



EMPLOYMENT TRIBUNALS

Claimant: Ms Malgorzata Piliszek

Respondent: Jigsaw Foods Limited

Heard at: Nottingham

On: 15 November 2022

Before: Employment Judge Ayre (sitting alone)

Representation

Claimant: Ms D Janusz, Employment Advisor

Respondent: Mr R Grove, Solicitor

Other attendees:

Polish Interpreter: Ms M Niedeziolka

Observer: Judicial Shadower, Mr M Hewitt

JUDGMENT having been sent to the parties on 30 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

The Background

1. The Claimant is employed by the Respondent and her employment is ongoing. On 18 November 2021 she issued a claim for disability discrimination and unlawful deduction from wages in the Employment Tribunal following a period of early conciliation that started on 1 October 2021 and ended on 18 October 2021.
2. There was a Telephone Preliminary Hearing for case management purposes on 14 April 2022 before Employment Judge Brewer. At that hearing the issues in the claim

were clarified, case management orders were made and the claim for unlawful deduction from wages was withdrawn.

3. That claim was subsequently dismissed on withdrawal.
4. The Claimant is pursuing complaints of disability discrimination, specifically that the respondent failed to make reasonable adjustments and for disability related harassment. Those claims are listed for a final hearing in January 2023.

The Issue

5. The issue that failed to be decided today is whether the Claimant was at the time of the alleged acts of discrimination disabled by reason of chronic back pain. The Respondent admits that the Claimant had a physical impairment at the relevant time and that the impairment had an impact on the Claimant's ability to carry out normal day to day activities. The questions to be decided today therefore were whether the impact on the Claimant's ability to carry out day to day activities was substantial and whether it was long-term.

The Proceedings

6. There was an agreed bundle of documents running to 243 pages split into a main bundle and a supplementary bundle. I heard evidence from the Claimant and on behalf of the Respondent from Valerie Butler, HR Manager. Ms Butler's evidence was unchallenged by the Claimant. I was provided with a written skeleton argument by Mr Grove for which I am most grateful.
7. At the start of the hearing, I clarified the period in respect of which it is alleged that the Claimant was disabled. It appeared from the issues identified by Employment Judge Brewer in the previous Preliminary Hearing that the alleged acts of discrimination took place between February 2021 and July 2021.
8. At the start of today's hearing Ms Janusz applied to amend the claim to change the date from which it is alleged that the Respondent discriminated against the Claimant to December 2020 through to July 2021. Having heard submissions from both parties on the question of the amendment I granted it. The amendment sought by Ms Janusz was a minor one, namely a change in the dates of the alleged discrimination. It did not involve any new allegations or evidence or any new factual enquiry. The Respondent has been aware of the correct date from the time it filed its response to the claim in which it referred to December 2020. I therefore concluded that there was no prejudice to the Respondent in allowing the amendment and that the balance of justice and hardship favoured allowing it. The Claimant is therefore permitted to amend her claim to change the dates of the PCP applied by the Respondent and referred to in paragraph 3.2 of Employment Judge Brewer's case summary from February 2021 to December 2020.
9. The period of time therefore in respect of which I have to decide whether the Claimant is disabled runs from December 2020 to July 2021.

Findings of Fact

10. The Claimant suffers from chronic back pain. She began suffering from back pain in the Autumn of 2020. She first consulted her GP about the back pain on 1 December 2020. The doctor's notes of that consultation record that the Claimant reported having had lower back pain for 2-3 weeks and having used a pain killer known as Zapain in the past for similar problems. The Claimant was prescribed Zapain and Co-codamol and was given a fit note covering her from 1 December to 14 December 2020 and stating that she may be fit for work on light duties.
11. The Claimant contacted her GP again on 6 January 2021 with a request for a repeat prescription of Zapain, and again on 19 April 2021. She was also seen in a Rheumatology Clinic on 20 May 2021 for her chronic back pain and leg cramps. The notes of that appointment record that her symptoms had not changed much and that an urgent scan had been booked.
12. On 4 June the Claimant requested a repeat prescription of Zapain, as she did again on 14 July. On 26 July she contacted her GP but was unable to describe the reason for her call because she speaks little English. An appointment was made for 29 July at which the Claimant was accompanied by her daughter. The notes of that appointment record that the Claimant was suffering from long standing lower back pain radiating to both legs. The Claimant was referred for an MRI scan and to physiotherapy and given a self-referral form to complete. In that form the Claimant said that her problems were having a moderate impact on her ability to carry out her day-to-day activities although they were not preventing her from working, playing sport, driving or caring for a dependant. The Claimant also commented in the form that she was being woken up from sleep by her symptoms and that the pain was severe.
13. In November 2020 the Claimant had been examined by a Consultant at Kings Mills Hospital, Dr Limb. In a report dated the 26 November 2020 and sent to the Claimant's doctor, he diagnosed the Claimant as having chronic back pain with a history of leg cramps. He also commented that she had a normal posture and well-preserved movement but that her presentation was suggestive of mechanical back pain.
14. Between December 2020 and July 2021, the Claimant had only half a day off work due to back pain, upon her return from a 2 month period of furlough between January and March 2021. Other than that, she appeared fit for work and even when she began her period of sickness absence in July 2021, she told the Respondent that she was fit to do cleaning duties. The Claimant was however experiencing regular back pain and was taking medication on a very regular basis to control this.
15. In May 2021 the Claimant was assessed by the Respondent's Occupational Health providers. Occupational Health commented in their report that the Claimant was able to care for herself independently and to complete normal activities of daily living. They assessed her as being fit for work with no adjustments required and as unlikely to meet the definition of disability contained within the Equality Act.

16. The Claimant's evidence to the Tribunal, which on balance I accept, was that her condition had a fluctuating effect on her ability to carry out normal day to day activities. On some days she had no pain and felt normal without any restrictions. This she said was the case at the time of the Occupational Health Assessment, which explains why the Occupational Health Advisor reached the conclusions that she did.
17. On other days however the pain is so bad that the Claimant cannot get out of bed, cannot walk and cannot even use the toilet. It is not unusual for back pain to have fluctuating impact. When the Claimant is having a bad day, she finds it difficult to climb stairs, she cannot lift heavy items, finds it difficult to do day to day activities such as cleaning, shopping, cooking, walking and driving a car. On other days there is no impact on her day-to-day activities.
18. Her condition has deteriorated over time and since July 2021 she has remained absent from work. She continues to suffer from back pain.

The Law

19. The burden of proving disability lies with the Claimant. The definition of disability is set out in section 6 of the Equality Act 2010:

"(1) A person (P) has a disability if -

- a) they have 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".*

20. Schedule 1 Part 1 Para 2 of the Equality Act defines long-term and states that:

"(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,*
- (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."

21. 'Likely' has been held to mean "is a real possibility and could well happen" by the Supreme Court in **SCA Packaging Limited v Boyle [2009] ICR1056**. The guidance states that conditions with effects which recur only sporadically or for short periods can still qualify as long-term impairments if the effect on normal day to day activities is substantial and likely to recur more than 12 months after the first occurrence
22. Substantial is defined in section 212(1) of the Equality Act as meaning more than minor or trivial. The cumulative effects of an impairment should be taken into account when working out whether it is substantial.

23. Paragraph 5 of Schedule 1 to the Equality Act provides that:

“An impairment is to be treated as having a substantial adverse effect on the ability to carry out normal day to day activities if measures are being taken to correct it and but for that it would be likely to have that effect.”

24. Paragraph 12 of schedule 1 to the Equality Act provides that: “

“When deciding whether a person is disabled the Tribunal must take account of such guidance as it thinks is relevant.”

25. The Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability (“the Guidance”) was issued by the Secretary of State in May 2011. I have taken this into account.

26. In ***Goodwin v Patent Office [1999] ICR 302*** the then President of the Employment Appeal Tribunal gave guidance on the approach for Tribunals to adopt when deciding whether a claimant is disabled. He suggested that the following 4 questions should be answered in order-

- i. Did the Claimant have a mental or physical impairment?
- ii. Did the impairment affect the Claimant’s ability to carry out normal day-to-day activities?
- iii. Was the adverse condition substantial?
- iv. Was the adverse condition long-term?

27. Day to day activities encompasses activities which are relevant to participation in professional life as well as personal life and the Tribunal should focus on what the Claimant cannot do or can only do with difficulty rather than what they can do.

28. Guidance on recurring or fluctuating effects is contained within paragraph C(5) to C(8) of the statutory guidance on the definition of disability.

My Conclusions

29. It has not been necessary for me to decide the questions of impairment or whether the impairment has an adverse impact on the Claimant’s ability to carry out normal day to day activities. Those matters are conceded by the respondent. I have only had to decide whether the impact on the claimant’s ability to carry out normal day-to-day activities was substantial and whether it was long term.

30. Turning first to the question of whether the impact was substantial, I find on balance that it was. Whilst I had some concerns about the credibility of the Claimant’s evidence, I accept that it can be difficult where a condition is ongoing to remember exactly when it started and when particular symptoms were experienced.

31. I find that the Claimant began suffering from chronic back pain in November 2020 and has continued to suffer from it since then albeit that the impact of that back pain

has been fluctuating. The back pain has never gone away and appears overall to have got worse over time. Although the Claimant has good days and bad days, on the bad days the impact of her chronic back pain on her ability to carry out normal day to day activities is substantial. She cannot get out of bed, she cannot use the toilet, she cannot walk. In addition, her ability to carry out normal day to day activities such as shopping, driving and cleaning is also impacted by her chronic back pain even when she takes the pain medication. It would no doubt be even worse without the medication. I have to consider the impact of the impairment without the beneficial effect of the medication.

32. The fact that the claimant does not suffer from chronic pain all of the time and that the impact on her day-to-day activities fluctuates does not prevent the condition from having a substantial adverse impact nor one which is long-term. The impact on her is more than minor or trivial.
33. I am therefore satisfied that the chronic back pain from which the Claimant suffers has a substantial adverse impact on her ability to carry out normal day to day activities.
34. I am also satisfied that the impairment meets the definition of long term. The Claimant began to suffer from chronic back pain in autumn 2020. She has suffered from it persistently since then. On balance I find that at the relevant time, namely the time of the alleged acts of discrimination, it was likely that the impact of the pain on the claimant's ability to carry out normal day-to-day activities would last for 12 months or more. There was no obvious treatment or cure in sight for the Claimant and by the end of the material period in July 2021 she had already been suffering from chronic back pain for approximately 9 months. In these circumstances there was in my view a real possibility that the back pain could last for at least another 3 months.
35. For these reasons I find that the Claimant was at the material time disabled by reason of chronic back pain.

Employment Judge Ayre

Date: 9 March 2023

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