



EMPLOYMENT TRIBUNALS

Claimant: Mr P Bessell

Respondent: The Chief Constable of Dorset Police

Heard at: Southampton **On:** 13 March 2017

Before: Employment Judge Jones QC

Representation:

Claimant: Mr D Stephenson, of Counsel

Respondent: Ms A Meredith of Counsel

JUDGMENT

1. The Claimant is not a disabled person for the purposes of the Equality Act 2010.
2. The claims of:
 - (a) Discrimination arising from disability;
 - (b) Indirect disability discrimination; and
 - (c) Failure to make reasonable adjustments;

are dismissed.

REASONS

1. There was a single issue for determination: was the Claimant a disabled person for the purposes of the Equality Act 2010?
2. The relevant test is that set out at Equality Act 2010, s. 6.
3. The parties were agreed that the Claimant has a physical impairment for the purposes of s. 6(1)(a): Deuteranopia. That impairment consists of a want of middle wavelength cone pigment in his eyes. The consequence is that the Claimant has difficulty seeing green light. He is, colloquially, Red Green Colour Blind. His impairment makes it difficult for him to distinguish a number of colours and not just red and green. He has difficulty, for instance, distinguishing between grey and pink.
4. As to whether the impairment has a “substantial and long term adverse effect on [the Claimant’s] ability to carry out normal day-to-day activities” within the meaning of s. 6(1)(b), the focus of the disagreement was on the substance of the effect.
5. The Claimant ultimately relied on three activities. They were conceded to be normal day to day activities. They were:
 - (1) Cooking;
 - (2) Reading/Interpreting documents/text; and
 - (3) Watching sport.

The Claimant provided a number of examples of specific activities which were problematic. The parties agreed that I should not treat these as discrete activities for the purposes of the Act but instead ask whether, looking at those specific examples, they founded a conclusion that the more broadly defined activity was substantially adversely affected. To give an illustrative example, the Claimant gave evidence that he had difficulty reading a book to his 2 year old son where that book was designed to help children distinguish between and to identify colours. If one asked whether reading a book of that very specific sort was a normal day to day activity, the answer would likely be no given that the very low frequency of its likely occurrence as an event. It is, however, an example of a broader difficulty with reading. The issue of the frequency with which such problems might arise then goes to the question of how substantial an effect the impairment could be said to have.

6. I was referred to the Statutory Guidance. Ms Meredith submitted that I could draw conclusive assistance from the “illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would not be reasonable to regard as having a substantial adverse effect on normal day to day activities”. That list identifies the following factor:

"Simple inability to distinguish between red and green, which is not accompanied by any other effect such as blurring of vision"

Ms Meredith submitted that Mr Bessell's circumstances fell neatly into this passage of guidance. Beyond his deuteranopia, he had no other eyesight problems. The drafter of the guidance must be taken to have intended to include all degrees of red green colour blindness whether or not it created substantial difficulty in distinguishing between colours other than specifically and solely red and green. Mr Stephenson took a different approach. Someone who could not distinguish red from green was covered. Someone whose problem was so severe that their red green colour blindness had the effect of creating difficulty with a much wider range of distinctions was not.

7. I took the view that it was better first to ask whether or not I was satisfied as a matter of fact that the Claimant was experiencing a substantial adverse effect on his ability to carry out normal day to day activities. If he was, I do not read the guidance as requiring me to refuse to follow the path the facts identify. Red green colour blindness is not an impairment that has been deemed incapable of amounting to a disability. On the other hand, if no substantial adverse effect existed, the guidance would add nothing.
8. The second piece of guidance was less controversial: I should take into account coping strategies adopted by the Claimant. If the strategy adopted could be reasonably expected of him, I should look at the extent to which any adverse effect was removed (see Guidance at B7 and **Commissioner of the Metropolitan Police v Virdi** UKEAT/0338/06/RN).
9. I concluded that the Claimant's impairment did not create a substantial adverse effect on his ability to carry out any of the activities he relied upon. The Claimant was an impressive witness. He was frank even where it led him to accept points that weakened his case.
10. On cooking, with a single exception, each adverse effect was matched by a coping strategy that effectively negated its impact. The Claimant could not tell by colour whether meat or fish was fresh but he used smell, touch and other visual cues (such as whether the fish's eye was glossy). The Claimant could not tell whether chicken was under-cooked just by looking at it but could and did use a skewer to test to see whether the juices were clear. The Claimant could not tell how well steak or cake was cooked but relied on texture. In each case a reasonable coping strategy removed the adverse effect. The exception was telling whether potatoes were green. He would ask his wife but, if she were not around, he would have to wait or cook something else. The problem was real but I had no evidence to suggest that it arose sufficiently frequently that it could be said that the Claimant's impairment created a substantial disadvantage when considering "cooking" more generally as the relevant activity.

11. The same picture arose in relation to documents and text. A form that had grey and pink sections caused some initial difficulty but once he had completed it once or twice, he knew where the information was to be put and could ask a colleague to check if he was unsure. The colours used on subway maps were of no assistance to him but he could use destinations and other information about the lines. Looking at a cross-section of the public (as was urged upon me by Mr Stephenson and by the guidance given by EAT in **Paterson v Commissioner of Police of the Metropolis** [2007] IRLR 763), there was no reason to believe that Mr Bessell would take appreciably longer to get the hang of forms or maps than most people. There would be many without his impairment who would find forms and maps daunting in any event. None of the examples relied upon suggested, in my view, that there was any difficulty with reading or interpreting documents or texts more generally and he had efficient and reasonable coping strategies with which to deal with those documents that might use certain colours to convey or emphasise information.
12. Finally, much the same was true of watching sport. Watching football or rugby did not generally give rise to difficulty. He had difficulty identifying the brown and green balls in snooker unless they were on their spots but where they came into play, that would generally be made clear by commentary. Commentary and captioning would also assist with his difficulty sometimes distinguishing between the strips worn by Tour de France cyclists.
13. I do not, on balance, consider that the Claimant's impairment creates a substantial adverse effect on any of the day to day activities upon which he relied with the consequence that he is not a disabled person for the purposes of the Act.

DIRECTIONS

Having given my judgment; I was invited to give certain limited directions for the further pursuit of the remaining claim of indirect sex discrimination.

1. On or before 27 March 2017, the Respondent shall disclose to the Claimant:
 - 1.1 The Expert Report of Professor Stockman;
 - 1.2 The commissioning report and/or any letter of instruction to the professor; and
 - 1.3 Related national guidelines.
2. On or before 24 April 2017, the Claimant shall inform the Respondent and the tribunal in writing whether in the light of the disclosure provided for immediately above, he wishes:
 - 2.1 To continue with his indirect sex discrimination claim; and, if he does
 - 2.2 To call an expert witness of his own.
3. In the event that the Claimant decides to continue, the parties should:

- 3.1 Seek to agree directions through to trial; and
- 3.2 Write to the tribunal with a view to listing a one hour telephone CMD on a date convenient to both parties.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Jones QC

20 March 2017

Sent to the parties on:

31st March 2017

For the Tribunal: