



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mr S Ali

London Underground Limited

ON: 11 March 2021

BEFORE: Employment Judge K Bryant QC

Appearances:

For the Claimant: Mr E Lynch (union representative)

For the Respondent: Mr N Bidnell-Edwards (counsel)

JUDGMENT ON A PRELIMINARY HEARING

1. The Claimant's claims for unfair dismissal, notice pay and unauthorised deduction from wages are dismissed on withdrawal.
2. The Claimant was disabled within the meaning of the Equality Act 2010 at the times material to his disability discrimination claims as a result of a physical impairment arising from his back and leg conditions.
3. The Claimant was not disabled at any time material to his claims as a result of any other physical or mental impairment.

REASONS

4. This Preliminary Hearing ('PH') was listed to consider whether the Claimant was disabled within the meaning of the Equality Act 2010 ('EqA') at the times material to his disability discrimination claims. As noted in the summary of the PH which has been issued separately, the Claimant confirmed that his only claims in this case are for disability discrimination, and that he brings a claim

- under section 15 of the EqA concerning his dismissal and a claim under sections 20 and 21 of the EqA concerning what he says was the Respondent's failure to make a reasonable adjustment by putting him through its redeployment process and allowing him to do so remotely.
5. Disability is defined in section 6 of the EqA which provides, in so far as material, 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.
- ...
- (6) Schedule 1 (disability: supplementary provision) has effect.'*
6. Schedule 1 to the EqA includes the following:
- '2. Long-term effects***
(1) The effect of an impairment is long-term if–
(a) it has lasted at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.
(2) 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.
- ...'
7. The Claimant confirmed during the PH that the material dates in respect of his claims are:
- 7.1 For the section 15 claim, the date of his dismissal which was 2 November 2019 (it was agreed by the Claimant that the different date given in the ET1 is incorrect);
- 7.2 For the section 20/21 claim, the Claimant says that the adjustment should have been made at, or shortly after, a case conference on 4 September 2019.
8. The focus for the tribunal is therefore whether the Claimant satisfied the statutory definition of disability at any time between early September and early November 2019.
9. In advance of this PH, the Claimant had disclosed a disability impact statement and the parties had exchanged various medical records, including GP records and Occupational Health ('OH') records. These, and other documents, were contained in a bundle prepared for this PH by the Respondent. The tribunal indicated that it had not read the various medical records and that if either party wished to rely on a particular document then they should refer the tribunal to it during their evidence and/or submissions.

10. The tribunal heard evidence from the Claimant. He confirmed the contents of his disability impact statement. He answered a number of questions from the tribunal and was also cross-examined by the Respondent's counsel.
11. In light of the Claimant's evidence, and the documents to which the tribunal was referred, the tribunal has made the following findings:
 - 11.1 The Claimant was employed by the Respondent on a part-time (16 hours pw) basis from November 2017 until his dismissal with effect from 2 November 2019. It seems that he worked weekends for the Respondent and also worked for another employer during the week.
 - 11.2 The Claimant suffered an accident whilst at work for the Respondent on 30 September 2018 which resulted in a number of immediate physical problems which will be discussed further below.
 - 11.3 The Claimant had suffered from sciatica in the past, but this had resolved to the extent that it was asymptomatic some years before, and at the time of the accident the Claimant was fit and well.
 - 11.4 He went to hospital immediately after the accident and, whilst there, he suffered some sort of seizure which was not of long duration but left him anxious that he may suffer from another.
 - 11.5 The GP records indicate that shortly after the accident, in early October 2018, the Claimant was reporting ongoing back and shoulder pain, and that he was having trouble sleeping and was worried that he might have another seizure.
 - 11.6 By late October 2018 there was reference to anxiety and depression and it was noted that his symptoms included nightmares, disturbed sleep and difficulty concentrating. Nevertheless, it was recorded that he hoped to be able to return to work the following week.
 - 11.7 The Claimant saw a Consultant Neurologist on 11 January 2019 who reported that after the accident the Claimant was in immediate pain, particularly in his back and right leg, which the Consultant felt was an exacerbation of his previous sciatica, and that he had also developed pain in his left eye. These symptoms had persisted and were again reported following a further examination on 24 January 2019 at which time there was also mention of headaches.
 - 11.8 On 31 January 2019 it was reported by OH that the Claimant had explained that he had been off sick '*due to back and shoulder pain*' and that he was still quite symptomatic '*especially with his back pain*'. There was also mention of left eye symptoms and an increase in anxiety / stress level / depression.
 - 11.9 The GP records indicate that in early February 2019 the Claimant was issued with a sick note with a diagnosis of '*other back injuries, shoulder injury [and] eye pain*'.
 - 11.10 The same Consultant Neurologist reported again in March 2019, noting that apart from the Claimant's back pain, '*his only other principle (sic) problem consists of pain in the left eye*'.
 - 11.11 In June 2019 the Claimant asked his GP for another sick note for a period of 3 months, and asked the GP to '*make the note specific to lower back injury, eye pain and shoulder injury*'.

- 11.12 This is consistent with a further OH report on 27 June 2019 which noted that the Claimant remained off work *'due to his musculoskeletal problems'* and although there is mention of eye symptoms his symptoms were said to be mainly musculoskeletal.
- 11.13 The GP records indicate that a further sick note was issued on 4 October 2019 for another 3 weeks with a diagnosis of *'other back injuries [and] shoulder pain'*. A further sick note was then issued on 23 October 2019 for a three month period, this time the diagnosis being *'other back injuries'*.
12. The Respondent has sought to make much of an OH questionnaire form which the Claimant completed and signed on 14 November 2018, ie around 6 weeks after his accident. The form was completed, as the tribunal understands it, in the context that the Claimant was applying for a promotion. In the form, the Claimant said that he was currently recovering from an accident at work but did not believe that there were any long term concerns. In response to a question as to whether he had, or had ever had, a musculoskeletal condition such as problems with his neck or back, he ticked 'no' but added *'Not a condition – recovering from an accident at work.'* He also ticked 'no' to the question about mental illness, such as anxiety or depression. Another question asked whether he had difficulty with standing, bending, lifting or any other movements to which he again ticked 'no' but added that he was *'recovering from a fall. Nothing serious I believe.'*
13. The Respondent suggests that either the Claimant was not being truthful in the OH questionnaire, perhaps in an attempt not to lose the opportunity of promotion, in which case, the Respondent says, this damages his credibility and the tribunal should not accept his evidence, or he was telling the truth in the questionnaire, in which case he is now exaggerating the impact of his symptoms.
14. However, the tribunal notes that the questionnaire was completed and signed within a few weeks of the accident, at which time the Claimant may well have believed, or at least hoped, that it would not have any long-term physical consequences. It is also unclear precisely when the Claimant was diagnosed (if indeed a formal diagnosis was ever made) with a mental health condition. As noted above, there is reference to anxiety and depression in the GP notes from late October 2018, but it is far from clear that this was a formal diagnosis by the GP at that time.
15. In the circumstances, the tribunal does not accept that the content of the OH questionnaire fatally undermines the Claimant's credibility. Having said that, the tribunal will look to the medical evidence to which it has been referred to see whether what the Claimant says is corroborated, or to any extent undermined, by that evidence.
16. The Claimant said in evidence to this tribunal that the impairments on which he relies are all those set out in his disability impact statement, ie:

- 16.1 Severe lower back pain.
 - 16.2 Right leg pain.
 - 16.3 Shoulder pain.
 - 16.4 Problems with his right (sic) eye, namely pain with associated migraines and blurred vision.
 - 16.5 Mental health conditions, namely anxiety, depression, stress, panic attacks and post-traumatic stress disorder.
17. The Respondent has said at this PH that much, if not all, of the references in the medical records to various symptoms rely on the 'say-so' of the Claimant. Similarly, the Claimant's impact statement is said to rely largely, if not entirely, on the word of the Claimant himself as to his impairments and their consequences for day-to-day activities.
 18. The tribunal does not accept the Respondent's point in its entirety. It is inevitable that medical professionals have to rely to a large extent on the description of symptoms given to them by their patients. However, as the Claimant said at this PH, they are medical professionals and, therefore, whilst their reports of symptoms, diagnosis and prognosis may be based on what is reported to them by a patient, it is also informed by their examination of the patient and their medical experience and expertise, and so is more reliable than merely the 'say-so' of their patient.
 19. Having said that, the tribunal reminds itself that the burden of proving disability rests with the Claimant and that there must be a sufficient evidential basis if he is to discharge that burden.
 20. The tribunal finds that the eye problems and associated migraines reported by the Claimant did not form part of any impairment or impairments giving rise to a disability at any time material to this case. The tribunal notes that the problems reported now by the Claimant refer to his right eye whereas the contemporaneous evidence, some of which is summarised above, refers to his left eye. Further, although the Claimant said in evidence at this PH that these problems only subsided after his dismissal, that is inconsistent, the tribunal finds, with the medical records. The last time he saw the Consultant Neurologist, according to the documents seen by the tribunal, was in March 2019 and, by June 2019, although OH still mention his eye symptoms they say that his problems are mainly musculoskeletal, ie such eye symptoms and migraines as he had were largely resolved well within 12 months of the accident and there is no evidence to suggest that they were likely to recur. In any event, the tribunal has been provided with no real evidence as to how the Claimant says any eye symptoms or migraines affected him on a day-to-day basis. Any eye problems and migraines fail both the 'long-term' and 'substantial' elements of the test under section 6 of the EqA.
 21. The tribunal also finds that the mental health conditions relied on by the Claimant did not form part of any impairment or impairments giving rise to disability in this case at any material time. It is right that the Claimant has been, and may still be, prescribed anti-depressant medication. It is also right

that there is mention in the medical records of such matters as anxiety and depression. However, there is insufficient evidence from which the tribunal could reach any finding of substantial adverse impact from any mental health condition or conditions, or of long-term impact. The Claimant said in evidence at this PH that the effect of his mental health conditions depended on what situation he was in, that he had low motivation, that he stopped looking after himself, that he had nightmares, that he was mentally very closed and that his behaviour with his family was 'different'. He says that he still has difficulties. However, even more so than the eye symptoms, mental health conditions do not feature prominently in the medical records for more than the initial period after the accident, and even when the Claimant himself asked his GP at various times in 2019 to give him a new sick note and said what he would like put on the note, there is no mention of any mental health conditions. There is also inadequate evidence from which the tribunal could conclude that any mental health condition led to a substantial adverse impact on the Claimant's ability to undertake day-to-day activities; other than relatively broad assertions in his impact statement and in reply to questions from the tribunal, there is a distinct lack of specificity.

22. That leaves what are referred to in the OH records as musculoskeletal problems. There is very little evidence as to the impact of any shoulder problems. His impact statement does not attribute any particular problems to his shoulders, and in answer to questions from the tribunal he said that he had shoulder problems 'for a little while' but that they improved significantly with physiotherapy. Again, the tribunal does not have sufficient evidence to conclude that shoulder problems contributed to any long-term substantial adverse impact on his ability to undertake day-to-day activities.
23. The final conditions in play are the Claimant's lower back and right leg problems, which the tribunal will consider together. The tribunal thinks it likely that these two conditions are related, and are probably a recurrence or exacerbation of the sciatica from which the Claimant suffered some years earlier, as the Consultant Neurologist suggested.
24. The Claimant described in evidence suffering from excruciating back pain from which he still suffers although he is now managing to cope with the pain better than he was previously. He also described in his impact statement and oral evidence a number of ways in which his day-to-day activities have been affected since the accident, which appear to the tribunal to be the result of his back (and leg) condition. These include difficulty dressing, standing, sitting or walking for long periods. He says that he cannot stand for more than 7 to 10 minutes, cannot sit for more than around 15 minutes without taking a break and cannot walk for more than 100m. He continues to have difficulty using public transport because he would have to walk to the station and walk up and down stairs. The tribunal accepts the Claimant's evidence as to the impact of his back (and leg) problems at least for the period from the date of the accident to the date of termination of his employment.

25. The tribunal has also taken into account the Secretary of State's Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011), including the non-exhaustive lists of factors that it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities, which include difficulty getting dressed, using transport and going up or down steps, stairs or gradients.
26. In the circumstances, and taking into account the totality of the evidence presented to it, the tribunal is satisfied that the Claimant's back (and leg) conditions gave rise to a physical impairment which had a substantial adverse effect on his ability to carry out normal day-to-day activities, and that they did so from the date of the accident at least up to the date of termination of the Claimant's employment in November 2019, ie for more than 12 months.
27. In terms of the 'long-term' element of the test, the Claimant's dismissal (which is the unfavourable treatment relied on for his section 15 claim) was more than 12 months after his accident, ie after the substantial adverse effect started. The Claimant says that the reasonable adjustment should have been made in early September 2019, which was a few weeks less than 12 months after his accident. However, the tribunal has concluded, given the persistence of his back and leg symptoms up to that time, that as at early September 2019 the substantial adverse effect was likely to last for at least 12 months.
28. That being so, the tribunal finds that the Claimant was disabled, within the meaning of the EqA, by reason of a physical impairment arising from his back and leg conditions at the times material to his claims.

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Employment Judge K Bryant QC
14 March 2021 – Croydon