



EMPLOYMENT TRIBUNALS

Claimant: Mr A Greenwood

Respondent: HMSHost UK Limited

Heard at: Manchester

On: 11 October 2019

Before: Employment Judge Phil Allen

REPRESENTATION:

Claimant: Mr A Boyd

Respondent: Ms A Niaz-Dickinson, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. At the material time the claimant had a disability as defined by section 6 of the Equality Act 2010 as a result of his Type II Diabetes.
2. At the material time the claimant did not have a disability as defined by section 6 of the Equality Act 2010 as a result of hypertension.

REASONS

1. The claimant was employed by the respondent as a Chef from 21 March 2011 until his employment ceased in July 2018. At a preliminary hearing heard by Employment Judge B Hodgson on 22 March 2019 the claims were confirmed as unfair dismissal, wrongful dismissal, direct discrimination and harassment. The claims in respect of direct discrimination and harassment relied upon disability. Whether the claimant had a disability was identified as a preliminary issue.

2. The questions recorded to be determined were as follows:

- (1) Was the claimant a disabled person as defined in section 6 of the Equality Act 2010, at the relevant time, and specifically:
 - (i) Did the claimant suffer from a physical and/or mental impairment?

- (ii) If so, did that impairment have a substantial and long-term effect on his ability to carry out normal day-to-day activities, at the relevant time?

3. At the time of the previous preliminary hearing the claimant sought to rely upon the following impairments: Type II Diabetes; hypertension; cellulitis; and stress/anxiety/depression.

4. During this hearing the claimant's representative confirmed that the claimant was no longer relying upon cellulitis and/or stress/anxiety/depression in contending that he had a disability. I have therefore only considered the other two impairments relied upon.

5. At the outset of the hearing it was clarified with the parties and agreed that the relevant time for determining whether the claimant had a disability was 11-16 July 2018.

6. It was also confirmed that the issues to be determined in this hearing were those relating to whether the claimant had a disability. This preliminary hearing was not determining the respondent's knowledge of the claimant's disability.

7. I heard evidence from the claimant. In advance of the hearing the claimant had prepared two witness statements, one signed by him on 24 April 2019 and one signed by him on 1 October 2019. A bundle had also been prepared which ran to 120 pages (including the claimant's statements) which included a report prepared by Dr Bodansky, a Consultant Physician, with an expertise in general internal medicine and diabetes.

The Relevant Law

8. Section 6 of the Equality Act 2010 provides that:

“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.”

9. Schedule 1 Part 1 of the Equality Act 2010 includes further provisions regarding determination of disability. For the purposes of this hearing the key provision is paragraph 2 which provides that:

“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.”

10. Schedule 1 Part 1 of the Equality Act 2010 also includes provisions which relate to the effect of medical treatment and to progressive conditions. However, in

both cases these provisions only apply where an impairment is otherwise one which does not have a substantial adverse effect on the person's ability to carry out normal day-to-day activities.

11. I have taken account of the guidance on matters to be taken into account in determining questions relating to the definition of disability, issued by the Secretary of State. The respondent has particularly highlighted two sections of that guidance.

12. Section B7 under the heading "Effects of Behaviour" of the guidance says:

*"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. For example, a person who needs to avoid certain substances because of allergies 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 on his or her ability to carry out normal day-to-day activities. (See also paragraph B12)"*

13. Section B12, under the heading "Effects of Treatment" of the guidance provides:

"The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question. (Sch1, Para 5(1)). The Act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (Sch1, Para 5(2)). In this context medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs.

14. Paragraph B14 of the guidance is also relevant (which is also under the heading "Effects of Treatment"), it provides:

"...Similarly, in the case of someone with diabetes which is being controlled by medication or diet should be decided by reference to what the effects of the condition would be if he or she were not taking that medication or following the required diet."

15. The appendix to the guidance provides an illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to

regard as having a substantial adverse effect on normal day-to-day activities. I do not need to reproduce all of the list but two relevant examples given are:

“A total inability to walk, or an inability to work only a short distance without difficulty; for example, because of physical restrictions, pain or fatigue.

Difficulty in going up or down steps, stairs or gradients; for example, because movements are painful, fatiguing or restricted in some way.”

16. The respondent’s representative relied on two authorities. The case of *Metroline Travel Limited v Stoute [2015] UKEAT/0302/14* was a case which involved a claimant who suffered from Type II Diabetes which he controlled largely by avoiding sugary drinks. The judgment focussed upon two issues: whether abstention from sugary drinks constituted a substantial adverse effect on day-to-day activities; and the impact which abstention from sugary drinks had when considering whether something was likely to happen, or considering whether the impact of medical treatment should be disregarded in assessing whether someone’s condition amounted to a disability. The respondent highlighted paragraphs 10 and 11 of that Judgment which I will not reproduce in this Judgment, save to highlight that they do include Judge Serota QC’s statement that:

“I agree with Mr Solomon’s submission that type 2 diabetes per se does not amount to a disability.”

17. The respondent also relied upon the case of *Taylor v Ladbrokes Betting and Gaming Limited [2017] IRLR 312*. That claim involved an employee whose diabetes was controlled by medication. The respondent relied upon paragraphs 9, 10 and 12 of that Judgment. I will not reproduce those paragraphs in this Judgment. However, I will highlight the words of Judge Hand QC at paragraph 16:

“Tribunals should start with the statutory language, consider the guidance and decide, having looked at both, what the statute means, concentrating primarily on the language of the statutory provision itself.”

18. That Judgment particularly focusses on paragraph 8 of Schedule 1 of the Equality Act 2010 and the impact of progressive conditions. It considers the concept of reasonable conduct introduced in paragraph B7 of the guidance quoted above, and the impact that has when looking at paragraph 8(2) of Schedule 1 and progressive conditions.

19. The respondent’s representative in her submissions contended that the impact of paragraphs B7 and B12 of the Guidance and the two authorities cited meant that I should consider whether the claimant could reasonably have been expected to modify his behaviour and use avoidance strategies such as diet and exercise previously, in order to reduce the effect of his diabetes upon him.

20. In the hearing and in answer to questioning, the respondent’s representative confirmed that she was contending that if someone had a condition which did at the relevant time have a substantial adverse effect upon their ability to undertake day-to-day activities, nonetheless if reasonable steps could previously have been undertaken to reduce the impact of the condition, the Tribunal’s assessment of what the impact of those reasonable steps would have been should effectively be

removed from the impact that the impairment had actually had. The Tribunal would need to determine what the impact on the claimant's condition would have been if he had taken reasonable steps such as those regarding lifestyle and diet in the past.

21. I do not agree with the respondent's representative that this is what I am required to do. A Tribunal certainly does need to consider what impact reasonable steps would have if it is looking forward at the potential impact of a condition and determining the likely length of time for which any substantial adverse effect will last. It also will need to do so when considering the likely effects of a condition if discounting the effect of medical treatment, or in considering the likely result in the future of a progressive condition. However there is a fundamental difference between: factoring in what can reasonably be expected of a claimant when envisaging what is likely to happen in the future; and determining that something in the past which otherwise satisfies the test of a disability is in fact not a disability because of something it is said the claimant should reasonably have done in the past. I do not consider that the latter is the correct approach, or is what is required by the statutory language when I apply the guidance from *Taylor* which I have cited above.

22. Each of the authorities relied upon involved a claimant whose condition was controlled (by medication or avoiding sugary drinks) and therefore the cases were not determining that someone who otherwise had a disability would not be held to be disabled by applying such a test. They were about undertaking a forward-looking or hypothetical exercise and factoring reasonableness into that consideration.

The Evidence

Hypertension

23. In the Claimant's original witness statement of 24 April 2019 he listed a number of day-to-day activities which he said were impacted only as a result of Type II Diabetes. In his statement of 1 October 2019 those same listed impacts (albeit slightly expanded) were attributed to both Type II Diabetes and hypertension, although the claimant's own evidence did not distinguish between the impacts upon him of the two conditions.

24. The important elements of Dr Bodansky's report in relation to hypertension provided the following:

- The claimant did have hypertension at the relevant time;
- In answering whether this had an adverse effect on the claimant's ability to carry out normal day-to-day activities he said the Claimant "*tended to feel dizzy intermittently, and this continues, particularly if it is warm. This could happen at work occasionally, necessitating leaving the kitchen environment*";
- The other example of normal day-to-day activities affected by hypertension given by Dr Bodansky was that the claimant "*found it difficult to play with his nieces*";

- The degree of such adverse effect identified, when addressing whether it was substantial, was to say that the claimant “*had to leave the kitchen a few times to cool down*”;
- This was a long-term condition.

25. While giving evidence and in answering questions, the claimant himself confirmed that apart from dizziness there were probably not any other day-to-day activities affected by his hypertension. He also confirmed that, in being honest, he did not think that this was a substantial effect. When asked about playing with his nieces, the claimant did not place much weight upon this.

26. There is no evidence about the impact any medication had upon the claimant’s hypertension, or what the position would have been if any medication had not been taken.

Type II Diabetes

27. The claimant’s evidence in both of his witness statements was that his Type II Diabetes affected his life in a number of ways which were listed. Other examples were provided in his witness statement, but to highlight some of those listed these included the following:

- He could only walk about 25 metres before needing a rest;
- He had difficulty going upstairs in his home, which had resulted in him spending nights sleeping on the couch;
- He had difficulty getting dressed;
- He had struggled to do household chores such as washing, cleaning tiled floors and vacuuming carpets.

28. In answering questions, the claimant was asked to explain when and for how long these effects had applied. In relation to these effects he was unable to describe precisely when they started but believed that they started before he had been diagnosed with diabetes and had continued to apply until early 2019. He was diagnosed with diabetes in 2014. This is a period of several years.

29. Positively for the claimant, since 16 January 2019 he has undertaken a weight loss programme, has operated on a diet of avoiding sugary and fatty foods, and has lost almost four stone.

30. In answering questions asked by the respondent’s representative, for almost all of the things described the claimant was now able to undertake the day-to-day activities which had been adversely affected by his condition. He was now able to climb stairs and walk for a reasonable distance. He was not yet able to run for a bus or tram (which was another example the claimant had given) but hoped to be able to do so in the future. He accepted that if he had taken the positive lifestyle steps which he has undertaken in 2019 at an earlier date, the impact of his condition on his day-to-day activities would have reduced earlier. The claimant did explain how difficult it

was to make such changes whilst he was working the shifts and times involved in his job with the respondent.

31. Dr Bodansky records the following:

- (1) The claimant's diabetes started in 2014;
- (2) The adverse effect on his ability to carry out normal day-to-day activities was that *“he felt tired during or at the end of a shift”*;
- (3) The normal day-to-day activities affected meant that the claimant was *“too tired to go out socially”*;
- (4) In answer to whether the effect was substantial Dr Bodansky says *“He says that it was, such as not being able to walk too far”*; and
- (5) The effect was long-term.
- (6) In a more detailed answer later in the report Dr Bodansky says:

“On the balance of probabilities, the claimant's diabetes would have affected his ability to carry out normal day-to-day activities due to fatigue because his diabetes was probably not optimally controlled. Without treatment his diabetes would have substantially affected his ability to carry out normal day-to-day activities in that he would feel tired, have poor energy, blurred vision...”

and he provides other examples of impacts that the condition would have had;

- (7) In relation to normal day-to-day activities affected he says that the claimant's *“Ability to go to work or socialise as his general energy was reduced. This would have been worse without medication”*;
- (8) he explains that the degree of any such adverse effect was *“Probably not substantial, whilst on treatment but without treatment it would have been substantial”*. The non-substantial conclusion is not however explained further and appears to contradict what he had already said;
- (9) he describes *“Type II Diabetes is a long-term condition and would probably last the rest of his life. Some cases can be reversed by appropriate weight loss and lifestyle modification.”*

32. The content of Dr Bodansky's report does not contradict any of the evidence the claimant gave about the impact that his Type II Diabetes had upon him personally at (or prior to) the relevant time. Perhaps unfortunately, Dr Bodansky had only consulted with the claimant by telephone and therefore his report was not based upon a physical examination or any observation of the claimant.

Applying the Law to the Facts

Hypertension

33. With regard to hypertension, there is little evidence that this impairment had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities. Whilst the claimant's second statement attributes many of the things listed (which are also attributed to his Type II Diabetes) to his hypertension, his first statement does not do so. The report of Dr Bodansky records the only effects as the claimant feeling intermittently dizzy and some impacts upon the claimant playing with his nieces, in relation to normal day-to-day activities. Having to leave a kitchen on occasion because it is too warm is not a substantial effect. The claimant himself in answering questions acknowledged that the impact of the hypertension was not substantial.

34. On that basis the claimant has not provided evidence that his impairment of hypertension had a substantial adverse effect on his ability to carry out day-to-day activities.

35. As there is no evidence available about what the potential impact may have been without medication, it is also not possible to determine that the effect of this impairment may have been substantial without medical treatment.

Type II Diabetes

36. With regard to the claimant's Type II diabetes it is accepted that the diagnosis alone does not mean per se that the claimant had a disability, however there is significant evidence that the claimant's condition had a substantial adverse effect upon his ability to carry out normal day-to-day activities. This covered a period of a number of years prior to July 2018. The impact only reduced from early 2019. The examples given by the claimant in his evidence clearly extended over a significant period prior to and including 11-16 July 2018.

37. Applying the wording of section 6 of the Equality Act 2010, the claimant's condition clearly had a substantial adverse effect upon his ability to carry out normal day-to-day activities for a period in excess of 12 months prior to July 2018. The examples of day to day activities adversely affected given by the claimant (such as being unable to climb the stairs without stopping for a while, and being unable to walk 25 metres without a rest) include some of those listed in the non-exhaustive list in the appendix to the guidance quoted above. These appeal to clearly satisfy that test. The evidence of Dr Bodansky also appears to support this conclusion and certainly does not in any way contradict the claimant's own clear evidence.

38. Accordingly, the claimant's condition at the relevant time was having a substantial adverse effect upon his ability to carry out day to day activities and had done for over a year prior to those dates. The fact that the claimant's health has subsequently improved does not alter that conclusion, for the reasons I have explained in the section on the law above. For the reasons outlined above, I am satisfied that the claimant's condition at the material time did have the substantial adverse effect on him.

39. I am satisfied that that was a matter of fact and does not require any consideration of what was likely in the future at the relevant time, or any consideration of what is likely in relation to progressive conditions. Those sections of schedule 1 of the Equality Act 2010 only need to be considered if the claimant's condition did not already have the effect required. It is unnecessary to go on and

consider the likelihood of such conditions recurring or other provisions relating to progressive conditions or treatment. As a result, the reasonableness wording contained in section B7 of the Guidance does not apply.

40. It was not necessary for me to consider whether the claimant at the date of this preliminary hearing satisfies the test for disability, and it is entirely possible that he does not. However, that does not mean that the claimant did not have a disability at the relevant time.

Summary

41. The claimant's Type II Diabetes is a physical or mental impairment which had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities as at 11-16 July 2018. The claimant's hypertension did not have such an effect as at that date.

Employment Judge Phil Allen

22 October 2019

JUDGMENT SENT TO THE PARTIES ON

31 October 2019

FOR THE TRIBUNAL OFFICE

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