



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Robert Warner

v

Movianto UK Limited

Heard at: Norwich (Public Preliminary Hearing by CVP)

On: 2 October 2023

Before: Employment Judge M Warren

Appearances

For the Claimants: In person

For the Respondent: Mrs L Lewis, Solicitor

RESERVED JUDGMENT

The Claimant was a disabled person at the material time between 1 November 2021 and 30 March 2022, by reason of degenerative disc disease, COPD and Emphysema, Adrenal Tumour Secretion and stress.

REASONS

Background

1. Mr Warner was employed by the Respondent as an HGV Driver between November 2021 and March 2022. On 25 February 2022, Mr Warner presented his Claim Form claiming disability discrimination, notice pay and arrears of pay. The information relating to his claims, at 8.2 and 9.2 of his Claim Form are extremely brief.
2. A useful summary of the case history is set out in the Case Management Summary of Employment Judge M Ord in relation to the Preliminary Hearing on 19 June 2023. I will not repeat it here.

3. Employment Judge M Ord made an Unless Order on 19 June 2023. The context was that Mr Warner had already been provided with a number of opportunities to give further information in relation both to his disability, that of his wife and in relation to the claims which he brings. Some of the information in relation to the claims which he brings was to be provided by 17 July 2023 and some of it by 26 July 2023.
4. Employment Judge M Ord listed today's Public Preliminary Hearing in order to:-
 - 4.1. Decide whether Mr Warner met the definition of a disabled person at the relevant time;
 - 4.2. Decide whether his wife met that definition;
 - 4.3. Decide whether there was any need for permission to amend in relation to any further and better particulars provided;
 - 4.4. Make Case Management Orders;
 - 4.5. List for a Final Hearing; and
 - 4.6. In the event that the issue of disability had been resolved, the hearing was to be converted to a Private Preliminary Hearing to deal with Case Management, in the event that there was a finding that Mr Warner is not disabled, it was to be converted to a Final Hearing to decide the issue of holiday pay.
5. The time allowed was three hours.
6. I was not assisted today by the Tribunal staff not providing me either with the Tribunal file or the Bundles prepared by the Respondent's Solicitors prior to the commencement of the Hearing. This resulted in an adjournment to 11:30 whilst I read into the case. We concluded at 13:26.

Confusion as to the status of the case as at commencement of this Hearing

7. Mr Warner wrote a three and a half page email entitled, "Allegations of Discrimination" on 21 June 2023. Subsequently, on 18 July 2023, Mr Warner wrote two emails, the first addressed to Employment Judge M Ord seeking an extension of time stating the fact that his wife had been taken to hospital the previous Friday with an urgent problem in relation to her kidneys, and a second email an hour and a half later giving information in relation to his alleged disability and that of his wife.
8. By letter of 3 August 2023, Employment Judge M Ord wrote to the parties,

“It appears to Employment Judge Ord that the issues made by the parties as to the provision of information are now resolved.”

9. The foregoing is an indication from Employment Judge M Ord that he considered the Unless Order to have been complied with and that Mr Warner’s request for an extension of time had been allowed.
10. By emails dated 8 September 2023, 11 September 2023 and 18 September 2023, the Respondent’s solicitor wrote to the Tribunal and suggested the Unless Order had not been complied with and querying the purpose of today’s Hearing. That correspondence was referred to Employment Judge Ord, but unfortunately his instructions to the Tribunal Clerks to write to the parties has not been carried out. His instructions are dated 19 September 2023 and read as follows:-

“The purpose of the Hearing on 2 October is clearly set out in the Orders made on 19 June 2023 as recited in the Respondent’s Representative’s email of 8 September 2023. They appear to be clear, but if there was any confusion about them, that has not been set out by either party. If the Respondent is seeking clarity, please state of what? If the Respondent is seeking to add to the matters for consideration on 2 October, then the Respondent is at liberty to make an Application.”

11. The Tribunal’s file having arrived during my adjournment, I dealt with this matter upon re-convening. Employment Judge M Ord’s letter of 3 August 2023 was a decision by him that the Unless Order has been complied with. It is not for me to interfere with that decision.
12. I read out to the parties Employment Judge M Ord’s instructions to the Administration, as set out above.
13. Were it a case of the question of compliance with the Unless Order being extant and before me, it seems to me highly unlikely that the Respondent would have been able either to persuade me that there had not been material compliance or in the alternative, in the circumstances of this case, that Mr Warner would not have been entitled to relief from sanction, applying Thind v Salvesen Logistics Limited EAT/0487/09. Employment Judge Ord will have had these considerations in mind when giving instructions for his letter of 3 August 2023.
14. I was left with just a little over an hour to try and deal with the issues left before me today. I decided to attempt to deal with the question of whether or not Mr Warner was a disabled person at the material time during his employment with the Respondent, with the time remaining.

Evidence before me on the question of whether Mr Warner met the definition of a disabled person during his employment with the Respondent

15. I did not have an Impact Statement. This is a point Mrs Lewis would have made had the question of compliance with the Unless Order been alive. What I had before me was Mr Warner's email of 18 July timed at 15:27.
16. I had before me two Bundles, one prepared for the hearing before Employment Judge M Ord on 19 June 2023 and the second prepared for today's hearing, (Bundle 1 and Bundle 2 respectively).
17. By way of Medical Evidence, Mr Warner referred me to, in Bundle 1, a letter from Dr Selby dated 16 February 2023 and in Bundle 2, a letter from Consultant Physician Dr Fowler dated 26 June 2023 and a print out of his "Patient Summary" from his GP Practice.
18. I took evidence from Mr Warner by asking him questions under oath. Mrs Lewis asked questions by way of cross examination. After hearing closing submissions from Mrs Lewis and Mr Warner indicating he did not wish to make any closing submissions, I indicated to the parties that I would provide them with a reserved decision.

The Law

19. For the purposes of the Equality Act 2010 (EqA) a person is said, at section 6, to have a disability if they meet the following definition:

"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.*

20. The burden of proof lies with the Claimant to prove that he is a disabled person in accordance with that definition.

21. The expression 'substantial' is defined at Section 212 as, '*more than minor or trivial*'.

22. Further assistance is provided at Schedule 1, which explains at paragraph 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 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*".

23. As to the effect of medical treatment, paragraph 5 provides:

"(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –

- (a) measures are being taken to treat or correct it, and*
- (b) but for that, it would be likely to have that effect.*

(2) 'Measures' includes, in particular medical treatment ..."

24. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government's office for disability issues entitled, 'Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability'. The guidance is not to be taken too literally and used as a check list, (Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19) but much of what is there is reflected in the authorities, (or vice versa).

25. As to the meaning of 'substantial adverse effects', paragraph B1 assists as follows:

"The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences and ability which may exist amongst people. A substantial effect is one that is more than a minor or trivial effect".

26. Also relevant in assessing substantial effect is for example the time taken to carry out normal day to day activities and the way such an activity is carried out compared to a none disabled person, (the Guidance B2 and B3).

27. The Guidance at B4 and B5 points out that one should have regard to the cumulative effect of an impairment. There may not be a substantial adverse effect in respect of one particular activity in isolation, but when taken together with the effect on other activities, (which might also not be, "substantial") they may together amount to an overall substantial adverse effect.

28. Paragraph B12 explains that where the impairment is subject to treatment, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or the correction, the impairment is likely to have this

effect. The word 'likely' should be interpreted as meaning, 'could well happen', (see SCA Packaging below). In other words, one looks at the effect of the impairment if there was no treatment, which includes medication. A tribunal needs reliable evidence as to what the effect of an impairment would be but for the treatment, see Woodrup v London Borough of Soutwark [2003] IRLR 111 CA.

29. As for what amounts to normal day-to-day activities, the guidance explains that these are the sort of things that people do on a regular or daily basis including, for example, things like shopping, reading, writing, holding conversations, using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, taking part in social activities, (paragraph D3). The expression should be given its ordinary and natural meaning, (paragraph D4).
30. When considering substantial effect, we should focus on what the claimant cannot do, (guidance B9). It would be wrong to weigh what a claimant can do with what a claimant cannot do and decide on balance, thereby, whether she or he is disabled.
31. The indirect effects of an impairment must also be taken into account, (the Guidance at D22). For example, where the impairment causes pain or fatigue, that pain or fatigue may impact on the ability to carry out day to day activities to such a degree that it becomes substantial and long term.
32. The word, "likely" in the context of the definition of disability in the Equality Act 2010, means, "could well happen", or something that is a real possibility. See SCA Packaging Ltd v Boyle [2009] ICR 1056 HL and the Guidance at paragraph C3.
33. A claimant must meet the definition of disability as at the date of the alleged discrimination. That means for example, if the impairment has not lasted 12 months as at the date of the alleged discrimination, it must be expected to last 12 months as at that time, (not the date of the hearing).
34. In Goodwin v Patent Office [1999] ICR 302 the EAT identified that there were four questions to ask in determining whether a person was disabled:
 - 34.1. Did the Claimant have a mental and/or physical impairment?
 - 34.2. Did the impairment effect the Claimant's ability to carry out normal day-to-day activities?
 - 34.3. Was the adverse condition substantial? And
 - 34.4. Was the adverse condition long term?

Findings of Fact on Disability status

35. I found Mr Warner a credible witness and accepted the evidence he gave me. It was in large part corroborated, albeit briefly, by the Medical Evidence.
36. The letter from Dr Selby confirmed:-
 - 36.1. Mr Warner had an operation on his cervical spine in November 2011 and on his lumbar spine in May 2011;
 - 36.2. He had partial removal right sided kidney due to renal cell carcinoma in 2005;
 - 36.3. In 2014 he had an MRI scan of his neck showing narrowing of C7;
 - 36.4. He was diagnosed with Emphysema and Chronic Obstructive Pulmonary Disease (COPD), the date of diagnosis is not given; and
 - 36.5. He has had during all of this time, episodes of low mood and anxiety.
37. The letter from Dr Fowler dated 26 June 2023 confirmed Mr Warner is under regular hospital surveillance because of an Adrenal Adenoma which requires ongoing surveillance, including scans, blood and urine tests. Visits to the Urology Department included 10 February 2021, 17 February 2021 and in Endocrine Clinic on 4 January 2022.
38. The Patient Summary of Mr Warner's Medical Records, (this is not full details of his visits to his GP) included:-
 - 38.1. In 2008, degenerative disc disease;
 - 38.2. In August 2009, Musculo-Skeletal Disorder;
 - 38.3. On 8 February 2010, upper respiratory infection;
 - 38.4. In May 2010, pneumonia;
 - 38.5. On 24 May 2011, primary lumbar discectomy;
 - 38.6. On 9 September 2011, inflammation of Lymph Node;
 - 38.7. On 10 November 2011, primary ANT decompression of Cervical Spinal cord, plus fusion;
 - 38.8. On 20 November 2011, Spinal Fusion;
 - 38.9. On 8 January 2013, acquired cyst of kidney;

- 38.10. On 7 October 2013, mixed anxiety and Depressive Disorder;
 - 38.11. On 12 January 2017, Post Traumatic Stress Disorder;
 - 38.12. On 27 May 2017, psychogenic hyperventilation;
 - 38.13. On 4 June 2018, Emphysema;
 - 38.14. On 6 December 2018, infection of lower respiratory tract;
 - 38.15. On 16 September 2020, chest infection;
 - 38.16. On 15 December 2020, chronic obstructive lung disease;
 - 38.17. On 4 February 2021, Adenoma;
 - 38.18. On 20 May 2021, chest infection;
 - 38.19. On 28 July 2022, Depressive Disorder; and
 - 38.20. On 8 March 2023, mixed anxiety and Depressive Disorder.
39. There is also a list of current medication which in itself is not helpful because it post dates his employment, but some of the medication listed there coincides with the medication Mr Warner tells me that he was taking at the time of his employment.
40. The combined effect of pushing through and trying to get on with life in as normal a way as possible, in the face of the symptoms experienced in respect of the three physical impairments relied upon, caused Mr Warner to be exhausted on a daily basis and to be worried and stressed for his own person health, a fear of cancer returning and concerns for his seriously ill wife.
41. The effect of Mr Warner's back condition, with which he has lived since 2009, is daily exhaustion from pain which he refuses to allow to defeat him. It is very difficult for him to sleep at night and to sit for long periods of time. He manages work as a Driver by taking pain killers, moving about in his seat, adjusting his seat settings and the lumbar support settings on a regular basis. He pushes through the pain to keep his employment. In January 2022 he had an episode of severe pain in his back whilst working for the Respondent. He had to be helped out of his van by a Mr Roach and Mr Doyle and he was laid on a table in the canteen. He was in excruciating pain and unable to stand. He was unable to walk unaided for four days and unable to sit.
42. Mr Warner takes pain killers including prescribed Amitriptyline and Tramadol and uses a Tens machine.

43. Mr Warner's COPD and Emphysema resulted in a diagnosis of his having a lung capacity at sixty per cent, which makes him breathless and unable to be active in the usual way. He has pain in his ribs from coughing and the condition leaves him exhausted. At the time in question he was on Fostair 200/6 and Salbutamol.
44. Mr Warner describes the day to day effect of his Adrenal Tumour Secretion as exhaustion, worry and stress that it could be cancer again. He does not take any additional medication for that condition. In respect of the stress from which he suffers, he refers to his above medical conditions, a constant source of worry and concern arising from his physical impairments, as well as his concern for his seriously ill wife. That it has been a problem for him for some time is evidenced by the above mentioned entries in his Medical Records. The degree of effect is evidenced by his attempt to take his own life in March 2022, which post dates his employment but gives some indication as to the seriousness of this impairment, as does the apparent diagnosis of PTSD in 2019, (for the avoidance of doubt, PTSD as such is not relied upon as a disability in Mr Warner's case as put).

Conclusions

45. Mr Warner meets the definition of disability because he has had cancer. However, that does not appear to be relied on by him.
46. On the facts as I find that as at the time of Mr Warner's employment with the Respondent he had been suffering from the physical and mental impairments relied upon for a period exceeding 12 months.
47. I had no evidence before me as to the effect of the medication that he was taking. Almost certainly, the effect on his day to day activities would have been far greater without them.
48. Even without considering the effect of the medication, I find that as the time of his employment with the Respondent:
 - 48.1. The effect of Mr Warner's back condition was that he was unable to stand or to sit for long periods of time without experiencing significant pain and discomfort;
 - 48.2. The effect of his respiratory issues were that he was breathless so that he could not undertake the sort of normal physical activity somebody else would be able to undertake;
 - 48.3. The Adrenal Tumour Secretion caused him to be exhausted and so tired that he could not undertake normal day to day activities in the way that another person would be able to, and

- 48.4. The combined exhaustive effect of all three conditions and the stress with which he has suffered meant that he could not undertake daily activities to the same degree as a well person to the extent that can properly be described as, “substantial”.
49. Accordingly, I find that Mr Warner meets the definition of a disabled person.
50. Case management will be dealt with in a separate document.

Employment Judge M Warren

Date: 5 October 2023

Sent to the parties on:12 October 2023.

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For the Tribunal Office.