



# EMPLOYMENT TRIBUNALS

**Claimant:** Graham Stimpson

**Respondent:** DHL Services Limited

**Heard at:** Cambridge Hearing Centre by CVP    **On:** 2 May 2024

**Before:** Employment Judge Allen

## **Representation**

**Claimant:** in person

**Respondent:** Laura Redman, Counsel instructed by DAC Beachcroft LLP

Written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Introduction

1. The case was listed for a two-hour preliminary hearing for the Tribunal to determine whether the claimant was a disabled person within the meaning in s6 Equality Act 2010 at the relevant time.
2. There were discussions at the start of the hearing as to whether 2 hours was sufficient time for the hearing to be completed. Both parties said that 2 hours was sufficient but were able to stay later if needed.
3. I had an agreed bundle of 143 pages which included an undated disability impact statement from the claimant.
4. I heard sworn evidence from the claimant. Both the claimant and Ms Redman made submissions which I have carefully considered together with the evidence presented and to which I was specifically referred.

## **Background**

5. The claimant was employed by the respondent on 28 November 2022 as a delivery driver. The claimant says that he sustained an injury at work on 28 December 2022. On 4 January 2023 the claimant had a telephone consultation with his GP and was diagnosed with back strain with potentially some degree of prolapse.
6. The claimant was off work from 30 December 2022 until 14 February 2023 when he was dismissed. The respondent says that the claimant was dismissed due to the high level of sickness absence during his 13-week probationary period. Early conciliation started on 19 April 2023 and an ACAS certificate issued on 31 May 2023. The claimant submitted his claim form (ET1) on 30 June 2023.

## **The issues**

7. Following discussions at the beginning of the hearing the respondent accepts that the claimant had an impairment of a prolapsed disc during the relevant period of 28 December 2022 to 14 February 2023. The respondent further accepts that this impairment had substantial adverse effects on the claimant's ability to carry out day-to-day activities. The effects, as agreed by both parties at the hearing, are waking up at night, struggling to get out of bed, bending, lifting, washing, dressing.
8. The claimant accepted that the effects of the impairment had not lasted at least 12 months and it was agreed that the remaining issues that I must determine are:

“Were the effects of the impairment long term?”

The Tribunal will decide:

2.1.5.1 were they likely to last at least 12 months?

2.1.5.2 If not were, they likely to recur?”

## **The Law**

9. Section 6 and schedule 1 of the Equality Act 2010 sets out that a person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months or is likely to last the rest of the life of the person.
10. The burden of proving disability lies on the Claimant. Four essential questions need to be answered: (1) does a person have a physical or mental impairment? (2) does that have an adverse effect on their ability to carry out normal day to day activities? (3) is that effect substantial? (4) is that effect long-term? These questions may overlap to a certain degree; however, a tribunal considering the issue of disability should ensure that

each step is considered separately and sequentially: Goodwin v Patent Office [1999] IRLR 4 (EAT).

11. In Royal Bank of Scotland plc v Morris UKEAT/0436/10, the EAT overturned a tribunal's decision that the claimant, who had been off work with depression, was disabled. The claimant in that case decided against obtaining expert medical evidence, choosing instead to rely upon contemporaneous reports made by occupational health and treating doctors. In the EAT's view, these reports justify a finding that the claimant suffered a relevant impairment for a time, but did not justify a finding that any substantial adverse effect was long-term or likely to recur.
12. An impairment will only amount to a disability if it has a substantial adverse effect on the individual's ability to carry out day-to-day activities which are normal. Whether an effect is substantial requires a consideration whether it is more than minor or trivial.
13. Paragraph 2(1), Schedule 1, Equality Act 2010 states that an impairment will have a long-term effect only if: (1) it has lasted at least 12 months; (2) the period for which it lasts is likely to be 12 months; or (3) it is likely to last for the rest of the life of the person affected.
14. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out day-to-day activities, it is to be treated as having that effect if it is likely to recur (paragraph 2(2), Schedule.1, Equality Act 2010).
15. The word 'likely' means whether something "could well do" or "could well happen".
16. The EAT in Tesco Stores Ltd v Tennant confirmed that the likelihood of something being "long term" must be judged as at the date of the alleged discriminatory behavior.
17. Disability: Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability.

Likelihood of recurrence.

C9. Likelihood of recurrence should be considered taking all the circumstances of the case into account. This should include what the person could reasonably be expected to do to prevent the recurrence. For example, the person might reasonably be expected to take action which prevents the impairment from having such effects (for example, avoiding substances to which he or she is allergic). This may be unreasonably difficult with some substances.

C11. If medical or other treatment is likely to permanently cure a condition and therefore remove the impairment, so that recurrence of its effects would then be unlikely even if there were no further treatment, this should be taken into consideration when looking at the likelihood of recurrence of those effects. However, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stopped, as

is the case with most medication, then the treatment is to be ignored and the effect is to be regarded as likely to recur.

## **Decision**

### **Were the effects of the impairment likely to last 12 months**

18. In *All Answers Ltd v. W and anor* [2021] EWCA Civ 606 CA, the Court of Appeal held that the tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect was likely to last for 12 months. The Court of Appeal confirmed that following *McDougall*, the key question is whether, as at the time of the alleged discriminatory acts, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts and the tribunal is not entitled to have regard to events occurring later.
19. The evidence presented shows that on 4 January 2023 the GP notes state, “likely muscle strain but may also have some degree of disc prolapse” and to avoid lifting etc until resolved and that the claimant “feels more mobile every day”. This suggests that matters are improving. On 10 January 2023 to 6 February 2023 the claimant is not fit for work with a diagnosis of back pain.
20. On 6 February 2023 the GP notes makes a referral on the basis that the claimant is struggling with back pain almost 6 weeks, and a fit note was made covering 6 February 2023 to 19 February 2023 but there is nothing in the GP notes to suggest that the effects of the impairment were likely to last for 12 months.
21. I find that the claimant has not presented any evidence to demonstrate that at the relevant time the substantial adverse effects were likely to last at least 12 months and I find that the claimant has not discharged the burden of proof on him.

### **Were the effects likely to recur**

22. 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.” In considering whether the effect is likely to recur I have had regard to the principles in *All Answers Ltd v. W and anor* (cited above) and the relevant paragraphs in the Government Guidance on matters to be taken into account in determining questions relating to the definition of disability as set out at paragraph 16 above.

23. Mr Stimpson emphasised in his submissions and the respondent, in cross examination, said that there had been a flare up or relapse/recurrence when asking the claimant about the GP entry on 6 February 2023. I have carefully considered the wording of the GP entry on 6 February 2023 which is that: “thank you for seeing this 52y old gentlemen who is struggling low back pain for last 6weeks getting worse,” and the GP entry on 10 February 2023 states “lumbar pain for 6weeks now”. This wording does not suggest that Mr Stimpson’s back pain had previously ceased or ceased to have a substantial adverse effect and I find that although there had been some initial improvement the substantial adverse effects were continuing, requiring a referral. At this stage the claimant had not received any treatment, such as physiotherapy, and I find that this entry is not evidence that the substantial adverse effects were likely to recur and were long term. I find that this is evidence that, on 6 February 2023, the claimant had had lower back pain for almost 6 weeks which had worsened in the last 2 weeks.
24. The claimant was referred for tests including blood tests and x rays all of which came back as negative for any underlying conditions or bone issues. I find that the evidence relevant to the material time, 28 December 2022 to 14 February 2023, does not show that it is likely that the substantial adverse effects were likely to recur, and the claimant has not discharged the burden of proof.
25. Further evidence in the bundle to which I was referred shows that on the 23 March 2023, the claimant was referred for physiotherapy. I find, considering the GP records, that the claimant had three appointments and the clinical summary at page 109 of the bundle shows that from 12 April 2023 the claimant reported slight better with pain and mobility although still sore and 6 May 2024 that the claimant reported feeling a lot better with 75%, improvement. There had been two episodes of pain on performing more strenuous exercise.
26. At page 56 of the bundle there is a discharge letter dated 3 June 2023. This sets out that the claimant had three treatments and his condition on discharge was symptom free 85-100%. The notes state that the claimant was placed on SOS and during this period there had been no further contact. The assumption was that the symptoms were resolved, and the claimant was no longer in need of physiotherapy.
27. Mr Stimpson said that the reference to SOS is that he was told that if he had any issues he could come straight back and did not need to go through any referral process. Mr Stimpson said that he had not returned.
28. Mr Stimpson says that his back problems are ongoing and refers to a receipt in the bundle at page 108. This is payment to a private chiropractor. It does not give any indication of what the treatment is for, and I find that this evidence is not reliable evidence that Mr Stimpson has any ongoing issues with his back. Mr Stimpson says that he has not finished his treatment with them and therefore there is no report.

- 29. From 30 August 2023 the GP notes and Not Fit for Work notes all relate to an issue that the claimant has with his knee. Mr Stimpson confirmed at the hearing that the issues he has with his knee are completely unrelated to his back and does not form part of his claim to have a disability.
- 30. There is a GP entry on 19 October 2023 in relation to a Not Fit for Work Note for 16 October 2023 to 15 January 2024 which gives a diagnosis of osteoarthritis of the knee – recent flare up and says after a space “chronic back pain.” Mr Stimpson said in evidence that his back pain was sufficiently better such that he could start to look for work but the issue with his knee arose and he stopped looking for work. I find, given the claimant’s evidence, that the mention of chronic back pain, although mentioned, was not preventing the claimant from seeking work. The claimant’s own evidence was that he had not taken up the offer of his physiotherapist to return directly to them for further treatment in relation to his back if needed.
- 31. Having regard to the facts and circumstances at the relevant time and the evidence presented, I find that the claimant has not shown that, at the relevant time, the substantial adverse effects were likely to recur and were long term.

**Conclusion**

- 32. For the reasons given above I find that the claimant has not shown on the evidence presented that the effects were likely to last at least 12 months or were likely to recur.
- 33. I find that the effects of the impairment were not long term, and the claimant has not established that he was a disabled person within the meaning of the Equality Act 2010.

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Employment Judge Allen

6 June 2024

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Date

REASONS SENT TO THE PARTIES ON  
14 June 2024

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FOR THE TRIBUNAL OFFICE