



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Mr J St John

NHS Blood and Transplant

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: Watford
Before: Employment Judge Alliott

On: 14 August 2019

Appearances

For the Claimant: In person
For the Respondent: Mr C Baker (Solicitor)

JUDGMENT

1. The claimant was a disabled person at all material times within the meaning of the Equality Act 2010, the disability being back impairment.
2. The respondent's application for a strike out and/or deposit order is dismissed.
3. The claimant's claims against the second and third respondents are dismissed upon withdrawal.

REASONS

DISABILITY

1. This part of the OPH is to determine whether the claimant was at all material times a disabled person within the meaning of section 6 of the Equality Act, as ordered by Employment Judge Lewis at a CPH held on 18 September 2018.
2. The list of issues refers to the claimant's alleged disability as a back impairment.

3. The claimant's claim form did not tick the box in section 8.1 relating to disability discrimination and consequently the case was not coded "disability discrimination". However, the form did refer to a failure to make reasonable adjustments.
4. At the CPH on 18 September 2018, Employment Judge Lewis accepted that the claimant had brought a separate claim of disability discrimination in failure to make reasonable adjustments. That claim is set out in the list of issues.
5. Case management orders were made for the claimant to send the respondent relevant medical evidence and an impact statement by 30 November 2018.
6. The claimant has provided an impact statement dated 12 December 2018 but there is precious little medical evidence.

The Law

7. The Guidance on the definition of disability (2011) provides at A1 and A2 as follows:

"A1. The act defines a disabled person as a person with a disability. A person has a disability for the purposes of the act if he or she had a physical or mental impairment and the impairment has a substantial and long term adverse effect on his or her ability to carry out normal day-to-day activities (section 6 (1)).

A2 – This means that, in general:

- The person must have an impairment that is either physical or mental;
- The impairment must have adverse effects which are substantial;
- The substantial adverse effects must be long term;
- The long term substantial adverse effects must be effects on normal day-to-day activities.

This definition is subject to the provisions in schedule 1.

All the factors above must be considered when determining whether a person is disabled"

8. Mr Baker has submitted, and I accept, that the onus is on the claimant to prove he is disabled and that the material time for establishing disability is the date of the alleged discriminatory act.

The Facts

9. I have the claimants' impact statement. Apart from that I have contemporary documents in the form of OH reports dated 2 January 2018 and 4 December 2018, a Root Cause Analysis dated around June 2017, a physiotherapy report dated 30 November 2018 and a breakdown of overtime worked by the claimant between 1 May 2017 and 6 April 2019.
10. The claimant gave evidence before me.

11. The disability the claimant alleges is a physical impairment of back pain. He states that he has had this since a lifting accident on 30 March 2017. The Root Cause Analysis corroborates this and the OH reports refer to sickness absence in April 2017 due to a lifting injury. He reported sick on 10 April and returned to work on 24 April 2017.
12. The OH report of 2 January 2018 refers to the claimant being seen by his GP and being referred for appropriate investigations and physiotherapy. I have not seen the GP notes or investigations. There is evidence the claimant had physiotherapy. I find he did sustain the back injury on 30 March 2017.
13. The Root Cause Analysis of about June 2017 does appear to have been created in response to continuing symptoms of ill-health, the root cause of which was said to be the accident on 30 March 2017. The claimant's back was made worse when bending down.
14. The 2 January 2018 OH report describes the claimant as having improvement in his symptoms but the claimant continued to report ongoing back pain aggravated by prolonged standing or walking. He was recorded as following advice and exercise given by the physiotherapist which was helping. The claimant was working his full normal hours and he was deemed fit for his current duties. It is clear that he worked about two extra days a month overtime when available. Recommendations were made to rotate him between tasks to allow a mix of sitting, standing and walking activities. It was stated that he may need some assistance with manual handling activities from colleagues or aids where available. It was stated he should avoid heavy manual handling (over 8-10kg) and avoid repetitive bending, twisting or stooping.
15. Whilst the OH report of 2 January 2018 expressed the view that the claimant was not disabled, as his condition had not lasted 12 months, by the time of the OH report of 4 December 2018, the view was that:

“my interpretation of the relevant UK legislation is that Mr John St John's back condition is likely to be considered a disability because it has lasted longer than 12 months and is having a significant impact on some of his normal daily activities”.
16. That view, of course, is not determinative.
17. The 4 December 2018 OH report records the claimant continuing to describe some ongoing back pain aggravated by prolonged standing or walking. The claimant struggled to lift over 10kg and avoided activities that were likely to aggravate his symptoms outside of work.
18. In his impact statement, the claimant states that the impairment has affected his mobility and ability to carry out day-to-day activities in that he is restricted in lifting, moving, pulling or pushing any heavy object or standing or sitting for a long period of time. He refers to being able to carry out most of his duties at work but with discomfort and difficulty. He states he is taking precautionary measures like medication, physiotherapy, exercise and the avoidance of lifting and pushing activities.

Conclusion

19. I address each aspect of the statutory definition of disability as appropriate.
20. The claimant clearly relies on a physical impairment. It is true to say that there is an absence of medical diagnosis but it is not necessary to consider how an impairment is caused (guidance A7). The material time is leading up to the presentation of his claim in April 2018 due to the reliance on a continuing act. By 22 April 2018, his back impairment had lasted 12 months and as such it qualifies as a long term impairment. In fact, it has lasted to date. In assessing whether the impairment has a substantial adverse effect on normal day-to-day activities, the act provides that treatment is to be disregarded (guidance B12). I note that the claimant's condition was helped by medication, physiotherapy and advice on avoidance which may explain his capacity to work normally and do overtime. However, I assess the effects disregarding the treatment.
21. The guidance appendix refers to inability to move heavy objects, such as a large suitcase or heavy furniture as not adversely affecting every day activities but the list of factors included cites difficulty picking up and carrying objects of moderate weight with one hand. In my judgment, restriction on lifting 8-15kg is a moderate weight and a day to day activity. In addition, I find lifting, moving, pulling and pushing moderately heavy items to be normal day-to-day activities. They do not cross over into being specialised activities peculiar to the claimant's occupation. Consequently, I find that the claimant did suffer substantial adverse effects on normal day-to-day activities.
22. Consequently, I find that the claimant was a disabled person at all material times within the meaning of the Equality Act 2010, the disability being back impairment.

APPLICATION FOR STRIKE OUT AND/OR DEPOSIT ORDER

23. Mr Baker, on behalf of the respondent, seeks to strike-out and/or have a deposit order made in relation to each aspect of the claimant's claim.
24. Mr Baker acknowledged that the Employment Appeal Tribunal has said on numerous occasions that in claims relating to the Equality Act, it should only be in the clearest cases that a strike-out is appropriate. I note that due to the fact sensitive nature of discrimination claims and by virtue of public policy in terms of a full examination of such claims, it is comparatively rare that a strike-out order will be appropriate in these instances. Having examined each of the claimant's claims, it is my judgment that it cannot be said that the situation is so clear that a strike-out order is appropriate. Consequently, I decline to make any strike-out order in relation to any of the claimant's claims.

25. Having found that the claimant is a disabled person for the purposes of the Equality Act, the disability claim remains as set out in the list of issues of Employment Judge Lewis. Clearly there remains an issue as to whether or not the respondent did or could reasonably have known that the claimant was a disabled person. However, the onus of that issue remains on the respondent. The PCP relied upon is the requirement for the claimant to lift and move heavy items. I have endeavoured to explore with the claimant how it is that he says that the PCP puts him at a substantial disadvantage compared with those people who are not disabled. Precisely how the claimant puts his case in relation to this aspect of his claim and how reasonable adjustments could address such potential disadvantage is not entirely clear to me at this stage. However, the claimant has advanced a range of issues, namely not being considered for promotion and how he was treated and on that basis, I am not prepared to conclude that there was little reasonable prospect of success and order a deposit order. He is a litigant in person and, in my judgment, he should have his complaints evaluated by a full tribunal. Consequently, in my judgment that aspect of the claim should be allowed to proceed.
26. As regards the discrimination claims relating to age/race and/or detriment on the basis of trade union activity, fundamentally these boil down to a complaint of not being provided with full QM training and failing to appoint the claimant in November 2017 as a Band 7 Team Manager. In my judgment, the claimant alleges that others of differing age, race and non-trade union activity were provided with those opportunities and he was not. Whether or not the threshold has been crossed to raise a prima facie case of discrimination and thereby transfer the burden onto the respondent, in my judgment there is sufficient in the allegations made by the claimant for me not to conclude that there is little reasonable prospect of success and accordingly, those claims may proceed.
27. As regards the discrimination case on the basis of religion this is, as set out in the list of issues of Employment Judge Lewis, confined to a complaint relating to September 2017. As the claim form is dated 22 April 2018, so that claim must be outside the primary limitation period. Consequently, I will record that an extra issue in this case will be a time point, namely whether it would be just and equitable to allow the claimant to bring this claim out of time. In essence, this claim relates to being discouraged from applying for a post that would have required him to work on Sundays because, as a Christian, the claimant would not work on the Sabbath. I do not conclude that there is little prospect of success in that claim, subject to an extension of time for bringing it.

THE SECOND AND THIRD RESPONDENTS

28. On the basis that the respondent has, in an e-mail dated 5 October 2018 timed at 14:33, accepted full liability for the actions complained of against the second and third respondents, undertaking to meet in full any award made in respect of their actions and use its reasonable efforts to ensure that they attend to give evidence as witnesses, up to and including issuing a witness summons, then the claimant has indicated that he will withdraw

his claims against those individuals. Consequently, I record that the claims against the second and third respondents are dismissed upon withdrawal.

Employment Judge Alliott

Date: 16/9/2019

Sent to the parties on:

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For the Tribunal Office