



EMPLOYMENT TRIBUNALS

Claimant: Mr K. Aderibigbe-Suckoo

Respondent: Dexters Limited

Heard at: Croydon ET in public by CVP

On: 11 August 2023

Before: EJ Rea

Representation

Claimant: Claimant in person

Respondent: Mr Oliver Lawrence, counsel

Written reasons having been requested in relation to the judgment on disability only in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Judgment and following reasons are provided:

JUDGMENT

1. At the relevant times the claimant was a disabled person as defined by section 6 Equality Act 2010 because of a back complaint.
2. The complaints of disability discrimination can therefore proceed.
3. The Claimant's application to amend his claim to include a complaint of indirect disability discrimination is refused. The Claimant has no reasonable prospects of establishing that the alleged conduct formed part of a continuing act or that it would be just and equitable to extend time for this complaint.
4. The Claimant's application to amend his claim to include a complaint of harassment is allowed. The substance of the complaint is already in the Claimant's ET1 claim form and so this is a re-labelling exercise rather than a new claim.
5. The Claimant's complaints of age and race discrimination are dismissed upon withdrawal by the Claimant.

REASONS

Relevant Law

6. Section 6 of the Equality Act provides a definition of "disability" as follows:

A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

7. Section 212(1) of the Equality Act provides that “substantial” means more than minor or trivial. Schedule 1 of the Equality Act gives further details on the determination of a disability. Schedule 1 para 2(1) provides that 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 or (c) it is likely to last for the rest of the life of the person affected.
8. Para 2(2) of Schedule 1 provides that if an impairment ceases to have a substantial adverse effect, it is to be treated as continuing to have that effect if that effect is likely to recur. In *SCA Packaging Ltd v Boyle* 2009 UKHL 37, the House of Lords ruled that “likely to” in this context means “could well happen” rather than “more likely than not.”
9. Para (5) of Schedule 1 sets out provisions with regard to the effect of medical treatment. It provides that 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 measures are being taken to correct it and, but for that, it would be likely to have that effect.
10. The Tribunal must take into account Statutory Guidance on the definition of Disability (2011). Section B7 provides as follows: Account should be taken of how far a person can reasonably be expected to modify his or her 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. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet 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. For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities. (See also paragraph B12.)
11. Day to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This includes work related activities (Guidance D2 – D7). The test is a functional and not a medical test 11. The Tribunal must consider the status of the claimant at the date of the discriminatory act; *Cruikshank v VAW Motorcast* [2002] IRLR 24.

Findings of fact

12. The Claimant first notified the Respondent he was suffering with back pain on a date in December 2021. He recalls waking up in pain on that day. There was some delay in the Claimant seeing his GP which he says was due to the difficulty in getting an appointment for a non-emergency reason.
13. The Claimant was assessed by his GP on 29 June 2022 (page 75). The Respondent arranged for a workstation assessment to be carried out for the Claimant on 27 July 2022 (page 77). The recommendations from that assessment included the provision of a new desk and headset (page 83).
14. The new desk was in place from early September 2022 and the Claimant worked with no apparent issues until 27 September 2022. On this date the Claimant informed the Respondent that he would only be able to work for 1 hour a day as

he was suffering from nerve impingement. The Claimant relied on the advice he said he received from his Osteopath. As a result the Claimant ceased attending work from 29 September 2022. The Claimant says he was willing to attend but was told not to by the Respondent given he was only prepared to work 1 hour a day. The Respondent maintains the Claimant refused to attend work. No finding of fact is made on this point.

15. The Respondent referred the Claimant to Occupational Health (page 92).
16. The Claimant's osteopath provided his assessment of the Claimant's condition on 5 October 2022 (page 97). He noted that the Claimant's process of getting ready for work had been taking 50 minutes but this had reduced to 15 minutes. The Claimant says his pain fluctuated but was still significant and that he managed it using a TENS machine.
17. The Claimant underwent an MRI scan which could not locate any nerve impingement which would be causing the Claimant's pain. The Claimant was referred for an epidural.
18. The Claimant resigned from his employment with the Respondent in November 2022. The Claimant had been offered a new job with a different Estate Agency which he started straight away. The Claimant worked full-time hours for this new employer. The Claimant stated in the hearing that he had told the Respondent he was able to work full-time hours again but it had placed him on garden leave.
19. The Claimant received his first epidural in December 2022. This was unsuccessful and the Claimant was waiting for a second epidural which was scheduled to be given on 14 August 2023.
20. The Claimant left his new employment and started another role with an estate agent in February 2023 which was his current role at this hearing. He works full-time hours with this employer.
21. The Claimant gave evidence at the hearing that he used his TENS machine 24 hours a day, restarting it every time it times out after 100 minutes. He said he only takes it off to have a shower and for an MRI scan. He claimed that this gave him 2nd degree burns but this was a price he was willing to pay to manage his pain.
22. The Claimant has for a number of years pursued a career as a music performer in his spare time. He classifies his music as trap soul. In March 2023, he performed at a concert in the O2. This was the first live performance he had given for some time.
23. The Claimant stated that he was limited in his ability to give a full performance because of his back pain and that he was only able to perform a modified version of a two-step dance move. The performance lasted approximately 15 minutes and the Claimant stood unaided on stage throughout. The Claimant stated that he struggled with the walk to the venue from the car park and had to lean on his girlfriend and take periodic breaks to sit down on benches.

Decision

24. It is clear that the Claimant had a physical impairment at the relevant time which caused him back pain.
25. His physical impairment had been present from December 2021 and so had lasted nearly 12 months by the time of his resignation in November 2022. It was therefore likely to last more than 12 months and so meets the definition of long-term. It did of course continue and the Claimant continues to receive treatment for it.

26. The Tribunal accepts that the physical impairment had an adverse impact on the Claimant's ability to carry out day to day activities such as getting ready for work. However, was this adverse impact substantial, that is more than trivial?
27. The Respondent relied heavily during cross-examination on how the Claimant presented at the performance in March 2023. However, the Tribunal must decide whether the Claimant was a disabled person at the relevant time, which was the period up until his employment terminated in November 2022. How his condition developed later is not determinative.
28. It is this Tribunal's view that the Claimant provided misleading testimony about the extent of the pain he has been suffering in the period since his employment with the Respondent and the impact on his ability to carry out day to day activities. In particular, the Tribunal does not believe it is plausible that the Claimant uses his TENS machine 24 hours a day. Further, his evidence about his condition on the evening of the performance at the O2 in March 2023 was inconsistent. If he was able to stand unaided on stage for 15 minutes and perform a modified two-step, it is not credible that he would have struggled so much walking the short distance from the car park to the venue. The fact the Claimant is able to work full-time hours in his new employment would also suggest a marked improvement in his condition.
29. The Tribunal also took note of the way the Claimant presented at the hearing. He chose to sit on his bed with nothing supporting his back. When the Tribunal expressed concern about this and suggested he might be more comfortable on a chair he said this was not causing him any problems. The Claimant also did not require additional breaks to stand up and stretch although these were offered.
30. The Tribunal carefully considered whether this cast doubt on the severity of the Claimant's physical impairment during the period up until his employment ended in November 2022. However, the Tribunal is satisfied that there was medical evidence demonstrating that the Claimant's physical impairment was having a more than trivial impact on his ability to carry out day-to-day activities at the relevant time. Although there were signs of improvement, the Tribunal finds that the impact meets the relatively low threshold for substantial.
31. The Claimant was therefore a disabled person at the relevant time and his discrimination claims can proceed.

Employment Judge Rea
07/11/2023