



EMPLOYMENT TRIBUNALS

Claimant: Mr. A. Uruthiraneson
Respondent: Tesco Stores Limited

Heard at: Watford
On: 24 September 2024
Before: Employment Judge S. Matthews

Representation

Claimant: In Person
Respondent: Ms. Whittington (counsel)

JUDGMENT having been sent to the parties on 3 December 2024 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant was employed by the respondent as a Delivery Driver from 29 June 2022 until 27 March 2023. The claimant brings complaints of direct disability discrimination, failure to make reasonable adjustments, harassment related to disability, victimisation and unlawful deductions from wages. Page numbers in brackets below are references to the pages in the bundle provided for this hearing.

The case management background

2. The claim form was presented on 17 August 2023. The tribunal wrote to the claimant on 3 March 2024 asking him to answer questions about his alleged disabilities by 1 April 2024. These questions asked him about the impairments relied on, the dates when they started and stopped, the medication and the effects that the impairment would have if he was not taking the medication. He was also asked to send copies of GP records and other documents he relied on to establish that he has a disability. The claimant provided some limited medical evidence which is in the bundle before me today (pages 49 to 53). There are two consultations with the doctor regarding his skin condition, 22 September 2022 and 16 November 2022. There is also a letter from the doctor dated 11 March 2024 regarding his bladder outlet problem which the doctor explains is compounded by medication (page 53).
3. The parties attended a case management hearing with Employment Judge French on 16 April 2024. At that hearing the claimant said that his disabilities

were a skin condition (erythematous), diabetes and a bladder outlet problem. The case management order set out the same questions he had already been asked in relation to those three conditions, and he was ordered to provide that information by 13 May 2024. He did not provide any new documents, but he did provide an email dated 31 May 2024 which he referred to as his impact statement (page 68 to 69).

The scope of the preliminary hearing today

4. This hearing was listed at the request of the respondent by an email dated 31 May 2024. The respondent does not concede that the claimant has a disability and requested a Public Preliminary hearing to determine whether the claimant was disabled within the meaning of the Equality Act 2010 at the relevant time.
5. In the case management order the relevant time is identified as 29 June 2022 to 27 March 2023. I determined today that the relevant time was 1 September 2022 to 31 May 2023, because the events relating to the claimant's allegations commence in September 2022 and continue until the outcome of his appeal hearing in May 2023. My conclusions would however remain the same if the relevant period commenced on 29 June 2022 as I accept that all the alleged impairments arose more than 12 months before the claimant started employment with the respondent.
6. The respondents made a very late application for a deposit order sent after the close of business yesterday evening. There was not time to deal with this today.

The issues

7. The issues to be decided are referred to in the case management order of Employment Judge French:
 - 7.1 Did the claimant have a physical or mental impairment?
 - 7.2 Did that impairment have a substantial effect on his ability to carry out day to day activities and was that adverse effect long-term?
 - 7.3 What would be the effect if he did not take medication or take other measures to correct the impairments? Would the impairments have a substantial adverse effect on his ability to carry out day to day activities?

Findings of fact

8. I heard oral evidence from the claimant, and I was provided with a bundle of 97 pages which included the claimant's impact statement (68-69). I made findings of fact in respect of each alleged impairment.

Skin condition

9. This is a condition which the claimant says affects him unless he wears non-artificial fabrics such as good quality cotton. He says he first experienced this problem when he worked for Sainsburys. The uniforms they supplied caused

him to break out into a rash. He described 'getting reddish' when starting to sweat and having to scratch himself. It was uncomfortable on warmer days.

10. The claimant then went on to say that he wore his own clothing at Sainsburys, so the issue did not arise and that he wore his own clothing at the respondent, so the issue did not arise then either. He said he spoke to his doctor about it in 2018 to 2019 when he was at Sainsburys. He has not disclosed GP records referring to this and he thinks that the doctor did not record it at the time. I find it probable that if it had been having a substantial adverse effect on the claimant at the time the doctor would have recorded it. I find the claimant's account confusing in that he says that he did not actually experience symptoms when he was at Sainsburys because he did not wear the uniform they supplied. That was not explained. In any event, he contacted his GP about a rash he was experiencing in September 2022 when he wore the clothes provided by the respondent (page 50). The doctor did not examine him as it was a telephone consultation, but the notes indicate that he advised him to change the fabrics he wore and queried whether this was an allergy ('? Contact allergy to fabrics'). A further telephone consultation took place with his GP on 16 November 2022 (page 52) in which he was given the same advice. The GP recorded the problem as 'Contact dermatitis'.
11. In summary, the medical records refer to the claimant's concern that he may suffer from symptoms if he wears synthetic fabrics. The claimant did not put forward evidence of a diagnosis, although the GP suspects an allergy when hearing about his symptoms over the phone. The claimant confirmed in oral evidence that there is not a problem when he can choose his own clothing and that the condition is synonymous with an allergy in that he cannot wear certain types of clothing.

Diabetes

12. The claimant was diagnosed with type 2 diabetes in August 2011 (page 85) for which he has been prescribed medication, Jardiance. He says that if he did not take that medication there would be 'very serious consequences' but he was unable to explain what they would be. The consequence that he wanted to draw the tribunal's attention to is that the medication causes him to need to urinate more. I deal with this below.

Bladder problem

13. The claimant has suffered from a bladder problem, benign prostatic hyperplasia, since 11 November 2005 (page 85). The medication Jardiance makes it worse (page 53). He has been taking this medication since October 2018.
14. He experiences dripping and wears a pad. He also experiences a sudden urge to go to the toilet. This can be every two to three hours, but it can be after just half an hour. It is unpredictable and that is the problem. He does not have any problems with any tasks around the house because he knows he can get to the toilet quickly. The problem does not stop him from going out. When he goes to the cinema or theatre he wears a pad. He does not avoid going out, but he feels he cannot go out without the pad because he cannot be sure that he can find places to urinate in time. He also described having problems because he needs to go to the toilet at night, preventing him

getting a full night's sleep and causing problems if he goes to stay with others.

The law

Disability

15. The burden of proving disability is on the Claimant. He must show that at the material time he had a physical or mental impairment which had a long term and substantial adverse effect on his ability to carry out normal day to-day activities.
16. Section 6 (1) of the Equality Act 2010 states:
 - (1) 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.
17. The definition set out in section 6, as supplemented by provisions in Schedule 1 to the Act, poses four questions:
 - i) Does the person have a physical or mental impairment?
 - ii) Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
 - iii) Is that effect substantial?
 - iv) Is that effect long-term?
18. The activities affected must be "normal". The Equality Act 2010 "Guidance on matters to be taken into account in determining questions relating to the definition of disability 2011" (the Guidance) states (D3):

'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.'
19. Schedule 1 (paragraph 2) to the Act provides that an impairment will have a long-term effect only if:

It has lasted at least 12 months;
The period for which it lasts is likely to be 12 months; or
It is likely to last for the rest of the life of the person affected.
20. Section 212 of the Equality Act 2010 defines 'substantial' as 'more than minor or trivial.'
21. In relation to whether an impairment had a substantial adverse effect on the person's ability to carry out normal day-to-day activities, the focus is upon what the person either cannot do, or can only do with difficulty, rather than on the things that the person can do (Goodwin v The Patent Office [1999] ICR 302).

22. An impairment will be treated as having a substantial adverse effect on a person's ability to carry out normal day-to-day activities if:

Measures are being taken to treat it or correct it; and
But for the measures, the impairment would be likely to have that effect
(Paragraph 5(1), Schedule 1.)

23. In deciding what effect an impairment would have had without the benefit of treatment, the Court of Appeal in Woodrup v London Borough of Southwark [2002] EWCA Civ 1716, held that the question was whether, if treatment had been stopped at the relevant date, the person would (despite the benefit obtained from prior treatment) have an impairment which had the relevant effect. At paragraph 13, Simon Brown LJ said:

"In any deduced effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this particularly benign doctrine....should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary."

24. Paragraph B7 of the Guidance states that:

'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.'

25. The Guidance gives the example of a person who needs to avoid certain substances because of allergies who 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. What is a 'reasonable' modification will depend on the circumstances and is a matter of degree.

26. In Metroline Travel Ltd v Stoute (debarred) 2015 IRLR 465, EAT the EAT held that neither type 2 diabetes per se nor type 2 diabetes controlled by diet alone is necessarily a disability for the purposes of the Equality Act 2010. By contrast the claimant in Richards v Interserve FS (UK) Ltd ET Case No.3302743/15 was found to be disabled where he suffered from type 2 diabetes. R was employed as a security guard and dismissed for failing to close a gate when he left to take his medication when he felt unwell. Although his claim failed for other reasons, the employment tribunal found that his diabetes amounted to a disability. The consequences of not managing the condition with prescribed medication could be very serious. leaving him with identified impairments such as being immobile and unable to concentrate on activities such as reading or watching television or to drive safely.

Submissions

27. I heard oral submissions from both the respondent and the claimant, and I have taken those into account in reaching my conclusions.

Conclusions

Skin condition

28. The claimant's oral evidence was that certain fabrics cause him to come out in a rash. He consulted his GP prior to working for the respondent but it was not recorded as significant at the time. He then consulted his GP again when he was being asked to wear synthetic fabrics by the respondent. No diagnosis has been confirmed. On the basis of that limited medical evidence and his own account of the history of the condition, I do not accept that the claimant has established that he has an impairment. However, if he does have an impairment, I find that he has not established that it has a substantial effect or had a substantial effect on his day to day activities at the relevant time. He has to avoid wearing synthetic fabrics which is a reasonable avoidance strategy.

Bladder problem

29. In respect of the bladder issues I find that the claimant has established that he has an impairment, but he has not established that it has a substantial effect on his day to day activities. He has to wear a pad, which is a reasonable coping strategy to take regarding the dripping; he has to go to the toilet frequently which can be problematic when he is out or stays with friends, but I do not find that it meets the threshold of substantially affecting his day to day activities.

Diabetes

30. My interpretation of the claimant's submissions and the impact statement is that he is not seeking to rely on diabetes as a disability. In the impact statement he does not refer to diabetes and identifies the primary issues as:
- A. My skin related issues with the fabrics of Tesco Uniform.
 - B. My BPH and Jardiance matter that is relating to the frequency of my urination.
31. I concluded the claimant's reference to diabetes is confined to the effect of the medication which he must take because of it.
32. If the condition is being pursued as a disability, the claimant has not put forward any evidence of the effect on his day to day activities or the effect on his conditions if he did not take medication, despite being asked on 2 occasions prior to the hearing and at the hearing itself.
33. In any event the claimant's allegations do not relate to the condition of diabetes and so even if I was to find that it was a disability at the relevant time it would not support the claims he is bringing.

Summary

34. Accordingly I find that the claimant was not disabled within the meaning of

the Equality Act 2010 at the relevant time.

35. The claimant has confirmed that he is not pursuing a claim for direct discrimination. His claim for reasonable adjustments cannot now proceed. His claims of victimisation, harassment and unlawful deductions can proceed as these are not dependent on him having a disability.
36. Finally, I apologise for the delay in sending out these written reasons. Although the request for written reasons was received by the tribunal on 3 December 2024, I did not receive the request for written reasons until 19 December 2024, shortly before the Christmas break, and it has not been possible to finalise the reasons until today.

Approved by

Employment Judge S Matthews

Date: 29 January 2025

Judgment sent to the parties on

30 January 2025.....

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For the Tribunal office

Recording and Transcription

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