Case Numbers: 3201242/2019
2201746/2019

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EMPLOYMENT TRIBUNALS

Claimant: **Mr K Harris**

Respondent: **(1) HCL Great Britain Limited**
(2) Fleet Street Accountancy Limited (in administration)

Heard at: **East London Hearing Centre**

On: **11 March 2020**

Before: **Employment Judge Gardiner**

Representation

Claimant: In person

Respondent: Ms M Stanley, counsel

JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant was not a disabled person at the relevant time, as disability is defined by section 6 of the Equality Act 2010. Accordingly, his disability discrimination claim is dismissed.**

REASONS

1. The issue to be decided is whether the Claimant was a disabled person when working for the First Respondent, and therefore entitled to bring a claim for disability discrimination by way of failing to make reasonable adjustments. He was engaged to work for HCL between 30 October 2018 and 11 January 2019.

2. I have heard evidence from two witnesses, namely Mr S Perumal on behalf of the Respondent and Mr Harris, the Claimant. In addition, I have been referred to medical evidence at pages 76 to 82 of the bundle prepared by the Respondent for this hearing.

This is the evidence that the Claimant sent through to the Tribunal in response to the Order of Employment Judge Burgher on 23 September 2019. That required the Claimant **[quote from [58]]**.

3. The Claimant says he has provided additional medical evidence at the time that he lodged his claim. However, there is no such evidence on the Tribunal file and no good reason why this evidence would not have been provided at the same time he sent the other evidence he provided by email on 13 November 2019.

4. The definition of a disabled person in Section 6 of the Equality Act 2010 is as follows:

> (1) 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.

5. Schedule 1 of the Equality Act, headed "Disability Supplementary Provision" contained the following explanation of "long-term"

> 2(1) The effect of an impairment is long-term if –
>
> a. It has lasted for at least 12 months
> b. It is likely to last for at least 12 months …

6. Substantial means more than a trivial adverse effect. Long-term means an adverse effect which has lasted for 12 months or is likely to last for 12 months. "Is likely to last for 12 months" means that the adverse effect could well last for 12 months. Insofar as is relevant to the particular issue to be determined, the Tribunal must have regard to the Guidance on Matters to be taken into account in determining questions relating to the definition of disability. No sections in that Guidance were referred to by either party.

7. The focus of the Tribunal's enquiry when considering whether an impairment is long-term is the period of the alleged discrimination. Here the relevant period is the period between 30 October 2018 and 11 January 2019. During that period, without the benefit of hindsight, the Tribunal must ask whether the impairment has lasted for at least 12 months or is likely to last for at least 12 months.

8. The burden is on the Claimant to show on the balance of probabilities on the evidence before the tribunal that his symptoms were sufficient to satisfy this definition during the period when his alleging disability discrimination. It is not for the Tribunal to contact the Claimant's GP or any other investigations into the Claimant's health beyond the records put in evidence by the parties.

9. The conditions which the Claimant says amount to a disability, either individually or in combination are as follows:

(1) Bursitis in his hips

(2) Arthritis in his feet

10. Both these conditions were referred to at the Preliminary Hearing before Employment Judge Burgher on 23 September 2019. Only hip pain had been referred to in the attachment to the ET1. This was a hearing attended by the Claimant where the issues were carefully discussed, identified and recorded in a full record of the Discussion. No reference was made then or subsequently to two further conditions that the Claimant now adds in his witness statement. These are:

(3) Stress, Anxiety, Depression and Related Stomach Ulcer

(4) Deformed toes affecting walking and balance

11. Ms Stanley, counsel for the Respondent, objected to these two conditions being relied upon in circumstances where they had not been pleaded in the ET1 or recorded as raised in the discussion before Employment Judge Burgher. I allowed the Claimant permission to argue that he was disabled by reason of these conditions, given that Judge Crosfill had not specifically limited the impairments that the Claimant could rely upon when framing his order requiring a disability impact statement. However, I indicated that reliance now on matters that could and should have been referred to at an earlier point, and where the omission was not sufficiently explained, may well impact on the Claimant's credibility and weight to which his evidence could be given on these matters.

12. The relevant period for the Tribunal to consider is the period from 30 October 2018 to 11 January 2019. There is no medical record before the Tribunal of any attendance at his GP or other healthcare provider within that period. The closest medical records in time are a discharge letter from the musculoskeletal clinic, dated March 2018, over six months before his work for HCL started; and a GP entry on 11 April 2019, three months after his work ended.

13. In the absence of such medical evidence, persuasive evidence as to the extent of the Claimant's restrictions whilst in the office is provided by Mr Perumal. He was questioned by the Claimant but the Claimant chose not to challenge much of his evidence. Mr Perumal was the Claimant's line manager and typically sat next to the Claimant on a daily basis. He gave evidence as to what he observed about the Claimant's mobility and ability to engage in normal day to day activities. He also regularly took lunch with the Claimant and other members of the small team. They would often discuss issues other than work. If the Claimant was in particular pain as a result of an ongoing condition, on the balance of probabilities he is likely to have mentioned it to Mr Perumal.

14. I accept the evidence of Mr Perumal that the Claimant did not mention he was experiencing pain apart from one occasion on 14 December 2018. On this date, he texted Mr Perumal referring to hip pain for which his GP had referred him for an x-ray. As a result, he asked permission to work from home. Mr Perumal told him to take the time off work to recover, because he did not want him to exacerbate his symptoms. The Claimant was off work for about 3-4 days and when he returned to work did not mention any further problems with his hip. He did not request any changes to his duties or take any time off work.

15. It is likely that the Claimant did visit his GP on this occasion in December 2018, notwithstanding the absence of a GP entry in the material provided to the Tribunal. This is because Mr Perumal recalls him mentioning in his text message that he had already done so. As said to Mr Perumal, it is likely that the GP did refer the Claimant for an x-ray, and this is the x-ray referred to in the entry in the medical records on 1 July 2019. I reject the suggestion of Ms Stanley that the Claimant was incorrect or untruthful when he said this to Mr Perumal. I accept the evidence of the Claimant that his GP did not have the facilities to carry out x-rays and that therefore the x-ray must have been carried out as a result of a previous referral made on a previous visit. The x-ray cannot have been taken on 1 July 2019 analysed and reported on by a suitably qualified expert so that the outcome featured in the GP note of the same short consultation.

16. As a result, there is a missing GP record which the Claimant has not provided in support of his claim. There may well also be other missing medical records. There are no hospital records of the x-ray or the report analysing the x-ray. The records provided indicate that there was a referral to physiotherapy for hip pain made to the musculoskeletal clinic on 2 July 2019, but that has not been provided to the Tribunal. Nor are there any subsequent notes from that clinic. In addition, the earlier entry on 11 April 2019 indicated that the GP was referring the Claimant to a podiatrist but that referral letter has not been produced, nor any subsequent records from the podiatrist.

17. Where, as here, there are missing records, and it was possible for the Claimant to have provided the Tribunal with a full set of records, any doubt as a result of the missing details must be resolved in favour of the Respondent. This is particularly the case where a very clear direction was given by Employment Judge Burgher as to the extent of the disclosure required to be made by the Claimant of his medical records. As I said at the start of the judgment, the burden is on the Claimant to prove that his symptoms met the required threshold.

18. During the course of the evidence, the Claimant repeatedly suggested that he would provide the Tribunal with his consent to access the medical records; or provide further medical records in due course. I stressed that the issue of disability had to be determined conclusively at this hearing, based on the evidence provided by both parties and in front of the Tribunal.

19. From the witness evidence and the medical records that have been provided, I reach the following conclusions:

(1) The result of the x-ray carried out in December 2018 was negative, given that the acronym NAD is recorded against X-ray in the GP entry. I take it that this stands for No Abnormality Detected;

(2) The problem was only in relation to the left hip, as recorded by the GP in July 2019 and not in relation to the right hip. If both hips were affected then this would have been stated;

(3) The left hip problem was not sufficiently significant to require the Claimant to consult his GP again until 1 July 2019, long after his work for HCL ended;

(4) That even at that point, on 1 July 2019, it was the second matter raised with his GP;

(5) It was not a matter that the GP felt required any pain relieving medication to be prescribed. There is no evidence from the Claimant he had ever taken painkillers for hip pain at any point;

(6) As the Claimant himself confirmed in his evidence, the hip problem had only started around the time that the Claimant was working with HCL. There is no evidence that the Claimant had experienced symptoms in his left hip before this. Thus the reference to longstanding left hip pain is a reflection of the fact that it had first started seven months earlier;

(7) To the extent that there was any hip pain at all, it did not restrict the duties that the Claimant in fact carried out apart from the four days of sickness absence. The Claimant did not refer to any hip pain apart from in relation to that short period of absence.

(8) Therefore, it did not have a substantial adverse effect on normal day to day activities. Further it was not long-term in that, on the evidence before me, having only started around the time that the Claimant's work started with HCL, on balance it was not likely to last more than 12 months.

(9) The Claimant had experienced discomfort in his feet in the past, whether caused by arthritis or deformed toes. This is shown by medical records in 2017 and March 2018. However, he had been discharged from the medical care of Alex Ross, Podiatrist in March 2018. By that point he had made good progress with exercises.

(10) There is no evidence that the Claimant required any medication or other orthotic assistance for foot pain whilst working at HCL. The Tribunal infers that any discomfort in the Claimant's feet was at a trivial level during the two and a half months of his work for HCL.

(11) In that time he had been able to manage a commute to work which was up to two hours long during rush hour, involving significant standing. He had been able to walk a mile to attend training, and to walk around the building in which he was based to speak to colleagues, attend meetings, take breaks and visit the cafeteria at lunchtime. He was able to stand for up to the 30 minutes required given the maximum length of team meetings;

(12) Although he had on occasions chosen to work from home he had never asked for permission to do so, or explained his decision to do so, based on the level of hip and foot pain he was experiencing. The Tribunal infers that he would have raised this if he was in significant pain;

(13) Based on the totality of the evidence, the likelihood is that the Claimant did not have a substantial physical impairment during his employment apart from the four days when he was absent on sick leave with hip pain.

(14) Further, in relation to the alleged symptoms of stress, anxiety and depression, there is no supporting medical evidence whatsoever. The ulcer was the result of the stress and so occurred after the onset of the stress condition. On the Claimant's own evidence, these matters only became a substantial problem after 2 January 2019 as a result of what he describes as bullying from HCL staff. There is no evidence that he sought medical treatment for this problem during the next week or so – or at all. Within 10 days or so his employment had ended. As a result, even if this alleged mental impairment had a substantial effect on normal day to day activities (on which the Tribunal is not persuaded), then it was not a long-term effect. It had not lasted 12 months, nor was it likely to do so, in the sense that it could well do so. The same is true of the ulcer. Both it and the stress appear on the evidence to be a short-term reaction to particular pressure at work.

20. For these reasons, I conclude that the Claimant's symptoms do not satisfy the definition of disability. As a result, his disability discrimination claim must be dismissed.

Employment Judge Gardiner
Date: 13 March 2020