



EMPLOYMENT TRIBUNALS

Claimant: KAI HAM YUNG
Respondent: MENZIES AVIATION (UK) LTD

Heard at: Watford (by CVP)

On: 25/10/2024
Before: Employment Judge Mr J S Burns

Representation

Claimant: In person
Respondent: Ms K Barry (Counsel)
Interpreter: Ms L Liu-Braham (Cantonese/English)

JUDGMENT

The claims of disability discrimination and harassment are struck out

REASONS

Introduction

1. The judgment followed a Public Preliminary Hearing to determine whether the Claimant was disabled (by left patella dislocation) for purposes of the Equality Act 2010 at the material time (April to October 2023).
2. I was referred to documents in a bundle of 100 pages assembled by the Respondent. This included an impact statement in the form of further particulars provided by the Claimant about his knee injury. There were some (incomplete) medical and physiotherapy notes. The Claimant was cross-examined on this material. I then received oral final submissions.
3. At the beginning of the hearing the Claimant stated that he wished to adduce in evidence photos and videos taken by his flat-mate to show “the inconvenience ” caused by his knee. He was unable to say how many photos and videos there were or on what dates they had been taken. There was no witness statement from the photographer nor was he/she proposed to be called as a witness. The Claimant said that he needed time to find, download and sort out this material and he asked for an adjournment to some later hour or date so he could carry out this work with a view to presenting it later. The Respondent opposed the application.
4. The Claimant, who is able to read and understand written English, agreed that he had known for months that the purpose of today’s hearing was to deal with the disability issue. He also acknowledged that he had been ordered on 3/3/24 to disclose to the Respondent

by 1/4/24 all relevant medical documents and also “any other evidence relevant to whether you had the disability at that time”.

5. The Respondent’s solicitors having received all the disclosure provided by the Claimant following this order, (none of which included or referred to any photos or videos) had, as directed, issued a letter dated 18/4/24 setting out its reasons for denying that the Claimant was disabled, and had thereafter prepared for today’s hearing on that basis. In the run-up to the hearing today, the Respondent’s solicitors had attempted to liaise with the Claimant but he had made no reference to this additional material. The Claimant gave me varying implausible explanations about why he had not already disclosed and prepared his proposed video evidence.
6. Had I allowed the adjournment/delay sought by the Claimant it would have made it impossible to complete the hearing today (which as it was ended at 4.40pm). I therefore refused his application and the hearing proceeded on the basis of the material in the bundle as supplemented by the Claimant’s oral evidence.

A summary of the relevant law

7. Per section 6 Equality Act 2010 a person has a disability if they have a physical or mental impairment which has a substantial (which means “more than minor or trivial” limitation going beyond the normal differences which may exist between people) and long-term adverse effect on his ability to carry out normal day to day activities. In assessing whether there is or would be a substantial effect, one disregards measures such as medical measures which are being used to treat it. Sch 1 para 5(1) and (2). A claimant does not have to show why he has an impairment - but merely the fact that he does have one; The question is “Is there something wrong with Applicant?” The Applicant does not have to show underlying cause of impairment is physical (rather than mental). Normal day to day activities are activities such as walking, driving, typing and forming social relationships. The effect is long term if it has lasted or is likely to last 12 months or for the rest of the person’s life (Sch 1 para 2)

Findings of fact and conclusions

8. The Claimant began employment with the Respondent on 06 March 2023. The Claimant was initially employed as a Flight Dispatcher. The Respondent provides airport services including ground handling, fuelling, cargo and transportation services at airports. The Claimant was based at Heathrow airport.
9. The Claimant dislocated his left knee on 2/6/22 in Hong Kong. The medical documentation available from Hong Kong is limited to a 2-page “ambulance journey record” dated 2/6/22 (which refers to knee dislocation but not to any further injury), and two pages of physiotherapy notes on 17/8/22 which state “*left knee kinesphobia+improving.minimal swelling over the left knee*” .

10. The Claimant on 26/10/22 registered with a UK GP who recorded *'You dislocated you knee on the 2nd of June following a slip when out shopping. You went to hospital. and they completed an x ray and a CT scan. You do not have any reports from this visit but you suggested there may be an avulsion of the Lateral collateral ligament and a small osteochondral defect behind the patella'*. (This latter suggestion is not supported by any of the Hong Kong documentation. Nor is it supported by any of the subsequent UK physiotherapy documentation).
11. The Claimant was referred for assessment by the UK GP's in-house musculoskeletal specialist in November 2022. The Claimant has failed to disclose any notes or record of that assessment.
12. He was however seen by a physiotherapist on 29/12/22 who recorded that the Claimant's *"knee is stable and moves through a full range of movement"*.
13. As he was complaining about *"lack of confidence in using the knee*, he was referred for 14 sessions of physiotherapy.
14. We have the notes of the 14 physio sessions which took place from 5/1/23 to 11/5/23. These notes, taken as a whole, suggest that when they took place the Claimant did not have much wrong with his knee but was given exercises and put through routines such as deadlifts and stepping up and down, to build his confidence.
15. On 23/2/23 the notes record ; *"-Patient reports there has been good improvement in their knee pain and symptoms. Patient able to walk with walking (single)-Patient is feeling more confident in walking and mobilising up and down the stairs, however still struggles a little with going down the stairs."*
16. By 16/3/23 (shortly after starting employment with the Respondent) the Claimant had discarded his mobility aids (a crutch and then a walking pole).
17. In the notes of 11/5/23 there is a reference to the Claimant reporting *"some nervousness when running and traversing the stairs on a double decker bus"*.
18. The notes on 11/5/23 also recording the Claimant having completed the following exercises *"safely and competently"*; *"PowerbagDeadlift 2x15@25kg...-Step Down from Box - 2x15 (supported by wail)...-Walking up/down (focus on the down) stairs - x6 - today's focus was maintaining a hip wide stance when walking up/down stairs, but also controlling the R leg and not being heavy footed when coming down the stairs...-Leg Press -1x10 @60kg, 1x10 @70kg, 1x10 @80kg, 1x5 @90kg, 1x10 @100kgs"*.
19. Despite this, when asked today what weight he could lift in the period when he was employed by the Respondent (ie including May 2023) he suggested he would be able to lift *"only 3kgs for no longer than one second"*.

20. The Claimant was then referred to Healthwise “for further exercises and support in recovery”. He had 7 further physio sessions between 16/8/23 and 6/3/2024. The Claimant has failed, without any explanation, to disclose any records of his treatment during that period - about ten months beginning on 12/5/23 and ending on 5/3/24, and including most of the period during which he complains about disability discrimination.
21. The Claimant presented his ET claim on 23/9/23 and on 3/3/24 EJ George issue directions and guidance to the Claimant as to the type of material he would need to adduce to support his claim to have been disabled.
22. The Claimant has disclosed the notes from one physiotherapy session on 6/3/24 which records the Claimant telling the physiotherapist that he “struggles to carry heavy shopping bags and to walk up the stairs on a bus”.
23. On 29/3/24 the Claimant produced, as he been directed to do, further particulars/an impact statement which contains allegations of mobility problems, for example “*I was not able to carry daily necessities from supermarkets by myself such as groceries, toilet tissues, drinks and cleaning detergents..... When it was raining and I need to cross a pedestrians crossing, I was not usually able to manage to cross within given time ...I struggled to get in and get out of trains with a big gap between trains and platforms. Moreover, I was not able to walk stairs without holding the handrails in the underground. I got knee pain when I was standing for 20 minutes and I had to find a seat to sit down to relieve my pain. I was unable to go upstairs and downstairs on double- decker buses. I was not able to run and walk the dog.*”
24. The Claimant in his account given to the physiotherapist and in his impact statement in March 24 alleges immobility more serious than that which is recorded in his notes from 2022 and in the period up to May 23, after which, as already referred to, there is an unexplained gap in the record.
25. The Claimant was unable to give any satisfactory account for the fact that he had disclosed some but not all his medical and physiotherapy records.
26. Had the Claimant genuinely been experiencing in 2023 the more significant mobility problems which he has described in 2024, it is obvious that he would have mentioned them to the physiotherapists in 2023, but evidently he did not.
27. When the Claimant was asked about the discrepancies between his earlier notes and his current account, he provided implausible explanations such as that the notes were deficient, the earlier physio sessions were too short, the physiotherapist was incompetent and had been dismissed, and that Ms Barry’s (the Respondent’s Counsel’s) imagination was too fertile.

28. I find that the Claimant has tailored and exaggerated his account in response to EJ Georges direction and that he is not a reliable witness as to his impairment and its effects.
29. On a fair reading of the available medical and physiotherapy record, the Claimant suffered a left patella dislocation in June 2022 which did not require surgical intervention, which was treated conservatively and which had almost completely recovered within a couple of months. The Claimant however suffered nervousness about using the knee (first noted as “kinesphobia” in Hong Kong) which was the main driving force behind him seeking physiotherapy and worrying about his knee thereafter.
30. I considered whether this “nervousness” or functional overlay should itself be considered as a (mental) impairment having a substantial adverse effect, but this was not the Claimant’s case as identified in previous case management and in his impact statement, and when it was put to him several times during the hearing that his problems, such as they had been, had been mainly psychological rather than physical, he vehemently rejected such a suggestion.
31. In any event and whether or not there has been a psychological component, the evidence shows that by February 23 he was just “...*struggling a little when going down stairs*”, that by March 23 he had discarded his mobility aids and by May 23 he was able to run and negotiate the stairs on double decker buses. Any residual adverse effect was trivial.
32. I therefore find that while the Claimant has shown that during the relevant time he was suffering from an impairment (the aftermath of a minor knee injury) he has not shown on a balance of probabilities that this had had a substantial adverse effect on his ability to do day to day activities for at least 12 months or was likely to do so.
33. According he has not discharged the onus of proof to show he was disabled under the Equality Act 2010 and his claims for disability discrimination and harassment must be struck out.

Employment Judge J S Burns
26/10/2024

Date sent to parties on
23/12/2024

For Employment Tribunals
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