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EMPLOYMENT TRIBUNALS

Claimant: Mr D. Opoka
Respondent: (1) Amazon Logistics UK Services Ltd
(2) Heads Recruitment Ltd t/a Proman

Heard at: East London Hearing Centre

On: 10 December 2020

Before: Employment Judge Massarella

Representation

Claimant: In person
1st Respondent: Mr O. Holloway (Counsel)
2nd Respondent: Ms A. Niaz-Dickinson (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. the Claimant's application to stay the proceedings is refused;
2. the Claimant was, at all material times, a disabled person within the meaning of the Equality Act 2010 ('EqA');
3. the Claimant lacked the two-year qualifying period of employment, required to pursue a claim of unfair (constructive) dismissal within the meaning of s.94 Employment Rights Act 1996 ('ERA'), and the claim is struck out;
4. the Claimant's claim of automatically unfair dismissal by reason of the assertion of a relevant statutory right, within the meaning of s.104 ERA, is misconceived, and is struck out;
5. the Claimant's application to strike out the Respondents' responses is refused.

REASONS

Background

1. By a claim form presented on 12 August 2019, after an ACAS early conciliation period between 29 and 30 July 2019, the Claimant complained of disability discrimination, victimisation, constructive (unfair) dismissal and automatically unfair dismissal. The disability relied on is an impaired right ankle.
2. The Claimant worked as a night warehouse operative for the First Respondent between 15 April and 13 June 2019.

The hearing

3. This hearing was listed to determine a number of issues: whether the Claimant was a disabled person at the material time; whether any of his claims should be struck out; and whether the Respondents' responses to those claims should be struck out.
4. The hearing took place in person at East London Hearing Centre. I had before me a small bundle of documents, running to 69 pages, which included a disability impact statement from the Claimant, and a large bundle of documents, running to 585 pages. I heard evidence from the Claimant on the issue of disability; he was cross-examined by both Counsel for the Respondents.

The Claimant's application to stay these proceedings

5. The Claimant applied by email, sent to the Tribunal at 04:55 on the morning of the hearing, for the Tribunal to 'postpone all its parallel activities in this case until after the conclusions of the judicial review and appeals'. I understood this to be an application for a stay of these proceedings.
6. The Claimant's claim was issued on 12 August 2019. There was a preliminary hearing on 27 January 2020 before EJ Lewis, at which he made an application to amend his claim form. The Judge rejected that application.
7. The Claimant explained in his application email, and repeated to me orally, that he considered that the decisions of judges in this Tribunal in respect of his case up to this point have been 'blatantly wrong', indeed he believed them to be so unfair as to amount to a breach of his fundamental rights under the European Convention. He asked for these proceedings to be stayed, while his appeals and his application for judicial review, were determined.
8. The Claimant referred to a breach of 'the implied term of trust and confidence', by which I understood him to mean that he had lost trust in this Tribunal's ability to act impartially in relation to his case.
9. A challenge to the decision of an employment judge can be made in various ways: by an application for reconsideration of that decision or, if it is a case management order, for variation of that order; or by way of an appeal. A

challenge to an individual judge's ability to hear a case impartially can also be made by way of an application for recusal.

10. The Claimant appealed EJ Lewis's decision to the EAT, in part on the basis that she had acted unfairly, and had demonstrated bias. That appeal was rejected on the papers by the President of the EAT, and then again by HHJ Tayler at a Rule 3(10) permission hearing on 7 October 2020. The Claimant then applied for judicial review on 25 September 2020. It appears that the subject of that judicial review was the conduct of the proceedings by the ET and the EAT. On 16 November 2020, Mrs Justice Collins Rice refused permission to apply for judicial review, in part on the basis that there were no arguable grounds.
11. Although the Claimant told me that he was surprised to hear that his judicial review had been unsuccessful, Ms Niaz Dickinson, Counsel for the Second Respondent, confirmed that Mrs Justice Collins Rice's decision had been sent to the Claimant by email at 17:54 on 16 November 2020, to the same address as he has been using in these Tribunal proceedings. The Claimant maintained that he had not received it. I asked Ms Niaz Dickinson to forward a copy to him today.
12. Insofar as the Claimant is dissatisfied with earlier decisions taken by other judges, that is not a matter in respect of which I have any power. The Claimant has taken the appropriate action to challenge those decisions, which I have described above.
13. According to what I have been told today, there are no outstanding challenges to earlier decisions, whether by way of appeal or judicial review; accordingly, that basis for the Claimant's application for a stay falls away.
14. In my judgment, it would be highly undesirable for there to be any further delay in moving forward with these proceedings. This is a claim which was presented in August 2019, and which has already been subject to considerable delay. There have been two adjournments of this preliminary hearing, as a consequence of which the full merits hearing, which was listed to start today, has also been postponed to November 2021. In my judgment, it would be contrary to the overriding objective to postpone the preliminary hearing, let alone to stay the proceedings as whole.
15. For these reasons, I refused the Claimant's application for a stay of these proceedings.

The issue of disability

Findings of fact

16. On 29 April 2011, the Claimant slipped on some stairs, and sustained a fracture to his right ankle. In a letter dated 16 August 2011, Mr A. Arya, Consultant Orthopaedic Surgeon, wrote that the fracture was healing nicely, although 'radiologically it has not healed fully'. The Claimant was complaining of stiffness in the ankle, and there was some lack of flexibility.
17. On 24 January 2012, the Claimant was seen by Mr J. Tyler, Specialist Registrar in Orthopaedics, who noted that he was 'unable to jog or do anything

that loads the ankle any more than simple walking'; he recorded that the Claimant was experiencing pain in the joint, and that his range of motion was 'mildly reduced'. Mr Tyler wrote:

'he has had an MRI scan which demonstrates an osteochondral defect over the medial aspect of the talus, but also it suggests in the report that they feel he may have had a talar neck fracture as he has a more widespread signal change in the proximal aspect of the talus.'

18. The Claimant had surgery (including a right ankle arthroscopy), which was conducted by Mr V. Kavarthapu, on 21 September 2012. Mr Kavarthapu saw the Claimant again on 4 October 2012 and noted that there was marked improvement in his ankle pain and flexibility already. However, he also recorded:

'significant distal tibial anterior osteophyte, along with predominantly grade II to III degenerative changes in the ankle joint and medial and lateral gutter impingement lesions.'

He noted that he would review the Claimant again in four weeks' time to monitor progress.

19. There is then a gap in the medical records until 2017. The Claimant's explanation for this was that he had been selective in his disclosure, because he considered that it was sufficient for these purposes to show that the condition was identified as being degenerative in 2012 and (as we shall see) in 2017. He maintained that he had had other reviews between 2012 and 2017. Although the Claimant was under an obligation to disclose all his records, and acted wrongly by not doing so, I accept his evidence that there were other reviews between those dates. I note that at least one further review was referred to in the correspondence, and Mr Holloway acknowledged that there would also have been a letter discharging the Claimant to his GP, with a prognosis, which is also not among the documents before me.
20. The next letter I had sight of was dated 6 July 2017, from Miss L Cooper, Trauma and Orthopaedic Specialist Registrar, in which she recorded that:

'He is not doing particularly well in terms of his ankle as he finds it difficult to walk long distances and also has difficulty fulfilling his everyday tasks work such as lifting heavy objects. He was sent for an MRI scan at his last appointment. This has revealed degenerative changes to the joints and some cystic changes and some synovitis [...] We have talked about his potential treatment options ranging from losing weight, modifying his activities, further keyhole surgery for debridement, although I have explained that this is unlikely to result in long-term improvement, and also the possibility of ankle fusion. I have explained that whilst ankle replacement is a possibility, it is normally more effective in lower demand patients with more limited mobility. However, we have talked in detail about rocker bottom type shoes and the patient is already investigating this option. In terms of his work, I recommended that he had a serious discussion with his employers as to whether his activities can be modified on a long-term basis and I have provided him with a note which states this. I have also recommended to him that he might

want to look for less physically demanding work which requires less walking, as he is also becoming quite frustrated with being unable to do everything that he needs to do.'

21. At that time, the Claimant was working as a security guard, which required him to walk long distances and to lift heavy objects.

22. There is then a letter, dated 30 November 2017, from Mr Kavarthapu, who wrote (among other things):

'the statement of fitness for work form signed by my Registrar clearly mentioned that he would be fit for work taking into account the following advice – amending duties – less standing/walking/heavy lifting. Desk job preferable. This advice has been provided for six weeks. It is really important that his occupational health team is involved to be able to give a detailed long-term assessment.'

23. The Claimant acquired special insoles for his shoes in around September/October 2018. Because of the shape of the shoes, less pressure is put on the joint. I accept the Claimant's evidence that before he started to use the insoles, his mobility was substantially affected, and walking anything more than short distances was difficult and painful.

24. On 7 March 2019, there is a further letter from Mr Kavarthapu, who recorded:

'He is very pleased to have experienced a significant pain improvement in his ankle since he started using the custom-made insoles. He has been fairly active since then. He has also changed his job and that has also helped with his symptom improvement. He is experiencing intermittent anterior ankle pains particularly when he walks on uneven surfaces. By and large, this is less frequent and does not affect his routine physical activities. The ankle range of motion is very good.

I have explained to him in detail about the current pathology, namely, the avascular necrosis of the talus and the associated degenerative changes. I have also shown him the MRI imaging and explained to him about the location and extent of this avascular necrosis changes [sic] noted in the past. This ankle is prone to develop secondary degenerative changes and this might take a number of years before it becomes significantly symptomatic. It is impossible to give a specific timeframe as it depends on his level of physical activities, bodyweight and a number of other factors. Definitive treatment when the secondary degenerative changes become significant would include an ankle fusion or ankle replacement.'

Under the heading 'Management', Mr Kavarthapu wrote:

'Currently managing satisfactorily with an orthotic insole. Patient may require a definitive surgical procedure in the long run.'

25. The Claimant felt well enough to apply for a job with the First Respondent in logistics. He worked for them between 13 April 2019 and 13 June 2019.

26. On 6 April 2019, the Claimant signed an agreement, in respect of working in the freezer and chiller section, that he had 'no underlying health issues which would prevent me from carrying out my assignment in full, including lifting up to 15 KG at a time, working in chiller and freezer environments, and walking long distances.'
27. On the same date he signed a document, entitled Health & Disability, in which he wrote 'I have an injured ankle but it is not limiting me from doing the tasks described when I use MBT shoes' (MBT is the brand name for the specialist shoes he was wearing).
28. It does not appear to be in dispute that, while working for Amazon, the Claimant worked long shifts (8 to 12 hours); he was on his feet throughout; and he would lift and moved products up to 15 kg in weight, when working in the ambient section. He also had to bend and stretch. All the work was conducted under time pressure. The Claimant's evidence was that, in retrospect, he felt that the shoes gave him a false sense of confidence, and that he overestimated his capacities as a result. He accepted that the work would be physically demanding for people without his impairment, but maintained that they would still find it easier to cope than he did. It will be for the Tribunal which deals with the final hearing to assess the evidence as to the matters referred to in this paragraph and, by recording them, it is not my intention to make findings which would be binding on subsequent Tribunal panels.

The law

29. S.6(1) EqA provides:
- A person (P) has a disability if –**
- (a) P has a physical or mental impairment, and**
- (b) the impairment has a substantial and adverse long-term effect on P's ability to carry out normal day to day activities.**
30. 'Substantial' is defined in s.212(1) EqA as meaning 'more than minor or trivial' and is a relatively low threshold.
31. Sch.1, para 5(1) EqA provides:
- (1) 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:**
- (a) measures are being taken to correct it, and**
- (b) but for that, it would be likely to have that effect.**
- (2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.**
32. 'Likely' means 'could well happen', rather than 'more likely than not to happen' (*Boyle v SCA Packaging Ltd* [2009] ICR 1056, HL). If there is material before the Tribunal to suggest that measures were being taken that may have altered the effects of the impairment, then it must consider whether the impairment would have had a substantial adverse effect in the absence of those measures (*Fathers v Pets at Home Ltd*, EAT 0424/13).

33. The Tribunal's focus should be on what the employee cannot do, or what he can do with difficulty, rather than on what he can do (*Aderemi v London and South Eastern Railway Ltd* [2013] ICR 591, EAT at [15]).

34. The 'long-term' requirement is developed in para 2, Sch.1 to the EqA which provides, so far as relevant:

(3) 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.

(4) 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.

35. S.14 EqA also empowers the Commission for Equality and Human Rights to issue codes of practice in connection with any matter addressed by the EqA. By s.54, the provisions of such a code are admissible in evidence and shall be taken into account by a Tribunal in any case in which they appear to it to be relevant. The Commission issued a Code of Practice on Employment in 2011, which includes a summary in relation to the definition of disability, at paras 2.8–2.20. Paragraph 2.20 further refers the reader to App. 1 to the Code.

36. Under the heading 'What is a "substantial" adverse effect?', paras 8–10 of the appendix provide:

'8. A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.

10. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities. For example, where an impairment causes pain or fatigue in performing normal day-to-day activities, the person may have the capacity to do something but suffer pain in doing so; or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time.'

37. Progressive conditions are dealt with in para 8, sch.1 EqA, which provides:

8(1) This paragraph applies to a person (P) if—

(a) P has a progressive condition,

(b) as a result of that condition P has an impairment which has (or had) an effect on P's ability to carry out normal day-to-day activities, but

(c) the effect is not (or was not) a substantial adverse effect,

(2) P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment.

(3) Regulations may make provision for a condition of a prescribed description to be treated as being, or as not being, progressive.

Submissions

38. The Claimant submitted that he has (and had at the material time) a degenerative, progressive condition: he pointed me to the medical records from 2012 and 2017, referred to above, in support of that. He reminded me that the medical records suggest that he may require further surgical intervention in the long run. He urged me to have regard to the fact that his use of specialist shoes provides an effective treatment, and contended that I should assess what the position would be, were he not taking advantage of that treatment. As well as his own witness evidence as to the adverse effects, he pointed me to the contemporaneous evidence which suggested that consideration should be given to amending his duties in 2017.
39. For the First Respondent, Mr Holloway was prepared to proceed on the basis that the Claimant's condition was progressive, and to accept that para 8, sch.1 EqA applied. He argued, however, that there was insufficient evidence on which the Tribunal could speculate as to the adverse effects of the impairment which were likely occur in the future. He submitted that the only reliable reference in the documents was that it might be some time before those effects would manifest themselves. For that reason, Mr Holloway submitted that the Claimant still had to show that there was a substantial adverse effect at the material time, and maintained that the Claimant had failed to do so. He submitted that the issues which the Claimant was having in 2017 were because he was doing a very physically demanding job (working as a security guard), which involved tasks which could not be described as normal day-to-day activities. He submitted that the fact that the Claimant was proposing to work shifts in the freezer is indicative of the fact that he still considered himself capable of doing physically demanding work. He maintained that there was insufficient evidence from which to conclude that the effect of the impairment would be substantial, were the Claimant not using specialist shoes, although he accepted that medical evidence is not always required.
40. For the Second Respondent, Ms Niaz Dickinson did not accept that the Claimant had a progressive condition; she argued that the documentary evidence was ambiguous as to this. She submitted that the evidence from 2019 suggested that the Claimant was doing well. She adopted the same position as Mr Holloway as to the doctrine of deduced effects, arguing that there was insufficient evidence to draw any reliable conclusion.

Conclusions

41. There is no doubt that the Claimant has an impairment to his ankle, as a result of the accident in 2011.
42. I am satisfied that, by July 2017 at the latest, the impairment already had more than minor or trivial adverse effects on the Claimant's day-to-day activities. I accept his evidence that, by this point, his mobility was very substantially affected. I note that in the letter of 30 November 2017, Mr Kavarthapu

recommended at that point that he do work, which avoided standing, and even suggested that a desk job would be preferable.

43. The Claimant began to wear insoles late 2018, and there was a marked improvement. He has worn them ever since. In these particular circumstances, I do not consider that expert medical evidence is required for me to be able to conclude that, had the Claimant stopped wearing the insoles, his mobility would have been substantially, adversely affected, as it had been previously.
44. I find further support for that in the fact that the use of the insoles did not entirely eliminate the adverse effects of the impairment. The Claimant did not only experience pain when doing physically demanding tasks: the letter of 7 March 2019 records that he 'still experienced intermittent anterior ankle pains, particularly when he walks on uneven surfaces'. I also accept the Claimant's evidence that climbing steps and walking on gradients causes him pain, even when wearing the insoles, and that he tries to avoid such activities.
45. By the time the Claimant started working for Amazon Logistics, the substantial adverse effects had already lasted well over a year, in all likelihood far longer, and the long-term requirement was satisfied. Accordingly, the Claimant was a disabled person at the material time.
46. If I am wrong about that, I consider the position by reference to the 'progressive condition' provisions in the EqA. In my judgment, Mr Holloway is realistic to accept that the Claimant has a progressive condition. I note in particular the express reference in the letter of 4 October 2012 to 'degenerative changes in the ankle joint' and the reference in the letter of 6 July 2017 to the fact that a recent MRI scan revealed 'degenerative changes to the joints'. Moreover, in that letter, Miss Cooper stated that even further surgery for debridement would be unlikely to result in long-term improvement. She raised the possibility of ankle fusion, or even an ankle replacement.
47. I infer from that letter that further degeneration of the Claimant's impairment was only a matter of time. In my judgment, it is also an obvious inference from that letter that the adverse effects of the impairment were likely (in the sense of 'could well happen') to have a substantial (in the sense of 'more than minor or trivial') adverse effect in due course on the Claimant's normal day-to-day activities. I can see no other explanation for the fact that such radical options as ankle fusion or ankle replacement were being canvassed.
48. For that reason, I find that the Claimant's impairment satisfied the definition in para 8, sch.1 EqA of a progressive condition in July 2017. I am satisfied that, by that point, it had some adverse effect on his ability to carry out normal day-to-day activities at the material time, for the reasons I have already given, and that in the future the adverse effects were likely to become substantial. Accordingly, and in the alternative, the Claimant was a disabled person within the meaning of the Act, by reason of a progressive condition.

The Respondents' application to strike out parts of the Claimant's claim

49. In a letter dated 6 April 2020, the Respondents made a joint application to strike out parts of the Claimant's claims, alternatively inviting the Tribunal to make a deposit order. Although that application included grounds for strike-out based on the underlying merits of the claims, Counsel confined themselves at

the hearing to pursuing two specific points only, and did not pursue the broader application.

50. The first point is straightforward. The Claimant accepts that he does not have a period of two years' continuous service, which is required to bring a claim of unfair (constructive) dismissal under s.94 ERA. For that reason, the Tribunal does not have jurisdiction to hear that claim, and it is struck out.
51. As for the Claimant's claim under s.104 ERA that he was automatically unfairly dismissed by reason of his asserting a statutory right, the Claimant's pleaded case is set out at Box 8.2 of his ET1 [*original format retained*]:

'(4) breach of statutory rights of not to be unfairly dismissed for requesting to make reasonable adjustment for my impaired ankle and for asserting my statutory reasonable adjustment right (S.104 of ERA 1996).'
52. EJ Lewis considered the Claimant's application to amend his claim form at the hearing on 27 January 2020 and refused permission. The Claimant has exercised his right to challenge that decision by way of appeal, and that challenge has been rejected. I cannot reopen that issue. The claim remains as pleaded.
53. S.104(4) ERA identifies the statutory rights which may be relied on in pursuing a claim of this sort. It does not include rights under the Equality Act 2010, such as a claim for breach of the duty to make reasonable adjustments. Accordingly, the Claimant's claim of automatic unfair dismissal is misconceived, and it is struck out.

The Claimant's application to strike out the Respondents' defence

54. The Claimant pursued an application to strike out the Respondents responses. By an order sent to the parties on 10 August 2020, EJ Russell directed that the application should be considered at this hearing.
55. The Claimant's written application, and indeed parts of his oral submissions, consisted of attacks on the Tribunal's conduct of the proceedings to date. As I have already observed, those challenges to previous decisions made in these proceedings have already been considered and rejected by the higher courts. I cannot go behind those judgments.
56. The Claimant focused his oral submissions on an argument that the Respondents' defence to his claims have no basis, other than a bare denial. In the alternative, he asserted that the Respondents have no evidence to make good their defence. He contends that their responses have no reasonable prospects of success.
57. I do not accept those submissions. I accept Mr Holloway's submission that there are very substantial factual disputes, on which the Tribunal which deals with the final hearing will have to adjudicate, including: whether the Respondents applied the PCPs; whether those PCPs placed the Claimant at a substantial disadvantage; whether the Respondents had actual or constructive knowledge of the Claimant's disability, and of the substantial disadvantage alleged; whether the adjustments contended for by the Claimant were

objectively reasonable; and, if so, whether the Respondents failed to make them. As for the victimisation claim, the Tribunal will have to decide: whether the Claimant did the protected acts which he relies on; whether the detriments occurred as alleged and, if so, whether there was the necessary causal connection between the protected act and the detriments. In short, there are very substantial factual and legal disputes in relation to elements of both causes of action.

58. It is well-established that striking out a claim of discrimination is considered to be a draconian step which is only to be taken in the clearest of cases: see *Anyanwu & Another v South Bank University and South Bank Student Union* [2001] ICR 391. In *Mechkarov v Citibank N.A* [2016] ICR 1121, it was held that: only in the clearest case should a discrimination claim be struck out; where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.
59. Tribunals must be every bit as alert to the dangers of striking out apparently arguable defences to discrimination as they would be to the dangers of striking out apparently arguable claims of discrimination. I am not persuaded that the Respondents' defences have no reasonable prospects of success; there are core issues of fact which will turn to a great extent on oral evidence. In my judgment, the responses must be allowed to proceed to the final hearing, when they can be tested against the evidence, and the Claimant will have the opportunity to challenge them.
60. The Claimant's strike-out application is refused.

Next steps

61. The final hearing remains listed for four days on 9-12 November 2021. A separate case management order will be sent out, giving directions for preparation for that hearing. If possible, the hearing will be conducted in person at the Tribunal, depending on the position at the time with regard to the Covid-19 pandemic.

Employment Judge Massarella

11 February 2021