



EMPLOYMENT TRIBUNALS

Claimant: Mr J Skrzyniarz

Respondent: WM Morrison Supermarkets Limited

Heard: Watford by CVP On: 27th November 2023

Before: Employment Judge Codd

Appearances

For the Claimant: Ms M Wisniewska
For the Respondent: Mr Gordon (Counsel)

RESERVED JUDGMENT

1. At the relevant times the claimant was not a disabled person as defined by section 6 Equality Act 2010.
2. The claim for disability discrimination, is not well founded and is dismissed.

Employment Judge **Codd**

01.12.2023

Sent to the parties on:
5 December 2023

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For the Tribunal Office:

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Reasons

Background

1. The claimant was employed by the respondent as a warehouse assistant, between the 17th February 2016 and the 10th January 2023, when he was dismissed. The claimant issued his claim on the 14th March 2023, following a period of early conciliation.
2. The claimant was originally engaged in activities which involved heavy lifting within the warehouse. However, in December 2020 he suffered with an abdominal muscle strain and was re-deployed to an area of the warehouse packing nuts (known as the nut room). This task involved only minimal lifting of up to 5 KG in weight and portions of the work can be completed in a seated position. It is accepted that these were light duties whilst the claimant recovered.
3. The claimant argues that his abdominal muscle strain was ongoing at the point of his dismissal and constituted a disability.
4. The claimant remained working in the nut room until his dismissal for gross misconduct. The matters around his dismissal are not strictly relevant for the purpose of this determination. However, the claimant alleges that he was dismissed based upon his disability, and the ongoing need to assign him to light duties.
5. The claimant issued a claim for unfair dismissal and disability discrimination. The matter was listed for a preliminary hearing in order to determine whether the claimant was a disabled person within the meaning of the Equality Act 2010, and to further case manage the case.

The Issues

6. The only question to be determined at this preliminary hearing is: whether the claimant is a disabled person as defined by S6 and Schedule 1 of the Equality Act 2010, at all of the relevant times?
7. Whether there is an impairment which has a substantial adverse effect on normal day-to-day activities must be assessed at the date of the alleged discriminatory

act. The same period is to be used when assessing whether the impairment has a long term effect.

8. The claimant claims that he was subjected to discriminatory treatment in respect of the decision to place him under investigation and subsequently dismiss him, and that these two decisions were directly linked to his disability and the fact that he would need to continue on light duties. The relevant dates for the issue of disability are between the 22nd of November 2022 and the 10th January 2023. The claimant must therefore establish that he was a disabled person at this point in time.

The hearing

9. The hearing was conducted via CVP, and the claimant gave evidence by way of a Polish interpreter. The claimant was cross examined for around two hours and I also heard extensive submissions from the parties. By the conclusion of submissions there was insufficient time left to consider a determination. I reserved my decision, to a written determination.
10. The claimant argues that during the course of his warehouse work he sustained an injury to his abdominal muscles requiring hospital treatment. He argues that this condition left him in acute pain and unable to undertake his duties.
11. The claimant relied upon limited medical records, and a letter from his GP in July 2023, detailing the history of his conditions. The claimant had produced a witness statement from a colleague Magda Kaminska-Stryczek. However, neither party sought to put questions to this witness and I deemed that further live evidence would not assist given the limited scope of the statement.
12. At the start of his evidence the claimant told me that in addition to his witness statement, he wished to confirm that he had bought a reclining sofa in 2021 and had been sleeping on this as the pain of climbing the stairs was causing him difficulty. By the time of the hearing the claimant said he had some re-generation in the muscles and his condition was improving. He said he had been in regular contact with his doctor and undergoing physiotherapy.
13. In submissions the claimant argued that he had established that he had a disability at the relevant time. On the basis that he had been maintained on light duties for the best part of two years, was an indicator that the respondent was aware and acknowledged the disability.
14. The respondent argued that the evidence produced by the claimant was insufficient to demonstrate that the condition complained of by the claimant was ongoing at the point of dismissal, or that the condition had a substantial long term

effect on the claimant. It argued that the evidence produced was contradictory and too poor to support a finding that the claimant satisfied the definition of disability.

The Law

15. The definition of disability has a number of different elements for a Tribunal to consider when arriving at its decision on whether a person has a disability. The starting point is Section 6 of the **Equality Act 2010**, which says that a person has a disability if:

(a) he has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

The meaning of 'substantial'

16. There is a general interpretation section in the **Equality Act** and at section 212(1) it says that 'substantial' means 'more than minor or trivial'.

The meaning of 'long-term'

17. Long-term impairment also has a particular meaning. A long-term impairment is one that has lasted 12 months or is likely to last 12 months or is likely to recur.
18. Whether an impairment is long-term must be considered as at the date of the alleged discrimination. (Long-term impairment is not to be considered as at the date of the Tribunal hearing (**McDougall v Richmond Adult Community College** [2008] ICR 431 CA).

Determining questions relating to disability

19. Guidance has been issued by the government under section 6(5) of the **Equality Act** concerning the definition of disability in the Act. Any tribunal which is determining for any purpose of the **Equality Act** whether a person is a disabled person has to take into account any aspect of this Guidance which appears to it to be relevant.

The meaning of substantial adverse effect

20. In deciding whether a claimant is disabled within the meaning of the Act, it is necessary to consider what 'substantial adverse effect' means.
21. This is considered in Part B of the Guidance. Paragraph B2 says that the time taken by a person with an impairment to carry out normal day-to-day activity should be considered when assessing whether the effect of the impairment is substantial, it should be compared with the time it might take a person who did not have the impairment to complete the activity.

22. Paragraph B3 states that another factor to be considered when assessing whether the fact of an impairment is substantial is the way in which the person with that impairment carries out normal day-to-day activities.
23. Paragraph B4 gives guidance that an impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.
24. Paragraph B6 says that a person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments taken together have a substantial effect overall on the person's ability to carry out normal day-to-day activities.
25. The cumulative effect of more than one impairment should also be taken into account when determining whether the effect is long-term.
26. Paragraph B7 says that account should be taken of how far a person can reasonably be expected to modify his behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities.
27. The Tribunal must consider the question of impairment as if the person is not taking medication or in the absence of measures controlling it.

The meaning of normal day-to-day activities

28. Paragraph D2 reminds us that the Equality Act does not define what is to be regarded as 'normal day-to-day activity'. Paragraph D3 says that in general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or 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, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or shift pattern.

Burden and standard of proof

29. The standard of proof to be applied is the balance of probabilities. The burden of proof rests upon the claimant to demonstrate that he had a condition capable of amounting to a disability at the relevant time.

Findings of Fact

Muscle Strain

30. The claimant had been employed by the respondent without issue until 2020. It appears at this point the claimant had taken a number of sick days absence. He told me in evidence that he injured his abdomen at work and attended hospital that same day in December 2021.

31. His evidence on this was that this incident occurred in December 2020. However, at times the claimant's evidence on the dates was confusing.

32. The claimant relied upon a fit note dated the 15th January 2021 which records muscle strain as the condition. The note was valid for 2 weeks. A second note was issued on 10th February 2021, for a further 2 weeks.

33. In support of his attendance at hospital, for the muscle strain, the claimant relied upon a letter confirming that he attended 'Accident and Emergency' on 16th December 2021, and again on 28th December 2021.

34. Despite extensive cross examination and clarification by Mr Gordon, the claimant was unable to comprehend that the evidence he relied upon in respect of his hospital attendance was almost 12 months later than his purported attendance at hospital December 2020.

35. This was compounded by the GP letter that stated:

Mr Skrzyniarz has also been experiencing pain associated with a muscle strain since January 2021. This pain began after he engaged with heavy lifting in December 2020. I advised him to rest and avoid heavy lifting to allow for proper healing. Additionally, he was informed to monitor the presence of a visible bump, which could indicate a possible hernia".

36. Whilst it may well be that the incident occurred in December 2020, it appears to me that there is ample scope for confusion (by the claimant) over dates such a long time ago. I therefore find that the first medical assistance the claimant sought was via his GP in January 2021, when he was provided with a fit note.

37. It is an important factor to note that the claimant was declared fit for work with amended duties. This is something which the respondent accommodated. After this point there is no further medical evidence supplied in the form of fit notes.

38. In December 2021 the claimant was again subject of medical attention. He attended hospital twice in December as noted above, the first of which was on the 16th December 2021.
39. On the 17th of December 2021, a return to work interview was scheduled with the absence line which recorded the absence as "*Kidney and Gastric Problems,*" with a return to work date of 19th January 2022.
40. The GP letter also notes that in December 2021 the claimant received a suspected diagnosis of a gastroduodenal ulcer, which was subject to ongoing investigations and tests. The medical certificate for the December 2021 period of sick leave commenced on 24th December 2021, this simply records; "*pain,*" as the condition. This is unhelpfully vague and I find I am unable to attribute this to the muscle strain, given that there were clearly other contributory conditions ongoing at the time.
41. On the 28th December 2021, a letter was sent by the claimant's line manager, inviting him to an investigatory meeting regarding him leaving the production line on 16th December 2021 (the same day he attended A and E). This letter references the claimant's self report about an abdominal muscle strain, but I find that this is inconsistent with the information given in the return to work interview on 17th December 2021.
42. I also note that the GP recommends follow up of the suspected Ulcer in their letter dated July 2023. This implies that the follow up is still pending or has not been pursued by the claimant.
43. I also attach weight to the fact that the GP letter records that the claimant has been suffering with intermittent abdominal pain since 2012 and has undergone numerous tests, which have proved unable to confirm any diagnosis. It is clear from this, and I find that the claimant has had undiagnosed abdominal pain, entirely separate from the muscle strain which he relies upon for his disability. Certainly there were other conditions suspected in December 2021 as the cause of his pain.
44. Given the absence of any confirmed diagnosis in his GP letter, since 2012, and the nature of the complaints, it is not possible to establish whether these are a genuine physiological condition or a psychosomatic condition. The letter from the respondent dated the 28th December 2021 clearly raised concerns as to whether the claimant was suffering with the condition which he alleged.
45. Finally in relation to the screen shots of the medical records produced, these do not help identify the conditions which the claimant claims to have. The medication review supplied does not tally with the list of medication which the claimant alleges he was prescribed. For example he claims to have been prescribed tramadol, which is not corroborated by notes provided or the GP letter. The only medication listed is Omeprazole, which is prescribed for gastric issues, again unrelated to the condition complained of.

46. The claimant alleges that he has had physiotherapy, and regular GP visits, however, this is not borne out by the evidence provided by the claimant. He also said that he had an internal hernia based upon what his GP had said. I noted that the claimant had elevated what was guidance and advice from the GP (regarding a hernia) into a condition which he alleged to have been diagnosed with. There is no evidence to support the fact that the claimant ever had a hernia.

47. It follows therefore that I find the claimant's evidence inconsistent and unreliable in respect of the medical investigations he has undergone.

Long term effect

48. In terms of the effect of the claimant's condition, it is clear from the GP letter that this condition would fully recover in time with rest. There is no evidence of any complicating features requiring medical intervention thereafter. It is undisputed that the claimant had the muscle strain in early 2021 and he had 4 weeks worth of fit notes for the condition. It is also undisputed that for this period that he had to adjust his working practices and was placed upon light duties.

49. Why the claimant remained on light duties is unclear. I have not been provided with any documents to suggest why this remained necessary, other than the claimant's own narrative. I have not been provided with any documents by the claimant as to any assessment that was undertaken into his need for adjustments at work.

50. The claimant told me in his evidence that he was able to sit at a chair or on a table. When I explored this with him, this both appeared as a break from the production line, but also as a mechanism to conduct his work. However, it was clear from his evidence that this was an intermittent provision and that there were also times when he stood for prolonged periods, and moved and stacked lightweight boxes. Although he told me that there were times when he had to leave and go home, the details of this are vague and the claimant's witness (Magda Kaminska-Stryczek) does not provide any detail which could corroborate the frequency or timescale as to when this occurred.

51. The only evidence I have of him leaving the workplace is on 16th of December 2021 and given the other medical information I have, I find that this was connected with the diagnosis of a suspected Stomach Ulcer, rather than the muscle strain.

52. The claimant told me he was unable to climb the stairs at his home to use the toilet and to sleep. He had been sleeping on a reclining sofa. However, the evidence in this regard shifted throughout the claimant's evidence. This varied from a continuous use of the sofa, to an intermittent use and to the fact that this was no longer required. I found it almost impossible to evaluate a clear picture of whether the use of the sofa occurred for a prolonged period, or on what basis and when it

was required. What is clear is that if the claimant were suffering to the extent that he could not climb the stairs, then he was not in contact with his GP, and he was still able to fulfil his work duties, involving bending and lifting up to 5KG weights over a long shift.

53. He also acknowledged at the end of his evidence that he had some regeneration of the muscles and that the use of the sofa was no longer required. It was entirely unclear when he says this change occurred.
54. I note that the claimant sought to add the sofa use to his evidence as it was not included in his statement. He argues that was because of an omission. However, on balance it seems more likely to me that if the claimant used the sofa, it was for a limited period during the early part of 2021, during the period covered by his fit notes. However, beyond this I have seen no evidence to support that his condition impacted his life to the extent that this was required. Regarding the claimant's testimony, I found that this was an unreliable account. I am unable to conclude that the condition impacted his ability to climb stairs for more than a few weeks. I observe that the recovery from any physical injury is not linear in terms of an improvement and I can readily accept that the claimant had both good and bad days. There is little evidence that the condition was ongoing after the fit notes expired. If it was, no explanation has been provided as to why further fit notes were not sought, in order to maintain the deployment to light duties, or manage the substantial pain the claimant claimed he was in.

Substantial effect

55. Whilst I can readily accept that having to sleep downstairs, or struggling to climb the stairs is a substantial effect, I am unable to find that this was anything other than short term.
56. In terms of the claimant's assertion that he required light duties, this was certainly evidenced from his fit notes for the early part of 2021. However, thereafter, there is no written evidence provided that he required to continue to work in the nut room. The fact that he did continue to work there is not determinative in my view.
57. It appears from the ET1 at paragraphs 7 and 9 the claimant stated the following:

"The Claimant was being sent to work in a nut department where is loud. He was assigned to do tasks with an employee of limited capabilities. This stressed the Claimant as he felt pressured, he did most of the tasks on his own. He asked management a few times for a fair rotation but there was no engagement, he was told 'don't discuss, just go to packhouse'. So he did go....."

"On 22nd November 2022 when looking at a board to find out what job was assigned to him, he made a comment within the lines why he was being sent to nuts again and then went as requested. The Claimant will say that other employees were laughing at him because he was being sent to packhouse."

58. I find that these matters relied upon indicate that the claimant was looking for deployment elsewhere and that his role in the nut room was not dependent upon his physical condition, but included a determination by management as to business need.
59. The claimant in his evidence confirmed that he was able to do his work. He could sit or rest for a period and there was an element of stacking and lifting, and repeated bending. The claimant did not indicate that he could not perform these duties. I infer that if he had struggled to climb the stairs then he would have struggled with stacking (even lightweight) boxes. He has not complained that he was unable to do so.
60. The claimant discussed in his evidence that he was no longer able to play football or run around after his grandchildren. An injury that prevents an individual playing sport does not necessarily constitute a significant adverse effect, unless it strays into other daily areas of the claimant's functioning. Life is full of transient injuries which from time to time limit one's physical abilities, but that does not elevate them to a disability, there must be more to it than that.
61. In terms of the duration that the claimant was unable to run or play football for, again I was unable to meaningfully evaluate how long this had gone on for. Given the unreliability of other aspects of the claimant's testimony, I cannot see that he has discharged his burden to show these issues were ongoing at the relevant date (attributable to his muscle strain).
62. On the evidence before me, taking the claimant's documentary evidence at its highest, the best that can be said is that the claimant suffered with a muscle strain in December 2020 which was ongoing affecting his day to day capabilities for around 8 to 12 weeks. Beyond that there is an inadequate level of evidence, to show the substantial adverse effect on day to day tasks. I found the claimant's account to be too unreliable to place any significant weight upon his narrative of the effect.
63. From the limited evidence I have about his workplace, I find that after March 2021, his muscle strain was not having a substantial adverse effect on his ability to perform these day to day tasks.
64. I therefore find that at the relevant time (22nd November 2022) onwards, the claimant had substantially recovered from his abdominal strain.

Conclusion

65. Taking into account my findings above regarding the claimant's diagnosis, and the impact and duration that his abdominal strain has had on his life, I find that this

condition could not be considered to meet the definition of a Disability, under **S6 of the Equality Act 2010**. Even if it had been capable of meeting some of the requisite criteria, for a period (and I have found it was not capable of doing so), I find that by the relevant date on the 22nd of November 2022, that the condition had resolved and the claimant would have ceased to meet the definition of disabled, in any event.

66. It follows that I will dismiss the claim for disability discrimination as it is not well founded. In respect of the claimant's remaining claims related to alleged unfair dismissal, I shall issue separate case management directions in order for that to be listed for a final hearing.

67. That is my Judgment.

Employment Judge Codd

01.12.23

Sent to the parties on:
5 December 2023

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For the Tribunal Office:

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