EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Galatis	**v**	Catalyst Housing Limited

Heard at: Watford Employment Tribunal On: 9 August 2021

Before: Employment Judge Norris, sitting alone (via CVP)

Representation:
Claimant – Did not appear/not represented
Respondent – Mr K Sonaike, Counsel

JUDGMENT
WITH REASONS

Background

1. The Claimant worked for the Respondent as a flooring installer, between 23 October 2019 and 24 February 2020. On or about 20 November 2019, he claims to have suffered a back injury at work and was signed off from then until his dismissal.

2. The Claimant submitted a claim for disability discrimination on 6 June 2020. The Respondent defended the claim. The parties appeared before EJ Quill on 9 April 2021 for a Preliminary Hearing (Case Management) (PHCM). EJ Quill set the matter down for an open Preliminary Hearing (OPH) on 9 August 2021 to determine, among other factors, whether the Claimant met the necessary definition at section 6 Equality Act 2010 (EqA) and, subject to that definition being met, listed the matter for a full Merits Hearing between 6 and 8 April 2022. He ordered that the parties were to exchange evidence on the point by 20 May 2021 and (by the same date) the Claimant was to provide a disability impact statement. It appears that the Claimant did comply with the Orders, though possibly not until 30 June 2021.

3. In any event, the Respondent prepared a small bundle for the OPH, which was before the Tribunal on 9 August.

OPH 9 August 2021

4. The Claimant did not appear at 10.00, the scheduled start time. The Respondent's Counsel, Mr Sonaike, endeavoured to contact the Claimant through his instructing solicitors. The Tribunal also made several attempts to phone and email the Claimant. His phone was not taking incoming calls and he did not reply to the email. We waited until 11.00 before starting, in case the Claimant had been mistaken as to the time. It was the Respondent's submission that we should

proceed in the Claimant's absence.

5. I considered the provisions of Rule 47 (Schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013). These state that if a party fails to attend or be represented at a hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it must consider any information available to it, after any enquiries that may be practicable, about the reasons for that party's absence.

6. I concluded that the Tribunal had made all reasonable efforts to contact the Claimant using the details that he had provided. No reasonable explanation had been given for his absence. I therefore agreed to Mr Sonaike's submission that we should proceed with the hearing. I heard Mr Sonaike's submissions on behalf of the Respondent and reserved my decision.

Law

7. The question of whether a person has a disability is governed by section 6 EqA. They are required to show that they have a physical or mental impairment, and that that impairment has a substantial and long-term adverse effect on their ability to carry out normal day to day activities. Schedule 1 to the EqA deals with the question of whether something is "long-term". This will be the case where an impairment's effects have lasted for at least 12 months, or are likely to do so, or (if likely to be less than 12 months) are likely to last for the rest of the person's life.

8. The EqA Guidance (on matters to be taken into account when determining the question of disability) confirms that "day to day activities" are those which people do on a regular basis, such as shopping, reading, writing and taking part in social activities. They do not include specialised activities such as playing a musical instrument, or playing sport to a high level of ability, or activities where very specific skills or levels of ability are required.

9. Participation and progression in a particular profession is not normally considered a "normal day to day activity". However, the EAT has held[1] that advice from a GP not to go to work "is in itself evidence of a substantial effect on day to day activities… day to day activities include going to work".

10. According to section 212 EqA, a "substantial" adverse effect is one which is more than minor or trivial.

11. So far as the word "likely" is concerned when considering whether the effects of an impairment are "likely" to last for at least 12 months, the (then) House of Lords has confirmed[2] that it means something that "could well happen". The question of likelihood is to be determined at the date of the alleged act of discrimination.

12. The burden of proving disability is on the Claimant and the standard is the normal civil standard of the balance of probabilities.

Evidence

13. On or around 7 February 2020, the Claimant had an appointment with Dr Jehad Aldegather of BHSF Occupational Health Limited. The Claimant told Dr Aldegather that he had seen his GP and been advised to take pain killers and carry out his own physiotherapy back exercises. As of the date of the appointment, the Claimant told Dr Aldegather that he was still experiencing significant low back pain, exacerbated by movements including standing for periods of time, lifting heavy objects or bending over. Dr Aldegather said the Claimant "has had" difficulty

[1] *Rayner v Turning Point & Others* UKEAT/0397/10
[2] *SCA Packaging Ltd v Boyle [2009] UKHL 37*

driving longer distances. No further detail was given of those restrictions on the Claimant's movements.

14. Following a physical examination, Dr Aldegather considered that the Claimant had mechanical low back pain arising from an incident at work. He was not disabled within the EqA definition because his symptoms had not yet satisfied the longevity criteria. In his area of North Hertfordshire, a person unable to work is able to access urgent NHS physiotherapy within two weeks. The Claimant was given an urgent letter to show his GP so that he could do so. If that did not improve his symptoms, a referral to a local Musculo-Skeletal Triage Service would be the next option offered to him, also on the NHS. Once the condition was treated effectively, Dr Aldegather considered that the Claimant would be able to return to work and give "regular and effective service". However, he noted that with NHS waiting lists as they are, treatment could take many weeks/months to materialise.

15. The Claimant's disability impact statement says that the Claimant "used to play a lot of football and go gym regularly". Following the incident, he says, he was prevented from doing his normal activities outside work. He had broken sleep and often had to wake up to take over the counter medication. The issue affected his work and family time as well as his social life.

16. The Claimant has returned to work as a sub-contractor. He does not say when this was. He had to reduce what he could take and rely on different ways to adapt his work which slowed him down and caused him not to be able to work five days a week. He does not say over what period these restrictions applied. He says he uses mechanical/lifting aids, without giving further details. He has had to stop doing certain jobs because the weight would be too difficult to move around. Another worker works with him daily.

17. Finally, the Claimant uses a massage gun once a week and paracetamol for the pain. If the pain becomes too bad, he says he has been known to visit the physiotherapist for deep tissue massage. He has not put any evidence of these visits before the Tribunal, such as how frequently they take place.

18. The statement is undated but is signed by the Claimant. I take into account that he did not attend the Tribunal to allow the Respondent to challenge him on it, and I place reduced weight on it in consequence.

19. An NHS letter dated 20 November 2019 shows that the Claimant attended the hospital the previous day and had a confirmed diagnosis of lumbar spine strain. Under "treatment given", it records that the Claimant was given Guidance/Advice. Under "Further treatment/review required", it records that the Claimant was discharged without the need for FU (presumably, follow-up) treatment.

20. The Claimant had also produced his GP records for the relevant time. The records show that he saw his GP on 11 November 2019, in connection with eczema which had been exacerbated on his upper limbs, chest and face. He was prescribed ointment, capsules and cream.

21. On 28 November 2019, the Claimant saw his GP in connection with the reported incident at work some ten days earlier. The GP issued a certificate saying the Claimant "may be fit for work" and diagnosed "acute back pain". On 18 December 2019, he saw the GP again and reported that he had tried to return to work but his back pain had recurred. "Back pain – work-related injury" was diagnosed and the Claimant was signed off "may be fit for work" again.

22. On 10 January 2020, the GP records that the Claimant had started seeing a physiotherapist, who had advised six weeks' light duties. The Claimant continued

to be signed off "may be fit for work" between 10 January and 20 February 2020.

23. The remaining records do not suggest that the Claimant returned to the GP about his back pain. On 27 February, he saw his GP about a feeling of tiredness for three weeks, pain in his right lower ribs and tummy, ulcers in his mouth and feeling weak and feverish. The Claimant is recorded as having told his GP that he was going to "regular gym" and that his trainer had suggested the pain in his right side might be a hernia. He was diagnosed with an upper respiratory tract infection and advised to try to cut down his gym sessions while the symptoms persisted. Further visits in July 2020 and January 2021, both conducted over the phone, were in connection with the Claimant's eczema. He does not appear to have mentioned back pain after the 10 January 2020 visit.

Findings and Conclusions

24. I find that in the initial weeks after the Claimant's incident at work, he may well have met the definition of having a physical impairment that had a more than minor or trivial effect on his ability to carry out day to day activities. Although it is unclear what adjustments were recommended in the fit note, the Claimant was at least partially unfit to work. He says he was unable to play football or go to the gym. These are normal day to day activities, in that although not everyone plays football or has a gym membership, they are the sort of thing that people do as leisure activities on a regular, if not daily, basis. There is no suggestion that the Claimant was playing football to a very high level of ability and team sports are normal activities in which many people are involved.

25. Mr Sonaike very fairly accepted that based on Dr Aldegather's report in February 2020, while the Claimant's impairment had not yet lasted 12 months, it might possibly have been expected to in the absence of the recommended treatment. Dr Aldegather did say however, as I have noted above, that the Claimant was likely to give regular and reliable service once more, providing his condition was treated effectively.

26. It appears that that then did happen. As I have noted, although the Claimant apparently did not mention it to Dr Aldegather, his GP records confirm that he had already started physiotherapy by 10 January and the physiotherapist had recommended six weeks' light duties. There is no suggestion that he either saw his GP thereafter or that he was referred, as Dr Aldegather had indicated might have to be the next step, to the Musculo-Skeletal Triage Service. I conclude that had Dr Aldegather been aware that the Claimant had already commenced physiotherapy, it is likely he would not have mentioned "weeks/months" before treatment materialised.

27. Further, I find as a fact that the Claimant's inability to attend the gym had ceased by 27 February 2020, when he saw his GP for an unrelated issue and said he was once more "going to regular gym". That was just three days after the Claimant had been dismissed and is in keeping with the suggestion from the physiotherapists as recorded by the GP that the Claimant should have six weeks' light duties (i.e. from 10 January to 20 February); following that he appears to have made almost a full recovery. This is the date of the alleged discrimination; the failure to extend the Claimant's probation period to allow him time to recover and his dismissal are said to be two of the discriminatory acts of which the Claimant complains.

28. I note that the Claimant has said he has taken paracetamol for the pain as well as administering a massage gun weekly. Even taking this at face value (and mindful, as Mr Sonaike submitted, that this evidence was not given on oath or subject to challenge by way of cross-examination) this is not prescribed or strong medication and I do not consider that this demonstrates that the continuing effect meets the statutory definition. I also note that the Claimant has returned to work, although

he does not say when, and that there is insufficient detail in his statement to persuade me that he is prevented from doing normal day to day activities by the pain in his back.

29. I also note that the original diagnosis was one of a back sprain (i.e. a pulled muscle) without any medication or follow-up treatment indicated. It therefore appears that, as might be hoped when such an impairment arises from a single incident rather than being a chronic condition, that the Claimant has been successfully treated and that accordingly, as at the date of the alleged discrimination, it was not at all likely that any substantial adverse effects of the impairment would last for at least 12 months.

30. In the circumstances, I conclude that the Claimant did not have a disability at the relevant time and his claim of disability discrimination (section 15 Equality Act 2010 and failure to make reasonable adjustments) is therefore struck out. The Hearing listed for 6-8 April 2022 is accordingly vacated (cancelled).

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Employment Judge Norris
Date: 9 August 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE