities. The claimant's evidence in relation to previous experience of back pain is confused to the extent that his witness statement mentions back pain from August 2015, yet in cross examination he said that he had not experienced back pain in the period between 2012 and 2016. While there is sufficient evidence to allow me to conclude that the claimant experienced back pain previously, although the dates are muddled, the claimant has not shown on the balance of probability that any previous (prior to 2016) episode of back pain caused any substantial adverse effect on the claimant's ability to undertake his day-to-day activities.
7. The claimant's GP medical evidence starts on 26 February 2016. This refers to ongoing lower back pain but does not specify any difficulty with day-to-day activities at that time. The claimant's evidence in relation to negative effect on his day-to-day activities concentrates on the period of time he was absent from work up to December 2016. The claimant has not shown on the balance of probability that prior to February 2016, back pain had any adverse effect on the claimant carrying out his normal day-to-day activities.
8. I conclude that the claimant can show on the balance of probability, by reference to his witness statement together with the medical evidence that his back pain had an adverse effect on his ability to carry out normal day-

to-day activities from February 2016 until mid December 2016. It was not possible as of August 2016 to identify as of how long that affect might last. At that point there was no evidence to suggest that it would be likely to last in excess of 12 months. We now know that the adverse effect on day-to-day activities subsided by mid December 2016. It had lasted less than one year.

9. In mid-December 2016 the claimant commenced alternative employment and has worked since this time with an alternative employer in an administrative role. The claimant's back had improved significantly by this point. The negative effects on his day-to-day activities as set out within the claimant's witness statement clearly do not apply at this time as he was able to undertake alternative, albeit administrative, work. The claimant stressed during the course of cross-examination that he continued to experience back pain but he was required to deal with that. The claimant said that he avoided sport due to his condition. The claimant did not provide any further evidence relating to his participation in sport. There is a reference within the medical evidence of the claimant's participation within sporting activities trailing off between December 2014 and December 2016, that does not correspond with the claimant's evidence in respect of when he experienced back pain. The claimant said that he had been advised to run by his physiotherapist for distances of up to 1 km, but was not doing so due to other commitments. Taking all of the above into account, the claimant has not shown on the balance of probability that he avoids sport for reasons connected to his previous or current back pain.
10. The claimant did not produce evidence to the employment tribunal nor was there any medical evidence available to suggest that the claimant's back pain had any effect on his ability to carry out his day-to-day activities following mid December 2016. I conclude that the claimant's claim at its highest was that his back pain had a substantial adverse effect on him being able to carry out his day-to-day activities between February 2016 and mid December 2016.
11. The claimant's evidence was that he continues to experience back pain but he has learned to live with it. There is no medical evidence supporting his continued back pain. The claimant did not produce any evidence of his continuing back pain having any continuing negative effect on his ability to undertake his day-to-day activities. There is mention in the medical evidence of April 2018 to the claimant avoiding shopping, however the claimant does not provide any evidence or elaboration on this matter. It is clear from the evidence that the claimant avoids repetitive bending, lifting and twisting. He has secured an alternative position where such movements are not required. While bending, lifting and twisting all form part of normal day-to-day activities, it is the repetition of these activities that is avoided by the claimant. I do not consider that such activities on a repetitive basis fall within normal day-to-day activities. Taking all of the above into account I conclude that the claimant has not shown on the balance of probability that he has experienced any adverse impact on his

ability to undertake his day-to-day activities or avoided normal day-to-day activities due to his back pain since mid-December 2016.

12. I have looked at the likelihood of recurrence. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out their day-to-day activities, it is treated as continuing to have that effect if the effect is 'likely to recur'. 'Likely to recur' means that 'it could well happen'. The claimant has suffered with back pain previously and on his evidence continues to suffer to a lesser degree. He may well suffer with back pain in the future. Back pain is a common complaint. However, it is the substantial adverse effect on day-to-day activities that must be likely to occur rather than the back pain itself. In determining what is likely to occur, I take into account what a person could reasonably be expected to do to avoid such an occurrence. In this case, such steps include, taking regular breaks at work as the claimant does, following the advice of professionals by doing exercises etc. The claimant has not shown on the balance of probability that he was likely to suffer a recurrence of the adverse effect on his ability to undertake his day-to-day activities.
13. In light of the above I conclude that the claimant is not a disabled person as defined within the Equality Act 2010.

Marriage Discrimination- Limitation Issue

14. The claimant's claim for marriage discrimination is set out within his witness statement. He says that on around 6 June 2017 he was shown around offices in Southampton by an unnamed respondent employee. He chatted to the employee told her that he was married and had just got married a week ago. The conversation turned to a potential move to Southampton and the employee asked the claimant how he will be moving to Southampton when he is newly married. The claimant explained that his wife was a nurse and there was a hospital nearby, so that should not be a problem. The claimant heard nothing about this job opportunity for six weeks and then chased the respondent for a response. Following another six week delay the claimant was told that Mark Colborne, who was dealing with the role had left the business and the process would have to start again. The claimant added during the hearing that the employee who made the comment was an assistant of 'Debbie', who was known to the respondent and the respondent should be able to trace the employee who made the comment.

Deliberation and Decision on the Marriage Discrimination Limitation Issue

15. Section 123 of the Equality Act 2010 contains the statutory time limit for bringing discrimination claims to the attention of the employment tribunal. In general, subject to the extension provided by the ACAS early conciliation period, any claim for discrimination must be submitted to the employment tribunal before the end of the period of 3 months starting with the date of the act to which the complainant relates. In this case the claimant is complaining about a single act that took place on or around 06/06/2017. Taking the claimant's case at his highest, the latest potential

date is approximately 12 weeks later, sometime in mid-September 2017, when the claimant became aware that the role under consideration would not be offered to him.

16. The normal statutory time limit can be extended by such period as the tribunal thinks is just and equitable in accordance with section 123 (1)(b) of the Equality Act 2010. The exercise of discretion is the exception and not the rule. I have considered the provisions of Section 33 of the Limitation Act 1980 and the balance of prejudice to parties. The claimant did not contact ACAS until August 2018 and the claim was not submitted to the employment tribunal until 12 October 2018. This claim arises out of a single conversation that occurred in June 2017. The claimant was unable to put forward any reasonable excuse for delaying the presentation of this claim for such a long period.
17. The allegation arises from a casual conversation between the claimant and an unnamed party, as they were touring the office and it happened over two years ago. At no time, other than during the course of today's hearing, has the claimant provided any evidence to the respondent that would allow them to either identify the unnamed party to investigate his potential complaint or defend this action. Today, the claimant has clarified that the individual was said to be 'Debbie's assistant' and asserted that the respondent should be able to identify the individual. In light of the time elapsed, I consider this additional information to be too little too late. It is obvious that the respondent will face substantial prejudice due to the passage of time and fading of memories should it be obliged to defend this matter.
18. In taking the entirety of the evidence into consideration I conclude that it would not be just and equitable to extend the primary statutory limitation period in these circumstances. I conclude that the claimant's claim for direct marriage discrimination has not been brought accordance with provisions of Section 123 of the Equality Act 2010 and the employment tribunal has no jurisdiction to consider it.
19. The claimant requested written reasons for the above decision at the conclusion of the hearing.

Employment Judge Skehan

Date: ...4 November 2019...

Sent to the parties on:

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For the Tribunal Office