



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs N K Dhillon

v Leeds Teaching Hospital Trust NHS

Heard at: Leeds

On: 10 December 2019

Before: Employment Judge Rogerson

Representation:

Claimant: In person

Respondent: Mr A Sugarman, of Counsel

JUDGMENT

1. The claimant was not a 'disabled person' at the material time, by reason of the impairments of 'root canal treatment', 'bartholin's cyst' or 'pre-cancerous cervical cancer'.
2. The claimant no longer relies upon the impairment of 'foot surgery' and that part of her claim is dismissed upon withdrawal.

REASONS

1. This preliminary hearing is to decide whether the claimant is a disabled person by relation of the three impairments she now relies upon of
 - i. Root canal treatment
 - ii. Bartholin's Cyst
 - iii. Pre-cancerous cervical cancer
2. The claimant identified for each impairment, the evidence she relies upon from her bundle of documents, the additional documents produced for this hearing and her impact statement (pages 50 – 53 in the claimant's bundle and pages 117 – 118 in the respondent's bundle). For each impairment it is for the claimant to prove that the impairment satisfies all the requirements of section 6 of the Equality Act 2010 which 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".

3. The burden of proof is on the claimant to prove disability. She gave evidence and from the evidence I saw and heard I found as follows:

Findings of Fact

Root Canal Treatment.

4. The claimant has provided from her dentist as the root canal treatment is a dental procedure. Treatment began in December 2015 and was completed by 30 March 2016. In the claimant's own impact statement at page 118 she describes it as a 'short-term condition' identifying the dates of December 2015 to March 2016.
5. Schedule 1 paragraph 2 of the Equality Act 2010 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.
6. The claimant has on her own evidence accepted that the root canal treatment lasted less than 4 months. It was not long term and fails to satisfy the requirements of section 6 of the Equality Act 2010. The claimant was not a disabled person by reason of the impairment of 'root canal treatment'.

Bartholin's Cyst

7. The evidence the claimant relies upon is summarised in her GP's report dated 2 July 2018 (page 59 in her bundle). The report states:

"Miss Dhillon was diagnosed with a Bartholin's cyst in September 2017 and was referred to the Gynaecology team. Unfortunately, the cyst recurred and Miss Dhillon was prescribed Flucloxacillin in December 2017, prior to an emergency admission to hospital. The cyst ruptured following admission and surgical intervention was not required. The cyst recurred in February 2018 and a further course of antibiotics was issued prior to this also rupturing. Miss Dhillon was issued an emergency supply of Flucloxacillin in June 2018, in case the cyst recurred while she was away on holiday"
8. In cross examination Mr Sugarman took the claimant through her medical records. The Gynaecology Clinic assessed the cyst on 16 October 2017 and identified it as a 1cm small Bartholin's Cyst. The treatment/advice given by the Gynaecology Clinic is *"if it gets persistently bigger or becomes infected then referral to operate"*. The evidence does not indicate there were any effects or any other treatment required after that assessment.
9. Subsequently no effects were reported and no treatment was given for the cyst by her GP or by the Clinic. It was only when the cyst become infected in December 2017, that the claimant was admitted to hospital for removal. The cyst ruptured and a course of antibiotics was prescribed to deal with the infection. No further effects or symptoms are identified in the records.
10. On 16 February 2018, the cyst ruptured, the claimant attended her GP. The GP examined the claimant and recorded a marble sized cyst, treated by antibiotics for the infection. Although the claimant refers to 'pain' on that occasion but treatment other than the antibiotics was advised. In June 2018, the claimant's GP had examined her and had noted "no distinct cyst present". As a precaution the GP provided a course of antibiotics for the claimant in case it became infected while

the claimant was on holiday. On 24 July 2018, the claimant attended her GP, she reported that there had been a rupture of the cyst during the flight. No adverse effects are recorded in the GP's notes at that time.

11. The claimant relies upon the cyst as a physical impairment that has a substantial long-term effect on her ability to carry out normal day to day activities. She refers in her impact statement (page 118) to the cyst causing "disfigurement in the genital area where there is scarring from previous surgery and during periods of flare up pain and discomfort in walking".
12. The only symptom/effect recorded in the medical notes is one reference to 'pain' after the rupture on 28 February 2018. The GP's contemporaneous notes at the time do not record that the claimant was reporting any significant effects on normal day to day activities as a result of the cyst.
13. Mr Sugarman points to the relevant period that the claimant relies upon to prove disability. From her account the cyst becomes infected in December 2017 and was last infected in July 2018. Any effects of the impairment were for less than one year and not long term. That was the only period when the cyst is said to have the adverse effect and it is only on occasions when the cyst ruptures that any treatment is required. The treatment is a course of antibiotics to treating the effects of infection. No other effects are recorded or treated either at the time of rupture or in the intervening period.
14. Against that evidence the claimant says that the cyst is likely to recur based on the three ruptures that she has experienced in December 2017, February 2018 and July 2018. During periods of infection the claimant says that the cyst does cause pain and discomfort when she is walking. She says taking antibiotics repeatedly has an adverse effect. She does not provide any other evidence of how she says the effects she identifies are substantial adverse effects on normal day to day activities
15. Section B of the 'Guidance on the Definition of Disability 2011' provides some guidance as to the meaning of substantial adverse effect and the factors that the Tribunal should consider, in deciding whether there is a substantial adverse effect on normal day to day activities. This includes looking at the activities identified, the time it takes to carry out the activity, the way in which the activity is carried out, the effects of any behaviour, for example coping or avoidance strategies to deal with the effects described, whether there are cumulative effects and the effects of treatment.
16. Based on the evidence provided the claimant has failed to satisfy me that the effects of the cyst are substantial adverse effects on her ability to carry out normal day to day activities in the context of walking which is the activity identified. She refers to the disfigurement in the genital area and I considered the guidance given at B24 which provides that in assessing the severity of a disfigurement the tribunal must consider factors such as the nature size and prominence of the disfigurement and location to consider substantial adverse effect. The example given is that a disfigurement on the back being is less severe as opposed to the face because of visibility. I accept it was a concern for the claimant, who already had scarring in the genital area. However, the location does not in my view make it a severe disfigurement for it to be treated as having a substantial adverse effect on her ability to carry out normal day to day activities.

17. On the evidence presented to me I was not satisfied the claimant has proved the impairment of a Bartholin Cyst meets the requirements of section 6 of the Equality Act 2010.

Pre-Cancerous Cervical Cancer

18. There was no diagnosis of cancer which is what is required if the claimant is to be able to rely on Schedule 1 regulation 6(1) of the Equality Act 2010 to treat it as a disability.
19. The claimant requested a report from her GP asking for the GP's assessment on the 4 conditions she relied upon. Her request is for an opinion "*beginning with the routine smear test (please give exact date of this) that was detected as abnormal which led to precancerous cervical cancer surgery and consequent follow up appointments and medication related to post-surgery infection.*
20. The GP's report of 2 July 2018 answers this confirming "*Miss Dhillon underwent LLETZ procedure in December 2014, following a smear test which demonstrated severe dyskariosis. Following this, swabs were completed which demonstrated an infection for which Co-Amoxiclav was prescribed*".
21. There was no evidence of any diagnosis of precancerous cervical cancer. The only evidence the claimant provided shows that following a smear test and a colposcopy procedure some abnormal cells were identified. The results of CIN 1 were given.
22. The respondent has produced some 'NHS Guidance' to assist me to understand the terminology used in the medical records produced. Guidance states that "abnormal cells may be detected while a colposcopy is carried out. About 6 in every 10 women have abnormal cells in their cervix known as 'cervical intra epithelial neoplasia' (CIN). A CIN 1 means "*it's unlikely the cells will become cancerous and they may go away on their own: no treatment is needed a routine test in 12 months to check they have gone*".
23. It is for the claimant to provide evidence confirming a diagnosis of cancer which she has failed to do.
24. She has also failed to identify a diagnosis of 'pre-cancerous cervical cancer'. Mr Sugarman has helpfully referred me to the case of **Lofty-v-Hamis t/a First Cafe** where on the facts in that case, a precancerous diagnosis has been held by the Employment Appeal Tribunal to fall within regulation 6.
25. In that case based on the medical evidence presented by Mrs Lofty, the Employment Tribunal clearly did identify that Mrs Lofty had a diagnosis of an early stage of skin cancer diagnosed which was why the term pre-cancer was used. The EAT found the evidence before the ET suggested it was indeed to be understood as cancer. There was no such diagnosis or evidence in this case. Secondly, at paragraph 47, the EAT judgment is clear "*Schedule 1 para 6 does require the complainant to have one of the specified conditions it is not sufficient that they might develop a relevant condition in the future*". Mr Sugarman submits that the claimant had a routine cervical smear test which revealed some abnormal cells. She then had a biopsy and subsequent tests which confirmed that there was no cancer or pre-cancer diagnosis. She was then left to be monitored under the normal cycle of annual or three yearly assessments. Therefore, the claimant cannot rely upon any diagnosis of cancer to prove disability
26. I agreed and accepted that submission. The claimant has either misunderstood or misinterpreted the evidence and has tried to rely on a diagnosis of cancer that was

never given. She cannot rely on Schedule 1 regulation 6(1) for the impairment she labels as ‘precancer cervical cancer’.

27. Therefore, all three impairments that the claimant relies upon fail, because they do not satisfy me that the requirements of section 6 of the Equality Act 2010, therefore the disability discrimination complaints fail and are dismissed.

Employment Judge Rogerson

Date: 18 December 2019

Note - Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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