



EMPLOYMENT TRIBUNALS

Claimant: Mr O Petrov
Respondent: Amazon UK Services Limited
Heard at: Leicester
On: 7 November 2019
Before: Employment Judge Ahmed (sitting alone)

Representation
Claimant: In person
Respondent: Ms I Ferber of Counsel

JUDGMENT

The judgment of the Employment Tribunal Judge is that the Claimant was not a disabled person at the material time and accordingly his claims of disability discrimination are dismissed.

REASONS

1. This was a Preliminary Hearing to determine the issue of whether the Claimant was at the material times a disabled person within the meaning of section 6 and Schedule 1 of the Equality Act 2010 ("EA 2010").
2. This Preliminary Hearing follows an earlier Hearing before my colleague Employment Judge Blackwell on 8 July 2019. There is also a further issue which was raised then as to whether the Claimant should have leave to amend his claim. Clearly that would not be necessary if the Claimant's claim was struck out so the issue of disability was dealt with first.
3. Mr Petrov has been employed by the Respondent since May 2017 and continues to be employed by them as a 'Fulfilment Associate'.
4. The disabilities the Claimant relies upon are lower back pain and pain in the buttocks. The Respondent concedes an impairment in relation to lower back pain but not the latter. The Respondent however disputes disability on the grounds that the back pain was not long term nor did it have a substantial adverse effect on the Claimant's ability to carry out normal day to day activities.
5. The Claimant alleges that at some point in December 2017 he woke up one morning with severe lower back pain and struggled to even get out of bed. He went to see his GP and was prescribed medication which we now know was Naproxen, a well-known analgesic. The Claimant's GP records show that

Naproxen was prescribed to the Claimant twice, on 5 January 2018 and on 5 March 2018 but not thereafter.

6. The Claimant has the benefit of private health care through his employers. He was referred to Nuffield Hospital in Leicester in January 2018 under the care of Dr Imran Dhariwal. Dr Dhariwal gave the Claimant an exercise programme and advice on how to reduce his difficulties by limiting the weight of pick up boxes at work. He suggested the Claimant should not pick up anything heavier than 10 kg. Dr Dhariwal's notes of 15 January 2018 following a consultation indicate that the Claimant was not keen on exercise but preferred yoga. He noted there was poor exercise compliance in accordance with his earlier advice.

7. The Claimant was later referred by the Respondent for an occupational health report on 21 February 2018 to Mr Sam Spencer, a Physiotherapist. Mr Spencer reported that the Claimant was fit for work and no adjustments were required. His report notes, inter alia, the following:

"Mr Petrov reports a two-year history of lower back pain which he can track into his right glute/thigh and thoracic spine pain in the absence of trauma which he feels has worsened since December 2017.

He has seen his GP who provided some advice, he also reports to having an x-ray on his lumbar spine in 2016 that showed a disc herniation. He has had four private sessions of physiotherapy so far and feels improved overall.

It must be noted that back pain is extremely common and the mainstay of treatment revolves around empowering the patient to take control of their symptoms and manage their condition accordingly, mainly through lifestyle changes. Further flare-ups are likely to continue.

He has been provided a robust home management programme from his physiotherapist which I have reinforced. In relation to work I recommend he has frequent hourly breaks from repetitive lifting for 3-4 minutes for a period of four weeks providing this can be supported by the business to allow him to (1) continue to gain improvements from his physiotherapy programme and (2) to allow the soft tissues to acclimatise to the new loading in the workplace. Following this time, I see no reason as to why he cannot work on full duties, restriction free."

8. In his statement for these proceedings to explain the impact of the alleged impairments on his ability to carry out normal day to day activities (the 'impact statement'), Mr Petrov says that he finds it difficult to do a number of things without feeling pain. This includes sitting on a bed, letting his legs down on the floor before getting out of bed, bending when dressing and when putting on his clothes.

9. In relation to domestic matters he is not able to stand long to use the gas hobs for cooking, he finds it difficult to undertake shopping, to stand up straight, to sit, to drive his car or to walk to the shops.

THE LAW

10. The definition of disability is set out in section 6 of EA 2010 and materially it is 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."

“Substantial” means that the impairment is more than minor or trivial - section 212(1) EA 2010.

“Long term” is defined as an impairment which has lasted 12 months, or where the total period for which it lasts, from the time of the first onset, is likely to be at least 12 months or which is likely to last for the rest of the affected person’s life – Schedule 1 Paragraph 2 EA 2010.

The word ‘likely’ has been defined in **SCA Packaging v Boyle [2009] ICR 1056** as meaning “could well happen”.

CONCLUSIONS

11. In coming to my decision I have had regard to the “*Guidance on matters to be taken into account in determining questions relating to the definition of disability 2011*” (the “Guidance”).

12. The question of disability has to be determined at the date of the alleged discriminatory act which in this particular case was February 2018 namely that the Claimant was prevented from applying for promotion or transfers to other establishments of the Respondent (see paragraph 7 of the Order of EJ Blackwell).

13. The Claimant was prescribed medication by his GP twice but not any further. I can find no evidence of any further prescription being issued or being requested beyond the two mentioned. I infer that the Claimant did not feel the need to request it because he no longer needed to relieve the pain. He refers to the fact that he took Co-codamol but there is no evidence that this was something that he was taking on a regular basis.

14. The Claimant was back at work in January 2018 albeit with adjustments by not being required to lift boxes above 10 kg. In February 2018 it was expected that he would shortly return to his full duties which it appears he did.

15. In the Nuffield report it is clear that the Claimant’s main issue was that he struggles to pick up boxes over 10 kg. The report is in direct contrast to the picture painted by the Claimant as to the state of his ability to undertake normal day to day activities. Mr Petrov recognises this but says that the Nuffield report is not an accurate reflection of what he said to Dr Dhariwal. I do not accept the Claimant’s account of what he says he cannot do. He would not be able to undertake his work duties if what he alleges was correct.

16. I see no reason for Dr Dhariwal to declare anything other than his genuine opinion or those facts which the Claimant told him. There was absolutely no reason for Dr Dhariwal to paint a false and misleading picture. I am satisfied that the Claimant did not undertake the exercises he was advised because he must have concluded they were no longer necessary.

17. There is nothing in the Nuffield report which suggest that the back pain was likely to continue beyond January 2018. It cannot be said that it was something that ‘could well happen’.

18. By the time of the February report the Claimant was found to be fit for work and no adjustments were deemed necessary by the Physiotherapist.

19. I am therefore satisfied in all of the circumstances that the impairment of lower back pain was not ‘long term’ as defined.

20. I have not been taken to any medical evidence that the Claimant had an impairment by way of pain in his buttocks. Accordingly, I find he was not disabled by reason of this alleged condition.

21. The Claimant does not therefore satisfy the definition of being a disabled person and accordingly as that is the only complaint in these proceedings the entire claim must be dismissed.

Employment Judge Ahmed

Date: 8 January 2020

REASONS SENT TO THE PARTIES ON

.....

.....

FOR THE TRIBUNAL OFFICE