



EMPLOYMENT TRIBUNALS

Claimant

Miss Ibolya Kun

v

Respondent

Cambridge University Hospital
NHS Foundation Trust

Heard at: Bury St Edmunds

On: 16 October 2019

Before: Employment Judge Laidler

Appearances

For the Claimant: Miss S Bewley, Counsel.

For the Respondent: Miss B Criddle, Counsel.

JUDGMENT ON PRELIMINARY HEARING

The claimant is a disabled person within the meaning of s.6 of the Equality Act 2010 by virtue of heat sensitivity.

REASONS

1. The claim form in this matter was issued on 23 July 2018 in which the claimant brought a complaint of disability discrimination. In her claim form she stated she suffered from:

“Systemic Lupus Erythematosus (Lupus) following an adverse reaction to a Hepatitis B vaccination in 1989. The condition is progressive. A side effect is that I am unable to effectively regulate my body temperature which can result in me feeling overheated and generally unwell when I am in a closed and heated environment. I can suffer with fever, nausea, headaches, dizziness and an increased heart rate”

2. The claimant also stated that she had a problem with her knee due to Lupus associated arthritis. The respondent defended the claims and denied that the claimant satisfied the definition of disability within the meaning of the Equality Act 2010.

3. The matter was at that time proceeding in the East London Employment Tribunal and there was a preliminary hearing before the Regional Employment Judge Taylor on 28 September 2018 which clarified the issues. It was agreed that the matter be transferred to the South East Region which was subsequently done. At a hearing before Employment Judge Smail on 28 March 2019 a preliminary hearing was listed for 2 August 2019 at the Bury St Edmunds Employment Tribunal to determine the issue of disability. That hearing was postponed at the request of the claimant and re-listed for today's date.
4. At the preliminary hearing before Employment Judge Taylor on 28 September 2018 the disabilities relied upon were identified as follows: -
 - 4.1. In relation to the medical conditions raised by the claimant following an adverse reaction to a Hepatitis B vaccination including:
 - (1) Oversensitivity to heat and the inability to regulate her own body temperature; and
 - (2) Systemic Lupus Erythematosus "Lupus" related arthritis;

Is the claimant disabled under the Equality Act 2010? At the conclusion of this hearing the allegation of the Lupus related arthritis and the claimant's knee condition as specific disabilities was withdrawn
 - 4.2 Does the impairment have a substantial and long term adverse effect on her ability to carry out normal day to day activities?
5. For this hearing the tribunal had an impact statement that the claimant had filed in compliance with an earlier order and a statement for this hearing. She also produced a witness statement of Elaine Pitt dated 26 September 2018 who appears to have previously worked with the claimant. The circumstances in which that witness statement was made were not explained to this tribunal. It had not been considered relevant by the claimant's solicitor but Miss Bewley who was only instructed at short notice, the day before this hearing, felt that it could be relevant and should be disclosed. It was disclosed to the respondent the day before this hearing and presented to the tribunal at it. Limited weight has been given to it as the circumstances in which it came to light have not been relayed and Miss Pitt was not available to be cross examined.

Findings of fact

6. From the evidence heard the tribunal finds the following facts.
7. The claimant gave evidence and it was not challenged that she was vaccinated against Hepatitis B as a compulsory requirement to carry out her job as a Biomedical Scientist at Hammersmith Hospital in London in 1989. She endured an immediate adverse side effect/allergic reaction to

the vaccine. The symptoms were difficulty breathing, extreme fatigue and tiredness, and huge hives developing all over her body. The claimant attended her general practitioner then at Mattock Lane Health Centre to assess the situation. Whilst the claimant says that the doctors there agreed that her symptoms were Systemic Lupus Erythematosus (SLE) and made the diagnosis of such, there is no documentary evidence in the claimant's medical records that that was indeed the case. In the bundle for this hearing the tribunal saw evidence of the steps that the claimant took to try and obtain release of her medical records with the general practitioner in the United Kingdom, the claimant being in Hungary.

8. In an email of 29 January 2019 from Mattock Lane Health Centre it stated that the claimant had never been registered with Mr Lin's surgery and asked that the email be sent to Gordon House Surgery directly to obtain the information. A Simon McPartlin, Contract Manager - Medical Records Registrations and Supplies, NHS England wrote to the claimant on 29 January 2019 confirming he had had no luck with either Mattock Lane Health Centre or Gordon House Surgery. It appears and the claimant believes that her medical records had been destroyed some years ago.
9. The claimant is Hungarian and had sought treatment in Hungary. Copies of medical records from Hungary which had been translated were seen in the bundle from pages 61-84.
10. A doctor's certificate was seen dated 8 June 2017 which confirmed: -

"I as the general practitioner for Ibolya Kun certify that following an adverse reaction to the Hepatitis B vaccination she developed a serious over-sensitivity to heat and sunshine resulting in panic attacks when forced to stay in a closed and heated environment therefore it is highly advisable to provide her a sitting arrangement with good ventilation where she is able to control the room temperature for herself."
11. The claimant underwent various blood tests in August 2017, the results of which were seen at page 63. The test results seen at page 68 noted "based on the performed tests the appearance of Lupus anti-coagulant is probable, a repeated test is recommended in 3 months". That did not provide a definite diagnosis of Lupus but that it was probable.
12. There were then seen extracts from the claimant's medical records for the period 25 July 2005 to 1 October 2018 at her Hungarian general practitioner. There were only entries for ten dates throughout the whole of that period. The claimant accepted they were the only visits she made to her general practitioner as he had explained there was little that could be done for the effects of Lupus other than medication which the claimant found had significant side effects. The claimant wished to not take any such medication but to explore alternative remedies which she has done. There is one entry on 10 April 2006 which stated with a numbered code "Observation for suspected disease or condition". Again, that does not state Lupus was diagnosed but acknowledges some concerns.

13. The claimant referred herself to Dr Zita Sprober, in Hungary, described as a specialist in internal medicine endocrinologist and diabetologist.
14. This doctor recorded gluten sensitivity, milk allergy, suspected SLE and osteoarthritis in the left knee. The doctor also noted that the claimant had told her she had not been able to tolerate warm temperatures since childhood but that had been exacerbated since her Hepatitis B vaccination in 1989. The laboratory results which were examined suggested menopause and no other pathological results were present other than elevated cortisol levels. The report concluded: -

“No endocrinological causes of her intolerance to heat which has a negative impact of her quality of life have been found. The underlying cause is likely to be familial but if exacerbated with the Hepatitis B vaccination. It is recommended that a cool environment be provided.”

That report was dated 19 October 2018.

15. In the claimant's impact statement, she set out the symptoms of the heat intolerance from which she suffers. These were at paragraphs 16 and 17 of her impact statements and she was not challenged on them in cross examination. The tribunal accepts that she finds she is unable to concentrate and make decisions, and feels dizzy so her co-ordination is also affected. It makes her weak, her vision becomes blurry which is a big problem for her as she is already severely short-sighted and wearing glasses of minus 10.5 on both of her eyes. She has burning sensations in her eyes due to the heat intolerance. She cannot go for holidays with her family as she would just stay in a hotel until the sun has gone down and is unable to take long haul flights because of the closed in and too warm environment. She manages to fly to Hungary which is about 2 hours away, but this is a struggle and she often sleeps most of the time as her body's coping mechanism. It is hard to socialise with friends although some do adjust their heating to accommodate her needs or go out with them when it is sunny and hot resulting in an isolated life.
16. In addition to those everyday activities, the claimant and her witness Miss Pitt also explained how her work of cytology requires sitting for prolonged periods of time, at least 5 hours per day looking into a microscope at patient samples, at hundreds of thousands of magnified human cells for minor changes. It is repetitive work requiring the highest level of concentration and holds a huge responsibility for the individual member of staff.
17. Counsel for the respondent took the claimant to an email that she sent to the agency under which she was employed on 27 April 2018 when she stated that despite her condition she was the one who screened the most amount of slides every day and suggested that no one came close to her numbers, so the respondent could not say that she was not working hard enough or that her condition affected her performance.

18. In an email however of 25 April the claimant had had to advise the respondent she was taking a day off as she was not feeling well as it was extremely hot for her as the systems temperature seemed to be set at around 24 degrees. She asked whether it would be possible to adjust the temperature to 21 degrees making it more bearable for her. Although the claimant has told this tribunal that 18 degrees would be the most beneficial for her.

Relevant Law

19. The tribunal must determine whether or not the claimant had a disability falling within s.6 of the Equality Act 2010, which provides: -

“(1) 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.”

20. Although in the earlier case management there was reference to the claimant's knee, following submissions and on taking further instructions the suggestion that the arthritic knee is a disability has been withdrawn by the claimant at this hearing.
21. The tribunal must consider the Guidance on the Definition of Disability.
22. Section A.3 deals with the meaning of impairment. It provides that the definition requires the effects which the person may experience must arise from a physical or mental impairment. It is not necessary for the cause of the impairment to be established nor does the impairment have to be the result of an illness. The guidance goes so far as to state at section A.7 that not only is it not necessary to consider how an impairment is caused, but the cause may even be in consequence of a condition which itself is excluded. For example, liver disease as a result of alcohol dependency would count as an impairment although an addiction to alcohol itself is expressly excluded.
23. Section A.5 provides that a disability can arise from a wide range of impairments which can be sensory impairments, impairments with fluctuating or recurring effects and auto-immune conditions including Lupus.
24. The Act and the Guidance make it clear that a substantial effect is one that is more than minor or trivial. The time taken by a person with an impairment to carry out normal day to day activities should be considered when assessing whether the effect is substantial. Also, the way in which an activity is carried out is relevant. Account should be taken also of how far a person can reasonably be expected to modify his or her behaviour, for example by using coping or avoidance strategies to prevent or reduce the effects of an impairment on normal day to day activities. 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.

25. Environmental conditions may exacerbate or lessen the effects of an impairment (section B.11). The section in the Guidance refers to factors such as temperature, humidity, lighting and the time of day. When assessing whether adverse effects of an impairment are substantial the extent to which such environmental factors are likely to have an impact on the effect should therefore also be considered.
26. The Guidance makes it clear at section D.8 that where activities are themselves highly specialised or involve highly specialised levels of attainment they would not be regarded as normal day to day activities for most people. They give the example of a watch repairer carrying out delicate work with highly specialist tools. Although the delicate work is a normal working activity for a person in his profession it would not be regarded as a normal day to day activity for most people. However, the Guidance goes on at section D.10 to make it clear that many types of specialised work, related or other activities may still involve normal day to day activities which can be adversely affected by an impairment.
27. Both representatives handed up skeleton arguments which are not proposed to be recited again in these reasons. Miss Bewley handed up two previous ET decisions. She was reminded that such are not binding and in fact these were completely irrelevant in this case as they were cases in which disability had been conceded by the respondents. They might have referred to Lupus but they could not have any bearing on the decision of this tribunal.

Conclusions

28. The definition of disability is a legal definition within the meaning of s.6 of the Equality Act 2010. The tribunal must determine whether the claimant has an impairment. She clearly does have. Indeed, it was never suggested to her in cross examination that she did not have one and that in fact this was some made up condition on her behalf. What was put on several occasions was that there was not a medical diagnosis of heat sensitivity and/or that it related to Lupus. This tribunal has concluded applying the relevant provisions of the Guidance that it is not necessary for it to come to any conclusion as to why the claimant has heat sensitivity, but it cannot dispute that she does have it.
29. That being a physical impairment the tribunal has to determine whether it has a substantial and long term adverse effect on her ability to carry out normal day to day activities. Again, the tribunal finds that it does. Although it was suggested on behalf of the respondent that it may have affected the claimant's ability to do her very specialised work in cytology which required particular levels of concentration, the claimant was not challenged on those paragraphs of her witness statement which have

been accepted in the findings of fact above in which she set out in detail the effect on her normal day to day activities. The ability to concentrate and make decisions is not one that only arises in the claimant's role as a cytologist. It affects everyday life. So does her inability to stay in an overly heated environment. The symptoms which she has occur on her evidence in her normal everyday life and not just in the workplace.

30. The claimant adopted coping mechanisms i.e. removing herself from a heated environment, wearing lighter clothing, sitting near an open window does not mean that those effects are not still present and where she cannot make those coping mechanisms work for her the effects still have a substantial adverse effect on her normal day to day activities.
31. It is quite clear from the claimant's evidence and even the brief medical records that this tribunal has seen that this condition has been long term. One of the medical documents refers to her having had heat sensitivity since childhood. The claimant's own evidence is that this was exacerbated when she had the Hepatitis B vaccination in or about 1989.
32. The tribunal has therefore concluded the claimant is a disabled person within the meaning of s.6 of the Equality Act 2010 by virtue of heat sensitivity.

Full merits hearing

33. The full merits hearing is already listed for 17-19 February 2020 and it was confirmed at this hearing that the respondent withdraws its application to postpone, its witnesses now being available on those dates. That hearing remains as listed. The only additional case management order is as set out below.

Case Management Order

34. The parties have leave to serve supplemental witness statements if so advised within 28 days of the date on which this judgment and reasons are sent to the parties.

Employment Judge Laidler

Date:28/10/19.

Sent to the parties on:18/11/19

For the Tribunal Office