THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs I Anderson**

Respondent: **Department for Work & Pensions**

Heard at: **North Shields Hearing Centre** **On:** **9 December 2019**

Before: **Employment Judge Hoey (sitting alone)**

Appearances

For the Claimant: **Mr J Cole (Lay Representative)**
For the Respondent: **Mr A Serr (Counsel)**

JUDGMENT having been sent to the parties on 17 December 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

1. This claim arose following a claim form that was presented on 11th June 2019 raising a claim for disability discrimination. The respondent disputed the claimant's status as a disabled person and argued it did not know and could not reasonably have known about the claimant's alleged disability and/or the alleged substantial disadvantage the claimant alleged she suffered.

2. I began the hearing by underlining to the parties the importance of the overriding objective and the for the need to ensure that the parties worked together to deal with matters justly, fairly, expeditiously and proportionately. I also explained that it was important that the parties be placed on an equal footing so far as possible.

3. The claimant was represented by a lay representative and the respondent by counsel. The Tribunal heard evidence from the claimant and her trade union representative and the claimant's line manager (Mr Eschle). Each of those witnesses produced a witness statement to which the tribunal's attention was

directed and the relevant witnesses were cross examined. The parties had also agreed a joint bundle of 234 pages.

4. Following the hearing and submissions an oral judgment was issued which summarised the key facts and reasons for the decision to dismiss the claim. Following a request from the claimant's agent, I now provide detailed reasons setting out the issues, facts, submissions and reasons for the decision that was issued to the parties.

Issues

5. At a case management preliminary hearing on 12th August 2019 this preliminary hearing was fixed to determine two issues:

   (i) Disability status: Was the claimant disabled under section 6 of the Equality Act 2010 at the relevant time, namely between 20th February 2019 and 22nd March 2019 (by reason of a physical impairment – the claimant's allergies from which she alleged she suffered, which was the only impairment relied upon)?

   (ii) Knowledge: Did the respondent know or could the respondent reasonably have been aware of the claimant's disability? If so, when (if at all) did the respondent know or when could the respondent reasonably have known that the claimant was placed at a substantial disadvantage by being required to remain in the building during refurbishment works.

Facts

6. I make the following findings of fact based on the balance of probabilities, namely whether or not the matter in question is more likely to have happened than not. Reference to page numbers are to the joint bundle. I only make findings in relation to matters that are necessary to determine the issues and from the evidence presented to the Tribunal.

7. The respondent is a large government department which the claimant joined in January 2003 as an administrative officer and was soon promoted to executive officer.

8. She was asked to provide medical information upon commencement as employment which she did. There was no reference to any allergies. None of the health declarations signed by the claimant (in her contract and in her pension documentation) made any reference to any allergy. The 2 pre-employment outcome summary reports which are signed by an Occupational Health Doctor confirm the claimant suffered no underlying health conditions upon the commencement of her employment.

9. In 1995 the claimant suffered some form of extreme reaction which she believed was an allergic reaction perhaps to having eaten a prawn sandwich.

10. Medical tests confirmed that there was no allergy at this time. The medical position suggested it may have been due to a panic attack as the symptoms related to hyperventilation. As a precautionary measure (and in response to the claimant's high anxiety) the claimant was issued with an Epi-pen albeit she did not require to use it.

11. As a precautionary measure, the claimant chose to be careful as to what she would eat (such as by avoiding prawns) and always ensured good standards of cleanliness. This did not impact upon her ability to carry out day to day activities to any appreciable extent. I accepted the claimant's clear oral evidence that this was the only impact she encountered as a result of the alleged allergy.

12. No further issues arose in connection with any allergy until 2019.

13. The claimant knew in around October 2018 that there were to be changes in her building where she worked. There was to be substantial building works.

14. The claimant did not raise any concerns until the commencement of the works in her building which commenced around 5th February 2019. She believed she was suffering from a reaction to the building works. She stated that other staff had been affected by the building works (in the same way she had) too. The suggestion was that the works had somehow affected staff generally who experienced the same issues the claimant had suffered. The claimant did not tell the respondent about the previous health issue she had encountered in 1995 nor connect the two.

15. Around February 2019 the claimant contacted her GP as she believed she might have suffered some form of allergic reaction, possibly to paint or adhesive or some other issue in connection with the building works. The reaction she faced was wheezing, having a red face and her nose was dripping. She told the respondent on 5 February 2019 that she had "allergies" but provided no further detail.

16. The paints and glue used were all approved materials.

17. On 7 February 2019 the claimant submitted an accident report stating that paint fumes and the new carpet had caused her breathing issues, tight chest and cough. Steps were taken to minimise fumes within the building.

18. On 20 February 2019 the claimant used a stairwell that she had previously been advised to avoid (as it had been recently painted). The claimant suffered chest pains and had difficulty breathing. She visited her GP. The claimant told her GP she believed she had an allergy to paint and a fit note was lodged stating the claimant may have suffered from an allergic reaction. No tests had been carried out.

19. In the course of February 2019 and March 2019 the claimant experienced some hoarseness, burning cheeks and some wheezing but this was not from any allergy the claimant had. This seemed to relate to the building works, given other staff had encountered the same issues. The claimant was absent from work at

various periods during this time by reason of work related stress and anxiety, which could have had an impact upon the claimant's health issues.

20. The claimant's medical records disclose that the claimant had a number of health issues at this time, including viral infection and general anxiety disorder. The medical notes have no entries in respect of allergies or potential allergies from 1997 until February 2019.

21. In September 2019 a consultant immunologist issued an opinion that said the claimant had not suffered from an allergic reaction but had an "airway irritation". The claimant did not suffer from an allergic reaction to the building works.

22. None of the claimant's previous managers knew of the alleged allergy issue the claimant believed she suffered nor that she carried an EpiPen and the first occasion the claimant raised this was with her manager in February 2019 when she told her manager that she suffered from an allergic reaction, which was accepted in good faith.

23. The claimant had previously suffered from panic disorder and generalised anxiety disorder together with stress and anxiety.

Law

The law - disability

24. Section 6 of the Equality Act 2010 states that:

    (i) "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…

    (ii) A reference to a disabled person is a reference to a person who has a disability.

    (iii) In relation to the protected characteristic of disability –

        i. A reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
        ii. A reference to persons who share a protected characteristic is a reference to persons who have the same disability

25. Paragraph 5 of Schedule 1 to the Act states:

    (i) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:

        i. measures are being taken to correct it, and

ii. but for that, it would be likely to have that effect.

(ii) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.

26. Paragraph 12 of Schedule 1 of the Act provides that when determining whether a person is disabled, the Tribunal "must take account of such guidance as it thinks is relevant." The "Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability" (May 2011) (the "Guidance") was issued by the Secretary of State pursuant to section 6(5).

27. In **Goodwin v Patent Office** 1999 ICR 302, Morison J (President), provided some guidance on the proper approach for the Tribunal to adopt when applying the provisions of the (then) Disability Discrimination Act 1995. Morison J held that the following four questions should be answered (which apply as much today for the Equality Act 2010 as it did then), in order:

(i) Did the claimant have a mental or physical impairment? (the 'impairment condition');

(ii) Did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition');

(iii) Was the adverse condition substantial? (the 'substantial condition');

(iv) And was the adverse condition long term? (the 'long-term condition').

28. That case also contains a reminder that a purposive approach should be taken of the legislation in this area and that Tribunals should bear in mind that even although a claimant can carry out a task with difficulty, the relevant effects can still be present. Persons with disabilities often downplay the effects of their impairments. Tribunals should also ensure they do not lose sight of the overall picture in making their assessment.

29. Substantial means more than minor or trivial. This reflects the general understanding that disability is a limitation going beyond the normal differences in ability that might exist among people.

30. Long term also means where the impairment has lasted for at least twelve months is likely to last for at least twelve months or is likely to last for the rest of the person's life.

31. Schedule 1 paragraph (2)(2) of the Equality Act 2010 states that where an impairment has had a substantial adverse effect in the past which has now ceased, it will be treated as continuing to have a substantial effect if the effect is likely to recur. "Likely" means could well happen.

32. At paragraph C9 the Guidance emphasises that in determining whether or not a particular impairment is likely to recur the tribunal must take into account of what a person can reasonably be expected to do to avoid effects such as to avoid a substantial allergic reaction.

33. Paragraph B7 of the Guidance states that account should be taken of how far a person can reasonably be expected to modify their behaviour. In some cases a coping or avoidance strategy might alter the effect of the impairment such that it is no longer substantial. The Code gives the examples of a person who needs to avoid substances because of allergies and it states that 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 effect on his ability to carry out normal day to day activities.

34. In **Metroline v Stoute** 2015 IRLR 464 the claimant had Type 2 diabetes which he controlled by diet (avoiding sugary drinks) and by taking medication. The Employment Appeal Tribunal held that an abstention from sugary drinks could not be a medical treatment and abstention from sugary drinks did not impair ordinary day to day activities.

35. The question is whether at the time the disability discrimination is alleged to have occurred would the condition recur. The Tribunal must look forward as at that date and decide whether or not at that time the relevant effects were likely to happen again.

36. The Tribunal must make that decision based on the evidence before it and at paragraph C6 of the guidance examples are given of two situations one involving a bi-polar disorder recurring form of depression which gives rise to two separate episodes. If the two episodes stem from the same underlying condition, they can be connected but if there were two discrete episodes of depression with no medical or other evidence showing that the condition or impairment stemmed from an underlying condition, absent any evidence of underlying condition, it is not possible to link the two incidents.

37. Finally, Schedule 8 paragraph 20 of the Equality Act 2010 states that an employer is under no duty to make reasonable adjustments if it could not know or could not reasonably know both that the claimant was disabled in terms of the definition of section 6 and that the claimant is likely to be placed at the relevant substantial disadvantage that is relied upon.

38. There are there are two ways in which the respondent can avoid the duty to make adjustments on the ground of lack of knowledge. The first is ignorance of disability. The respondent must show that it neither knew nor could reasonably have been expected to know that the claimant was disabled within the meaning of section 6. The second is ignorance of disadvantage. Here the respondent must show that it neither knew nor could reasonably have been expected to know that the claimant would be placed at a substantial disadvantage by the requirement to remain in situ during the building works.

Submissions

39. The respondent's counsel argued that the claimant had no impairment and that there was no medical evidence of any such impairment. The Tribunal should carefully consider the evidence which shows that there was no physical impairment as alleged by the claimant. The only impairment relied upon was allergy. It was the respondent's position that this did not exist as a matter of fact.

40. The respondent's counsel argued that there was no evidence of any impact upon the claimant's ability to carry out day-to-day activities nor was such impact substantial or long-term. The Tribunal was invited to accept the claimant's oral evidence in that regard. The evidence showed that there were two separate incidents arising independently of each other. The claimant was not therefore a disabled person.

41. The respondent's position was that by the claimant's own admission the respondent had only been advised as to the claimant's allergy on 5th February 2019. She had provided no further information which would entitle the respondent to know or reasonably know that the claimant was a disabled person.

42. The claimant was not able to link the building works with any disability and so the respondent could not know that the claimant was put at any disadvantage by being required to remain there.

43. The claimant's position was that looking at the evidence the claimant was disabled. It was submitted that the claimant advised the respondent she had a potential reaction to paint. The e-mail of 5th February 2019 advised that she had an allergy and used an Epi-pen. That suggested the claimant was disabled and had knowledge of disability.

Decision and reasons

44. I shall deal with each issue sequentially.

Issue 1 – Disability status

Impairment

45. The claimant relies upon suffering an allergy as a physical impairment. The claimant was clear in this point and was not relying upon any other health condition or issue (despite the fact that her medical notes indicated that there were a number of health issues the claimant had encountered). The claimant's position was that she suffered from an allergy and this was a physical impairment. It is that issue that the Tribunal must consider.

46. An impairment should be interpreted and considered in a common-sense way. It should be given its ordinary meaning. 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. I require to decide whether from the evidence presented to the Tribunal there was an impairment an allergy which the claimant believed she had which she considers to amount to a physical impairment. The Guidance does not give

any definition but states that its natural and ordinary meaning should be given – it is a matter of evidence.

47. I have carefully considered the evidence presented. The claimant believes that she has a physical impairment. While that is a strongly held belief, I look at the evidence that was presented. The medical evidence, which I use to assist me in determining whether or not there was an impairment, was compelling. The specialist evidence found no allergy. I have concluded that that there is no evidence to support the claimant's belief that she did suffer from an allergy. The claimant believed that she suffered from allergic effects but the evidence strongly supported the position that there was no allergy nor allergic effect.

48. The tests the claimant undertook in relation to the 1995 incident found no allergy. In relation to the 2019 incident at page 65 the consultant rules out an allergic reaction and concluded the claimant suffered from an "irritation". These were 2 separate health issues that affected the claimant. Applying the common sense and natural meaning, I do not find that they either individually nor collectively amount to an "impairment". They were independent health issues.

49. The onus is on the claimant to establish that she suffered from an impairment as alleged, namely allergy. While the claimant believes that she did suffer from an allergy, the evidence did not support this. The fit note she submitted was in respect of the claimant telling her GP that she had allergies and was not a diagnosis as such. The medical evidence that was obtained and tests that were undertaken contradicted this.

50. The claimant was rightly concerned about her health and the issues she experienced. She did suffer from generalised anxiety and stress which had an impact upon the claimant's health and well-being but that was not the issue for the Tribunal.

51. I find that the claimant's argument that she suffered from an allergy which amounted to a physical impairment is not well founded. I uphold the respondent's counsel's submissions in this regard and find that the claimant did not suffer from an impairment at the relevant time.

<u>Did the impairment adversely affect the claimant's ability to carry out normal day-to-day activities?</u>

52. Although the absence of an impairment would result in the claimant not having a disability as defined, I have considered what the effect of the health issues the claimant suffered, were if I were incorrect in my decision.

53. The claimant's oral evidence, which I accept, was that the only impact upon her day-to-day activities (of the allergy) was that she took precautionary methods to avoid certain foods and clean carefully. These were precautionary strategies to avoid or minimise the risk of any repetition of the incident that happened in 1995. She was worried there could be a repetition, albeit the evidence ruled out an allergy.

54. The claimant was worried about her health and her worries affected the claimant but there was no adverse impact as a result of the impairment alleged by her.

55. From the evidence I heard and accepted, there was no impact upon the claimant's ability to carry out normal day-to-day activities. The claimant chose to avoid eating prawns and shellfish but continued to get on with her life and her ability to carry out normal day to day activities was not affected adversely by such an impairment.

56. The impact upon the claimant's abilities to carry out day to day activities was not in my opinion adverse.

Substantial effect?

57. If there was an adverse effect, the effect must be substantial, ie not minor or trivial, in terms of the impact on the claimant's ability to carry out normal day to day activities. From the evidence presented to the Tribunal any impact was not substantial.

58. I make this assessment from the point in time when the alleged discrimination occurred (in February and March 2019) and consider the position as it existed then.

59. I take into account that the adverse effect is the severity of the impairment taking account of the claimant's ability to cope with the issues affecting her. The claimant did not play down the effect of the impairment. The evidence presented did not support any suggestion that the impact of the specific health issue in question was substantial. It was not more than minor or trivial.

60. In making this determination I have taken into account the Guidance and the factors to be considered, which include the time taken to do things, the way things are done and how far a person can reasonably be expected to modify their behaviour to prevent or reduce the effect of the impairment. The claimant reasonably modified her behaviour which avoided any substantial impact.

61. I consider **Metroline v Stoute** 2015 IRLR 465 to be of assistance in this regard. In that case a person with type 2 diabetes was held to be reasonably expected to abstain from sugary drinks to avoid the impact of the impairment. In that case the impact of the avoidance strategy rendered the adverse effect of the impairment no longer substantial.

62. In the case before the Tribunal, the impact of the claimant's avoidance strategy, to avoid certain foods and ensure cleanliness, could well rendered the adverse effect of the impairment no longer substantial since the impairment did not impact upon the claimant at all in the intervening period between 1995 and 2018. That was either because there was no impairment at all (and the events are separate and independent, which was what I have concluded) but could have been due to the impact of the claimant's avoidance strategy (which rendered the adverse effect of the impairment no longer substantial).

63. I have concluded that there was no underlying condition that linked both issues. The issues were separate and distinct and cannot be connected. The impact was not therefore substantial.

64. Either way, the effect did not result in the claimant satisfying the legal definition of disability.

65. I have been careful to ensure I focus on the entirety of the evidence, and not, for example, only on the things the claimant can do. I have taken a step back to consider the evidence as a whole and focus on the things the claimant could not do or could only do with difficulty. That did not result in the claimant satisfying the definition.

66. I assessed all the evidence and found there to be no link between the claimant's alleged impairment and her ability to carry out normal day to day activities. I also took account of the effect of treatment (the claimant's avoidance strategy) and the modification of her behaviour (as set out in paragraphs B12 and B7 of the Guidance).

67. The impairment relied upon by the claimant did not have a substantial and adverse effect upon the claimant's ability to carry out normal day to day activities.

Long-term adverse effect?

68. Even if the impairment did have a substantial and adverse effect upon her ability to carry out normal day to day activities, such an impairment must have a long term impact – namely lasted for 12 months or is likely to be last 12 months or likely to last for the rest of the claimant's life.

69. The questions I need to determine are therefore whether, at the time the alleged discrimination occurred, had the effects lasted for 12 months, were the effects likely to last for 12 months or were they likely to last for the rest of the claimant's life.

70. The claimant accepted there had been no impact for well over a year. In fact (if the issues were related) there had been no impact for over 19 years. The claimant accepted that since the 1995 incident no further issue arose until 2019.

71. There was no evidence any impact would last for the rest of the claimant's life.

72. There was also no evidence that any impact was likely to last for 12 months. The issue was specific to the circumstances pertaining to the claimant at that time and was short term.

73. The foregoing accords with the claimant's position as advanced now, since she argues that the impact was as a result of the building works (which were necessarily short term). This alone would result in the health issue not amounting to a disability.

74. I have taken into account whether the provisions regarding recurring sporadic conditions or fluctuating effects are applicable in this case. Schedule 1 paragraph

(2)(2) of the Equality Act 2010 states that where an impairment has had a substantial adverse effect in the past which has now ceased, it will be treated as continuing to have a substantial effect if the effect is likely to recur. "Likely" means could well happen.

75. The Guidance notes at paragraph C6 that a sporadic condition will qualify if its effects, when present, are substantial and its substantial effect has in fact lasted for 12 months from its first onset or where the substantial effect lasted for a lesser period the effects are likely to recur beyond 12 months.

76. In assessing the likelihood of recurrence, the Guidance states that the likelihood of recurring should be considered taking all the circumstances into account (paragraph C9). This includes what the claimant could reasonably be expected to do to prevent the recurrence, which would include avoiding substances to which a claimant is allergic.

77. The question is whether at the time the discrimination is alleged to have occurred, was it likely that the condition would recur. I conclude that it was not.

78. I have taken into account whether or not the effect was likely to recur and whether or not it was possible to link the 2 incidents but I have concluded that the claimant cannot do so.

79. Having assessed all the evidence, I have concluded that in this case the claimant suffered from two separate incidents: one in 1995 and one in 2019. There was no medical evidence (or other evidence) that showed that these 2 specific conditions were connected. The evidence did not suggest that the 2 episodes stem from the same impairment or cause.

80. It is necessary for the relevant effect to have lasted for 12 months or more or likely to so last. This was not present. It is not reasonably likely in all the circumstances that there would be a recurrence. Thus even if the conditions were connected, it is necessary for any recurrence to be reasonably likely. There was no evidence that would allow me to conclude that there was likely to be a recurrence.

81. The claimant was not therefore a disabled person for the purposes of section 6 of the Equality Act 2010.

Issue 2 - Knowledge

82. If the claimant was disabled, the respondent required to know or reasonably know about her disability and of the substantial disadvantage she alleges (the being required to work in the building when works were being carried out). Both of these limbs require to be satisfied. In the circumstances I have found that neither are satisfied.

83. The claimant accepts that the respondent only first learned of her perceived allergy on 5th February 2019. There was no suggestion in the claimant's

communication that there was any connection between any such allergy and the building works.

84. The respondent did not know and could not reasonably have known that the claimant had a disability from the information she gave to the respondent at the time (in February and March 2019). The respondent only had the information the claimant provided, namely that she believed she had an allergy. There was no information in the respondent's possession that the claimant had an impairment which impacted upon her ability to carry out day-to-day activities to any appreciable extent or that it was likely to be long term (as defined).

85. The claimant told the respondent she believed the building works affected her health (as it did other staff).

86. As a matter of fact there was no impact on the claimant's activities between 1995 and 2019. The respondent did not know of the 1995 incident and could not therefore have known of any potential connection between the two.

87. The respondent did have a fit note which suggested the claimant may have an allergy in relation to paint. That was not connected to the previous issue in 1995. The fit note in itself is insufficient to place the respondent under notice of disability. It was not reasonable for the respondent to have understood the information that was communicated to it by the claimant to result in their being fixed with knowledge of any disability. The respondent took the communication from the claimant at face value – that she had an allergy. That does not fix the claimant with knowledge as to any disability.

88. The respondent did not know and could not reasonably have known that the claimant was disabled.

89. Further, even if the respondent did know about the disability, there was no information given to the respondent at the relevant time that suggested the claimant would be at a substantial disadvantage by remaining in the building during the renovation works.

90. The 5 February 2019 communication stated that the claimant was struggling because of the works. There was no connection between any disability and the requirement the claimant remain in place during the works. The fact the claimant pointed out that others had suffered similar effects resulted in the respondent not knowing that the claimant was placed at any substantial disadvantage, since she was alleging other staff had suffered the same effects.

91. The respondent did not know therefore that the claimant would be placed at any substantial disadvantage by remaining in place during the building works.

92. I find therefore that at no stage did the respondent know or could reasonably have known that the claimant was placed at a substantial disadvantage as a result of requiring to remain in situ when building works were carried out.

93. Summary

94. In all the circumstances the claimant under the terms of Section 6 is not a disabled person from the evidence presented to the Tribunal (in light of the position advanced by the claimant) and in any event the respondent did not have the requisite knowledge such as to allow the claims to proceed.

95. The claims are therefore dismissed.

_____

EMPLOYMENT JUDGE HOEY

REASONS SIGNED BY EMPLOYMENT JUDGE ON 28 JANUARY 2020