



EMPLOYMENT TRIBUNALS

Claimant

Ms Clementina Cosco

V

Respondent

Harlesden Homes Ltd – 1st

Mr Michael Firmin – 2nd

Mr Tom Wang – 3rd

Mr Pranit Somaiya – 4th

PRELIMINARY HEARING BY CLOUD VIDEO PLATFORM

Heard at: Watford

On: 26 October 2020

Before: Employment Judge Bedeau

Appearances:

For the Claimant: Mr M Singh, Counsel

For the Respondents: Ms C Lord, Counsel

RESERVED JUDGMENT

1. At all material times the claimant was a disabled person within the meaning of section 6, schedule 1, Equality Act 2020.
2. The respondents' application for a deposit order is refused.

REASONS

1. On 9 July 2020, I listed this case for a preliminary hearing, in public, for the Judge to hear and determine the following issues:
 - 1.1 whether the claimant was, at all material times, a disabled person, and
 - 1.2 the respondents' application for a deposit order on the grounds that there are little reasonable prospects of success in

establishing that the respondents knew that the claimant was a disabled person.

The evidence

2. I heard evidence from the claimant. On behalf of the respondents, evidence was given by the individual respondents: Mr Michael Firmin, Area Manager; Mr Tom Wang, Director; and by Mr Pranit Somaiya, former Branch Manager.
3. In addition to the oral evidence the parties adduced a joint bundle of documents comprising of 147 pages. References will be made to the documents as numbered in the bundle.

Findings of fact

4. The claimant was born on 18 October 1977 and is 43 years of age. There is no dispute that she was dismissed on 8 February 2019 as a Property Manager. She contends that her dismissal was because of her disability. The respondents deny this and assert that she had not passed her probation.
5. On 8 December 2016, she was diagnosed as suffering from Pompholyx. This is a condition that causes the skin of the hands to become irritated, red, and blistered. It can affect people of any age, but it is often seen in adults under the age of 40 years. It is a type of eczema that causes tiny blisters to develop across the fingers, palms and sometimes the soles of the feet. It starts as intense itching and burning of the skin on the hands and fingers. The palms and fingers erupt into itchy blisters which may secrete fluid. The skin tends to become dry and crack or peel as it starts to heal within a few weeks. The condition often comes and goes over several months or years.
6. It may be triggered by either a fungal infection, a reaction to the skin touching metals, detergents, household chemicals, shampoo, cosmetic products, or perfume. (pages 144 - 147 of the bundle)
7. The first respondent is an estate agency. Mr Michael Firmin, the second respondent, is Area Manager; Mr Tom Wang, the third respondent, is a Director; and Mr Pranit Somaiya, was former Branch Manager.
8. The claimant successfully applied for the position of Property Manager based at the first respondent's Harlesden office. She commenced employment on 19 November 2018, and on that day, she completed a medical questionnaire in which she was asked the following questions:
 - “2. Are you currently taking or been prescribed any medication (excluding contraceptives) No.
 3. Are you currently receiving treatment for any physical or mental condition? No.
 4. Do you suffer from any injury, illness, medical condition, allergy, that might affect your ability to perform your duties? No.
 5. Do you consider yourself to have a disability? No” (82)
9. From her answers, the respondents believed that the claimant was not disabled. She said in evidence that she gave those replies because she believed that her condition would not affect her work as a Property Manager and did not want her employer to think that she was not the right person for the job.

10. Her work involved liaising with landlords and tenants; making sure that the necessary paperwork is completed by the tenants and landlords, such as Gas Safety Certificates and invoices; taking the occasional rents in cash; and inspecting and reporting on the condition of properties, amongst other duties. She used the telephone as well as her computer.
11. In terms of the treatment for her condition, she uses a white soft paraffin ointment for her hands five or six times a day; washes her hands only with Dermol 500 lotion, and whenever she has a flareup, she applies Dermovate cream, a cortisone steroid. This provides some relief from the symptoms.
12. The damage to her skin on her fingers and hands mean that she cannot effectively use them to do simple tasks, such as cleaning her house or washing her clothes. The itchiness in her hands and the pain caused when the weeping blisters and cracks in the skin comes into contact with physical objects like brooms, hoovers and other cleaning apparatus, makes it difficult for her to carry out household chores. Those tasks are done by her 13-year-old son and partner.
13. She is unable to attach, lift, carry or move many everyday objects, such as furniture, clothes, stationery or computer keyboards, keys or money unless they are completely clean, as exposure to dust or liquid will trigger her condition and her skin would start to peel.
14. She tried to wear gloves to protect her hands, but they did not provide the protection she required as when sweat developed inside of them, her fingers would become sore and had to be treated.
15. Outside of her home, she could only use public toilets if she has her own hand detergent as the products available are likely to trigger a flare up.
16. She can only touch food with the tips of her fingers as the liquids in tomatoes, salads, potatoes, or other vegetables, would cause her symptoms to appear.
17. There is no dispute that on a day in December 2018, Mr Wang, Director, was visiting the branch when he observed, close to the end of the claimant's working day, that she was wearing gloves while washing up a cup. The gloves were provided by the respondent for its staff to use when washing up. I am satisfied that the reason why the claimant was wearing gloves was because of her medical condition.
18. Mr Pranit Somaiya, commenced employment with the respondent, as Branch Manager, on 17 January 2019. He said that on 18 January 2019, while going through various aspects of the first respondent's business, he noticed that the respondent was paying a cleaner £200 a month for her services. As the office is small, it was possible for him, the claimant and Ms Marie Pilapil, Office Manager, to share that work saving money. At this point the evidence is in sharp conflict. The claimant asserts that she informed Mr Samaiya that she was unable to engage in any cleaning duties because of her medical condition. This is denied by Mr Samaiya, who said that the claimant refused to consider carrying out her part the proposed cleaning duties as it was not in her contract of employment.
19. I do not propose to make any findings of fact in relation to this disputed issue, but it sets the background to Mr Firmin and Mr Wang's involvement in the dispute.

20. In Mr Firmin's witness statement, paragraph 9, he stated that on or around 21 January 2019, he received a call from the claimant asking to speak to him about Mr Somalia who had asked her to clean the office and that she had told him that she did not think it was part of her contractual duties and was refusing to carry out that work. According to Mr Firmin, the claimant then said she had to wear gloves to avoid touching cleaning products. He said that the claimant did not make him aware of her medical condition only why she had to wear gloves.
21. In a letter from the claimant's surgery, West Hampstead medical Centre, dated 21 February 2019, Dr Birgit Curtis, wrote the following:
- "To whom it may concern,
- This lady suffers from a skin condition called Pompholyx. This causes her skin to become irritated, sore and red and to blister on her fingers and hands.
- It is aggravated by detergents such as cleaning materials as well as sweating so can flareup despite wearing protective gloves. She is prescribed treatment but is advised to avoid anything that triggers or aggravates the rash.
- She is therefore not able to carry out cleaning duties." (141)
22. I am satisfied that Dr Curtis confirms the claimant's medical condition and symptoms. It is also clear to me that the last sentence was written to support the claimant's position in relation to her dispute with Mr Somaiya regarding carrying out cleaning work.
23. In another medical report prepared by Dr M Khalifeh, dated 18 August 2019, from an organisation called, IPSA Medical Clinic, the doctor wrote, addressing the letter to the claimant,
- "I examined Ms Clementina Cosco who suffers from Pompholyx since 2016. In my opinion, Ms Cosco has a physical impairment which has a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities.
- Pompholyx has a substantial adverse effect on her ability to lift, carry or otherwise move everyday objects, her ability to perform cleaning duties, and her manual dexterity. In my opinion, between November 2018 and February 2019, Ms Cosco qualified as a disabled person, this because the substantial adverse effects of Pompholyx are likely to last more than 12 months.
- Pompholyx is a chronic condition for which there is no cure, hence it is likely to last for the remainder of Ms Costco's life." (139)
24. I am satisfied that this report was prepared by Dr Khalifeh after examining the claimant. Although persuasive, I am further satisfied that the doctor considered the claimant to be a disabled person and protected under the Equality Act 2010.
25. From the claimant's medical records, it shows that on 8 December 2016, she was first diagnosed as suffering from Pompholyx. On 5 June 2018, she was prescribed 500gms of soft paraffin and liquid paraffin to be applied liberally to dry skin 5 to 6 times a day. She was also prescribed Dermol 500ml lotion to be used as a soap substitute. (140)

26. What is not clear from the records is whether she was prescribed further medication. She told me that she would go to her surgery and would be given medication for her condition and have several packages at home.
27. There is a considerable amount of dispute over whether the respondents knew of the claimant's Pompholyx. They said that they did not see the claimant eat her food by holding it with a napkin as she alleges. She ate crisps despite her saying that she does not eat it. Mr Somaiya saw her holding keys in her hands without protection and had not seen her use creams on her hands during the time he worked with her. The claimant denies this. Mr Somaiya said that he also travelled with her in a company car to inspect premises and did not see her use any protection for her hand when touching objects in the premises they were inspecting. The respondents all denied that the claimant told them about her condition and said that the first they became aware of it was when they received the tribunal claim form or the bundle.

Submissions

28. I have taken into account the submissions made by Mr Singh, counsel on behalf of the claimant, and by Ms Lord, counsel on behalf of the respondent. In addition, I have taken account of Mr Singh's written submissions and authorities.
29. I do not propose to repeat their submissions herein having regard to rule 62(5), schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. In summary, Ms Lord submitted that the claimant's condition has minimal effect on her day to day activities. There is no contemporaneous medical report on her condition at the material time. Medication was prescribed in June 2018 but not subsequently. The respondents have not seen her clean her office equipment, hold food with a napkin, put keys in envelopes. None of the respondents knew of her condition until she presented her claims to the tribunal.
30. Ms Lord invited me to conclude that the claimant was not disabled at the material time and that there is little reasonable prospect of establishing that the respondent knew of her disability. Accordingly, I should issue a deposit order.
31. Mr Singh referred to his written submissions. He applied for the issue of knowledge to be considered at the final hearing as it is inextricably linked to the other issues in the case, such as constructive knowledge of disability. He submitted that the claimant's disability impact statement, her oral and written evidence, and the medical reports, do support a finding that she was at all material times, a disabled person. Even the mere fact that she was seen by Mr Wang in December 2018 washing up wearing gloves and had told Mr Firmin that she wore gloves because of her condition, are enough to establish knowledge.

The law

32. Section 6 and Schedule 1 of the Equality Act 2010 defines disability. Section 6 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."
- 33. Section 212(1) defines substantial as "more than minor or trivial." The effect of any medical treatment is discounted, schedule 1(5)(1).
- 34. Under section 6(5), the Secretary of State has issued Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011), which an Employment Tribunal must take into account as "it thinks is relevant."
- 35. The material time at which to assess the disability is at the time of the alleged discriminatory act, Cruickshank v VAW Motorcast Ltd [2002] IRLR 24
- 36. In Appendix 1 to the Equality and Human Rights Commission, Employment: Statutory Code of Practice, paragraph 8, with reference to "substantial adverse effect" states,
 - "A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people."
- 37. The time taken to perform an activity must be considered when deciding whether there is a substantial effect, Banaszczyk v Booker Ltd [2016] IRLR 273.
- 38. The power to make a deposit order is in rule 39 which states the following:
 - "(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.
 - (2) the Tribunal may make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

Conclusion

- 39. Mr Singh invited me to put off considering the respondents' application for a deposit order as I would be making findings of fact which would impinge on the findings in relation to constructive knowledge of disability. I came to the conclusion that when considering a deposit order, a Judge does not make findings of fact but considers the arguments presented by the parties. There are cases where, even if there is a deposit ordered, the judge or the Tribunal at the final hearing, having made findings of fact, find in favour of the party who was the subject of a deposit order.
- 40. Having regard to the wording of rule 39, as there are so many issues and facts in dispute, as set out in paragraph 27 above, the respondents have not satisfied me that there is little reasonable prospect of the claimant establishing that the respondent knew of her disability. This issue should be

tried at the final hearing when the tribunal will consider the evidence and make appropriate findings of fact.

41. In relation to the issue of whether the claimant was, at all material times, a disabled person suffering from Pompholyx, I am satisfied, on the balance of probabilities, that she was disabled. Without treatment and protective gloves, exposure to detergents, dust and metal objects would cause damage to the skin on her fingers and hands. She is unable to engage in some household chores, such as, cleaning her house or washing clothes. This is made more worse by itching and cracks in her skin come into contact with physical objects. She is unable to lift or carry heavy objects unless they are clean. Wearing gloves as a form of protection for her hands is not a sensible option as the sweat built up inside of them would cause her fingers to become sore.
42. She is only able to use public toilets if she has her own detergent as the soaps available in them are likely to cause a flare of her symptoms.
43. She must avoid touching food with her bare hands and uses a napkin when eating to protect her hands. She also uses the tips of her fingers when touching tomatoes, salads, and other vegetables.
44. Of note, was the fact that she was observed by Mr Wang in December 2018 using gloves to wash her cup. The reason being that her hands should not come into contact with detergents not prescribed by her doctor. This fact lends support the claimant's claim that she suffers from Pompholyx. This is also confirmed in the medical reports by Dr B Curtis, 21 February 2019, and Dr M Khalifeh, dated 18 August 2019.
45. The effects on normal day-to-day activities are more than minor or trivial as they restrict what the claimant is able to do at home and at work and requires her to have regard to her health and safety when touching certain objects, food and vegetables. She has to use ointment creams to alleviate her symptoms. Her condition has lasted more than 12 months, and the symptoms are recurrent.
46. I have come to the conclusion that, at all material times, while employed by the respondent, the claimant was disabled under section 6, schedule 1, Equality Act 2010.
47. The case is listed for a final hearing on 20 – 22 June 2022, before a full tribunal.

Employment Judge Bedeau

5 November 2020

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Sent to the parties on:

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For the Tribunal:

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