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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4100692/2019

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Held in Glasgow on 24 September 2019

Employment Judge: L Doherty

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Mr S Gill

**Claimant
Represented by:
Mr Healey -
Solicitor**

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First Glasgow (No.1) Limited

**Respondent
Represented by:
Mr S Peacock -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgement of the Employment Tribunal is that the claimant is not disabled in terms of section 6 of the Equality Act 2010.

REASONS

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1. The claimant brings claims of unfair dismissal, and discrimination on grounds of race and disability. Disability status is not accepted and this Preliminary Hearing (PH) was fixed to consider the issue of the claimant's disability status

E.T. Z4 (WR)

under section 6 of the Equality act 2010 (the EQA). The claimant was represented by Mr Healy, and the respondents by Mr Peacock.

2. The claimant gave evidence on his own behalf and lodged documentary productions.

5 Findings in Fact

3. From the evidence before it the Tribunal made the following findings in fact.
4. The claimant, whose date of birth is 5/04/1962, was employed by the respondents as a bus driver from August 1999 until December 2018. The claimant's job involved him driving buses on a variety of routes. The length of route which the claimant regularly drove varied, but a driving a route would regularly take between two to two and a half hours, up to on occasion 4 hours. The claimant could be required to be on the bus for 5¹/_a hours before he became entitled to a break.
5. The claimant was diagnosed with Sciatica in 2003. He attended his GP in the February 2003, and the GP records note that he had a sudden onset of pain in his right buttocks radiating down his right side with a sciatica distribution. It was noted that the claimant was a driver for a living, and that he was not in great distress. It was also noted that he took co-codamol.
6. The claimant attended his GP in in March 2003 and GP records note that he complained of pain in his right buttocks and that stretching helped alleviate the pain.
7. The claimant was given advise by this GP on stretching exercises.
8. The claimant also attended his GP in September 2003, and the records note that he had right sided Sciatic pain
9. The claimant has not attended his GP with complaints of Sciatica since 2003.

- 5 10. The claimant's Sciatica pain runs from his waist down the back of his leg of his right side. When sitting for long periods the pain gradually gets worse . The claimant is always aware of his Sciatica; on average it becomes painful about once a week. The claimant manages this pain by stretching his legs at regular intervals.
11. The claimant cannot sit or drive a bus or a car for more than 2 to 2½ hours without experiencing a degree of Sciatica type pain. He regularly takes a break after that length of driving in order to carry out stretching exercises on his legs to alleviate that pain.
- 10 12. The claimant manages to carry out his job as a bus driver by carrying out these stretching exercises on his legs which he does during his scheduled breaks.
13. After the claimant's employment with the respondent came to an end, he obtained alternative employment as a bus driver.
- 15 14. The claimant drives on a reasonably regular basis from Glasgow to Birmingham in order to visit family and friends. He takes two or three breaks on such a trip in order to carry out stretching exercises.
- 20 15. The claimant finds long periods of standing difficult. The claimant used to enjoy attending concerts where he could watch from a standing position; however now when booking tickets for the concert he always ensures that there is seating is available. The claimant would not engage in an activity which involves long periods of standing. The claimant previously undertook work as a DJ which involved long periods of standing, but no longer does this. The claimant could not stand for the duration of a commercial concert
- 25 without experiencing a degree of Sciatica type pain.

Note on Evidence

16. The Tribunal heard from the claimant, and in the main found his evidence to be credible and reliable. There was one element where the claimant's reliability came into issue, and that was the evidence that he attended his GP in 2012 for his Sciatica. The claimant's disability impact statement, which he said in evidence summarised his position, stated that he consulted his GP further in 2012, and the GP provided him with a list of exercises to alleviate any pain; enquired as to whether this improved his pain levels; and that the claimant advised his GP that it did improve his pain level. There was no record of this attendance in the claimant's GP records which were before the Tribunal, and the Tribunal formed the impression that the claimant's evidence on this point was mistaken. The Tribunal did not however conclude that the claimant set out to deliberately mislead it on this point.

15 Submissions

17. In its submissions Mr Healey began by addressing the Tribunal on the four stage test which he submitted it had to consider in determining disability in terms of Section 6 of the Equality Act. He submitted that the fact that the claimant had an impairment, Sciatica, and its long term effect was not an issue, and the Tribunal had to concentrate on the other two tests.

18. Mr Healey referred to the "Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability 2011 (the Guidance)" in particular, section B1 under the heading of "Meaning of Substantial Adverse Effect".

19. Mr Healey submitted that the claimant cannot take his rest breaks in the same way as other bus drivers, as he has to carry out stretching exercises. He cannot attend concerts and he cannot indefinitely sit or stand in the same way

as someone who does not have his condition. The activities of standing, sitting and driving were affected. Mr Healey submitted that the Tribunal needs to consider the effect of the claimant's disability on him, and the comparison has not to be made with the population at large (*Paterson v The Commissioner of Police of the Metropolis UKEAT/0665/06/LA.*) Mr Healey also referred to the case of *Aderemi v London and South Eastern Railway Ltd UKEAT 2012 0316120612* and paragraph 25 of the judgment in that case. Mr Healy submitted the normal day to day activities of standing and sitting are were affected.

10 20. Mr Healey submitted the Tribunal had to consider the effect of the claimant's condition absent treatment. It therefore had to disregard the effect of the stretching exercises which the claimant did in assessing his disability. It was not enough to say that the claimant could do his job just because he could carry out stretching exercises on his break.

15 21. Mr Healey also submitted that all four parts of the test need to be considered in determining disability status, (*Godwin v the Patent Office [1998] UKEAT579821 10*), and he referred to the case of *Vicary v British Telecommunications Pic [1999] WL1 142703* to support the proposition that more than minor are trivial is a low standard.

20 **Respondent's Submission**

22. Mr Peacock for the respondents firstly submitted that the burden of proving disability status rests with the claimant, and he submitted the claimant had not discharged that burden. Mr Peacock agreed there were four tests which the Tribunal had to consider. The respondents accepted that the claimant had an
25 impairment, and they also accepted its long term nature. The question for the Tribunal was whether that impairment had an adverse effect on the claimant's ability to carry out day to day activities, and if so, was that effect substantial.

23. Mr Peacock accepted, following *Godwin*, that there should be a purposive approach to the legislation. He accepted that substantial meant more than minor are trivial, and that that was a low threshold, but he submitted that even taking all that into account the claimant was not disabled in terms of the Equality Act.
24. Mr Peacock began with the medical evidence, and the claimant's GP report. He submitted there was nothing in the GP's report which supported the conclusion that the claimant did not carry out normal day to day activities.
25. Mr Peacock referred to the Guidance, at B7 which provides that account should be taken of how far a person should be reasonably expected to modify his or her behaviour, for example by the use of coping strategy.
26. Mr Peacock submitted that the claimant's carrying out stretching exercises fell into this category, and not as medical treatment, which should be disregarded as submitted by Mr Healey.
27. Mr Peacock also referred to D3 in the Guidance in connection with the day to day activities, and the definition contained in D3. While the Tribunal should not carry out a tick box exercise, this should give the Tribunal a good idea of matters which it should consider. Mr Peacock submitted that the claimant had not reached the threshold of adverse effect on normal day to day activities, and if he had, then it was not a substantial adverse effect.
28. Mr Peacock then dealt with the evidence particularly the medical report, and the medical records, and he took the Tribunal to the terms of the medical report and the entries in the medical records. He submitted that it was inconsistent with the notion that the claimant met the test in section 6, that he had not consulted his GP about his condition since 2003, and that he had no absent record for any reason from his employment.

29. Mr Peacock did not accept that driving a bus which involved between a 2¹/₂ to a 4¹/₂ hour route, amounted to a day to day activity, and the claimant failed to meet the test.

Consideration

5 30. Section 6 of the ETA provides-

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.

10 31. The Tribunal took into account B1 of the Guidance which states under the meaning a substantial adverse effect; *"the requirement that an adverse effect on normal day to day activities should be a substantial one to reflect the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that it is more than a minor or trivial effect."*

15 32. The Tribunal had regard to the Guidance at B12, which deals the effects of treatment, and provides; *"The Act provides that where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, "likely" should be interpreted as meaning could well happen. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (Schedule 1, paragraph 5(1)). The Act states that the treatment or correction measures which are to be*

20 *disregarded for these purposes include in particular medical treatment and the use of prosthesis or other aids (Schedule 1, paragraph 5(2)). In this*

25 *context medical treatment would include treatment such as counselling, the*

need to follow a particular diet and therapies in addition to treatment with drugs’.

The Tribunal also take into account the guidance, at B7 under the heading Effects of Behaviour. This provides; *“Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by using a coping or avoiding strategy to prevent or reduce the effects of impairment on normal day to day activities. In some instances, a coping or avoidance strategy may alter the effect of the impairment to the extent that they are no longer substantial and the person no longer meets the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day to day activities.*

It is not an issue in this case that the claimant has an impairment, Sciatica. Nor is it an issue that his condition is long term.

What is an issue for the Tribunal is whether the claimant's impairment has a substantial adverse effect on his ability to carry out normal day to day activities?

33. Mr Healey submits that the claimant's condition has an adverse effect on his ability to stand, sit and drive.

34. The claimant's evidence was that he could not stand, or sit, which included driving, for long periods and in particular, that he could not drive for long periods without experiencing a degree of Sciatica type pain and taking a break to stretch his leg. The claimant said in evidence that he could drive for up to 4 hours, but his evidence also was that he regularly drove for 2 to 27? hours before he took a break in order to stretch his leg.

35. On this basis the Tribunal was satisfied that the claimant could not drive for more than 2 to 2Vzhours without experiencing some Sciatica type pain and that when this occurred he took a break in order to stretch his leg. The Tribunal is supported in this conclusion by the fact that the claimant gave

evidence about driving from Glasgow to Birmingham, and the need to take two or three rest breaks in such a journey.

5 36. When assessing whether the claimant's condition had a substantial adverse effect on his ability to carry out day to day activities, the Tribunal considered whether, as submitted by Mr Healey, it should ignore the effect of the claimant's carrying out exercises, or whether as submitted by Mr Peacock, the claimant's carrying out exercises should be regarded as a coping strategy.

10 37. Having regard to the terms of the Guidance, the Tribunal concluded that the claimant's carrying out stretching exercises as recommended by his doctor, should be regarded as treatment, as opposed to a coping strategy. In reaching its conclusion, the Tribunal took into account the terms of the guidance at B12, which makes reference to following a particular diet or therapies in addition to treatment with drugs. The Tribunal was satisfied that it was in line with this Guidance to regard the claimant's carrying out stretching
15 exercises on a regular basis on the recommendation of his doctor, as treatment. In reaching this conclusion the Tribunal also takes into account the examples given on the in the Guidance as to the *Effects of Behaviour* at B7, which suggests that it would be reasonable to expect a person who had recurrent back pain to avoid extreme activities such as skiing. It appeared to
20 the Tribunal that carrying out stretching exercises went beyond a modification of behaviour as a coping strategy, as was to be regarded as a treatment following the guidance at B12. An example of a modification would be booking seats as opposed to standing tickets at a concert.

25 38. The claimant's evidence was that after driving for 2 to 2½ hours, he experienced sciatica type pain and took a break in order to carry out his stretching exercises on his leg.

30 39. The Tribunal has to consider the effect that the impairment without the claimant taking the measures in question (i.e. carrying out stretching exercises). On the basis of the claimant's evidence, the Tribunal concluded that it was likely that the claimant would not be able to sit or drive for a

sustained period beyond 2 to 27s hours without experiencing Sciatica type pain unless he carried out stretching exercises.

5 40. The Tribunal then considered whether on the basis of this conclusions, there was an “adverse effect” on the claimant’s ability to carry out day to day activities? The focus has to be on what the claimant cannot do, as opposed to what he can do. The Tribunal concluded the claimant could not sit or drive for more than 2 to 27?hours without experiencing Sciatica type pain. It also concluded that he could not stand for long periods without experiencing this type of pain. The claimant gave no evidence as to exactly what he meant by long periods, but he did say that he could not stand for the duration of a concert, and on that basis the Tribunal was satisfied that he could not stand for a period of time equal to the length of a commercial concert without experiencing Sciatica type pain.

15 41. The Tribunal then considered whether not being able stand for this length of time or to sit or drive for more than 2 to 27s hours without experiencing Sciatica type pain had a substantial adverse effect on the claimant’s ability to carry out normal day to day activities.

20 42. In this connection, the Tribunal then took into account the Guidance as to day to day activity, and D2, 3 and 4 of the Guidance. It was satisfied that driving, or sitting or standing, are day to day activities.

25 43. The Tribunal also took into account the definition of “*substantial*” referred to by Mr Healey. A substantial effect is one that is more than minor or trivial. Taking into account this guidance, the Tribunal was not satisfied that inability to sit or drive or drive for more than 2 to 27a hours without experiencing Sciatica type pain, or the inability to stand for a long period, equivalent to the duration of a commercial concert, without experiencing Sciatica type pain, amounted to a substantial adverse effect on a normal day to day activities. In reaching this conclusion the Tribunal takes into account that there was no evidence before it as how this effect of the claimant’s impairment amounted to a substantial one on his ability to carry out day to day activities.

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44. The Tribunal therefore concluded that the claimant was not a disabled person within the meaning of section 6 of the Equality Act.

45. The effect of this conclusion is that the Tribunal does not have jurisdiction to consider the claimant's disability discrimination claim.

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Employment Judge: Laura Doherty
Date of Judgment: 08 October 2019
Entered in register: 09 October 2019
and copied to parties

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