



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss E Parker

v

Valeo Confectionary Limited

PRELIMINARY HEARING

Heard at: Leeds in public On: 21st October 2020

Before: Employment Judge Lancaster

Appearance:

For the Claimant: In person

For the Respondent: Mr A Serr, counsel

JUDGMENT

The Claimant was at all material times a disabled person within the meaning of the Equality Act 2010, by reason of her type 2 Diabetes first diagnosed on 21st August 2018.

REASONS

1. Written Reasons are now provided at the request of the Respondent, taken from the transcript of the oral decision given at the hearing.
2. This is a Preliminary Hearing to determine whether the claimant Miss Elaine Parker meets the definition of disability within the Equality Act 2010 by reason of the impairment of Type II Diabetes. I have decided on balance that she does meet that definition.
3. The claimant was first diagnosed with Type II Diabetes at the end of August 2018. She had had a haemoglobin test at the end of 2017 which was negative but at some point, between then and her attendance in August the following year she had obviously developed this disease/impairment.

4. She presented to the GP on 21 August having already attended at hospital in relation to a number of complaints which although not conclusively linked to diabetes are clearly indicative of that diagnosis. Those are a failure for wounds on her legs to heal properly and unfortunately an incidence of thrush.
5. Therefore, the GP made a provisional diagnosis on the 21st and almost immediately confirmed that, so that by 24 August “type II diabetes mellitus” is declared to be the condition from which she suffers.
6. Diabetes is certainly ordinarily a lifelong condition but it is not of itself, necessarily a disability, and that is made clear in the decision of Metroline Travel Limited v Stoute in the Employment Appeal Tribunal reported at [2015] WL 1258730/[2015] IRLR 465.
7. As of 24 August the medical notes (which I have received without the benefit of any further explanation or report from the Doctor who made them, but which are on the face of it relatively clear) indicate that she was symptomatic and describe a number of difficulties which I understand are common to Diabetes: blurring of visual image, drinking, weeing, sugar was high at 24 - whereas a normal range is from 5 to 7 blood sugar levels.
8. Of course it is right that the principle means of managing this condition is by behavioural changes, particularly to diet and those the claimant did, to her credit, seek to put into place. It appears at this point in her life she was significantly overweight and she set about correcting that and over a relatively short period of time was able to lose two stone. She also modified her diet and reduced sugars.
9. She was placed on medication: initially that was glycoside and then from 4 December 2018 she was prescribed metformin, both of them drugs designed to assist the diabetic by reducing their blood sugar levels.
10. I do not have any specific evidence as to what the deduced effect would have been but for those drugs, but it is clear that although there is significant improvement over this period there were still issues which I consider do amount to a substantial adverse effect upon her ability to carry out normal day to day activities. I have identified the effects recorded and her symptoms as of 24 August. Also on any occasion where the claimant suffers a “hypo episode” (that is when her blood sugar levels reduce significantly) she is prone, as she has described to me, to shaking, to lack of concentration and inability to function properly. And of course if not corrected the consequences of such an episode could be dangerous.
11. As of 4 December I note the Doctor’s record on the same date that she was moved from one regime of drugs to the next, that although she had by then succeeded in cutting down sugars in her diet, and had lost two stones in that relatively short period she had still been getting hypos. He records the account of three episodes when her blood sugar level got below 4. The normal range is

5 to 7 so below 4 is potentially serious. Also a few of them had been below 5, which is at the lower end of normal range. The new drug was prescribed.

12. Throughout the whole of the period in question, whenever the claimant's blood sugar levels were actually tested at 3 monthly intervals, on the haemoglobin test the results were declared to be satisfactory, but into February there were still instances of failing to manage the stability of her blood sugar levels. So at the earlier stage, although dropping down from the 24 high recorded on 24 August it was in "high single figures". Then on 11 February it is recorded as around 10 on occasion.
13. Further on 7 March it is recorded that, and this is in a period when she had been transferred from the department where she preferred to work on 15 February, between that date and 7 March there had been at least 2 hypoglycemic events. She reported those to her GP. Whilst it is correct that the recorded levels taken by the claimant, who was always able to carry out her own test of her blood sugar levels, had been recorded as 5, or 4 sometimes, her GP said at this time that that was "not abnormal". It is the lower end of the normal range or slightly below it. The notes do however give sufficient indication, in accord with the claimant's own recollection of what she was told by the GP, that although these were not abnormal levels taken as a whole, for somebody who had been suffering from diabetes, recently diagnosed and attempting to regularise her blood sugar levels over the period, for her is was consistent with having still suffered a hypoglycemic attack. That is because her body would be accustomed, because of the fluctuations in levels, to higher blood sugars and therefore falling back to what it may have been before, even to the end of the normal range would still have resulted in her suffering an attack.
14. There continued to be a level of improvement and the drug regime ceased, certainly by sometime in March, and the claimant did not, between 22 May and 22 July, when she resigned go back to her Doctor. At this point the Doctor evidently believed that it was possible that, having ceased the drug regime, she would be able to control her condition by diet only. The haemoglobin A1C level as of 22 May was again recorded as "satisfactory no further action needed".
15. I accept the claimant's evidence that throughout that period she did however suffer further occasional hypoglycemic episodes. Again on each occasion when she actually suffered in that way that necessarily would have amounted to substantial, that is a more than trivial, adverse effect upon her normal day to day activities, I also accept her account that she was struggling throughout this period to manage her sugar intake because of the increased physical exertion and therefore because of fluctuating blood sugar levels. Although not reported to the GP that was having an effect upon her by way of fatigue and tiredness and an inability to carry out normal activities at home on her return from the end of a day's work. Again, all these appear to be common and usual incidences of somebody suffering from diabetes.
16. The claimant was diagnosed, as I have said, at the earliest on 21 August, necessarily she will have contracted this condition some time before that. The

period in question is up to 22 July when she resigned, that is slightly less than one year, though very much on the cusp of that 12 month period.

17. I do not consider that I am concerned with whether or not Type II Diabetes in this case is a “progressive condition”. I understand the Claimant says it is so described on various websites and I also see reference to that having apparently been accepted in the case of Taylor v Ladbrokes Betting & Gaming Limited EAT 2016 , a decision of His Honour Judge Hand QC. However “progressive condition” is given a very specific definition within Schedule 1 of the Equality Act. It applies firstly where somebody suffers from what is diagnosed, on medical evidence ordinarily, as having a progressive condition but it is not at stage leading to a substantial adverse effect on day to day activities. A person, P, is to be taken to have an impairment which has a substantial adverse effect if the condition, notwithstanding not presently meeting the criteria is likely to result in P having such an impairment. That is always under the Statutory language specific to the individual (“P”). A generic assessment of the effects of Type II Diabetes do not assist me. I have no medical evidence as to whether there will be any likely deterioration in the Claimant’s case. But in any event, I do not need to look at whether this is a progressive condition because that is only relevant where the adverse effects are not currently substantial. I am satisfied that, though not continuously, intermittently throughout the relevant period the claimant’s Diabetes did result in it having a substantial adverse effect upon her.
18. I am more concerned therefore with the likelihood of recurrence. In this context I consider it particularly appropriate to have regard, as I am obliged to do, to the guidance published by the Secretary of State on the definition of disability.
19. I did not consider that this is a case that engages those provisions within the Act (Schedule 1 section 5) or the Guidance (B12), that say I must disregard the effect of medicines or other treatment measures. Although there is possibly a deduced effect had the claimant not been prescribed drugs for the period from August to March, I certainly accept, in line with the Metroline case, that a mere adjustment to diet is not necessary to be taken into account in this context.
20. All I am primarily concerned about is the general effect of behaviour. I consider that those adjustments the claimant sought to make on advice of her GP from August onwards fall within the relevant section to the Guidance, therefore B7 and B10. In assessing the likelihood of recurrence beyond the 12 month period, likelihood in this context of course being defined as something that could well happen, I take account of paragraph B7 as to how far a person, in this case the claimant, can reasonably be expected to modify his or her behaviour, for example by use of coping or avoidance strategy to prevent or reduce the effect or impairment on normal day to day activities. Although changes to diet and lifestyle are ordinarily reasonable and should be expected, paragraph B10 does point out that in some cases people have coping or avoidance strategies which cease to work in certain circumstances. Example is given of someone who has dyslexia placed under stress. It is possible that a person’s ability to manage the effects of the impairment will break down so that the effects will sometimes still

occur. This possibility must be taken into account when assessing the effects of the impairment.

21. The claimant's evidence before me, which I have no reason to disbelieve, is that when she was working in the environment which imposed more physical demands upon her by way of lifting that created difficulties in managing her blood sugar levels. As she needed to increase her energy so she would take glucose tablets. This in turn created difficulties in maintaining a controlled reduction in her sugar intake in her diet. I consider that that is a situation beyond her control; she is not able to avoid the demands imposed upon her under the terms of her contract. It did have an effect and it interfered with the dietary regime which she had endeavoured to put in place. It is much easier obviously for those of us with jobs which are more sedentary and have more control over our working environment to manage a condition such as Type 2 Diabetes: the Claimant has limitations on what she herself can put in place.

22. So applying those two sections of the Guidance B7 and B10 together I consider that reasonably the claimant cannot always have been expected to mitigate the potential adverse effects of her condition upon her normal day to day activities simply by the control mechanisms that worked for the substantial period from August. Therefore it is, I find on these facts, likely that there could have been further recurrence both of continual hypoglycemic attacks, with reduction in her blood sugar level, and also impacts upon her ability -that is the time take or the way she is able to concentrate or devote herself - to her carrying out normal day-ot-day activities by reason of the inability to keep her blood sugar level stable by reason of the impact upon her of her working environment.

23. So for those reasons I conclude that the Claimant does meet the definition of disability and all claims will proceed further.

Employment Judge Lancaster

6th November 2020

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