



EMPLOYMENT TRIBUNALS

Claimant

Ms Amanda Verboort

Respondent

V Arriva London North Ltd (1st)

London Sovereign Ltd (2nd)

PRELIMINARY HEARING BY CLOUD VIDEO PLATFORM

Heard at: Watford

On: 17 December 2020

Before: Employment Judge Bedeau

Appearances:

For the Claimant: Ms J Ball, Counsel

For the Respondents: Ms H Royle, Solicitor (1st)

Mr E Nuttman, Solicitor (2nd)

RESERVED JUDGMENT

1. This case has been listed for a preliminary hearing, in public, to hear and determine whether the claimant was, at all material times, a disabled person suffering from obstructive sleep apnoea and hearing loss in the left ear.
2. The claimant's case is part of a multiple which is listed for 12 days for a final hearing from 18 January 2021, before a full tribunal.
3. She worked for Arriva London North Limited, "ALNL", the first respondent, as a bus driver and was based in Watford. She said she worked on route 340 together with a number of her work colleagues. They were told that the route would move to Palmers Green garage and their duties would move to that location from 8 June 2018. They objected on the basis that it was unsuitable as it was a long way from their place of work and would involve travelling into London which added to the time and costs likely to be incurred were they to accept the change.
4. In the claimant's case, she asserts that, as a disabled person who suffers from sleep apnoea and deafness in her left ear, she needed to be close to her home and engaged in "spread over duties", which are working shifts with a long gap in the

middle to enable her to use her CPAP machine to help with her breathing, and to rest. As she lives near Watford, she was able to go home to use her machine.

5. As regards her hearing, she asserts that it would be difficult to work on a local as opposed to a Transport for London route because she would need to deal with different fare stages and had to hear her customers.
6. Both respondents, initially, denied disability.
7. At the preliminary hearing held on 7 January 2020, the claimant's case was listed for a preliminary hearing, in public, for me to hear and determine whether she was, at all material times, a disabled person suffering from sleep apnoea and hearing loss in her left ear.
8. On 9 June 2020, ALNL conceded disability. However, LSL did not make that concession. The issue of disability is between the claimant and LSL.
9. Ms Royle, solicitor on behalf of ALNL, attended this hearing as an observer.

The evidence

10. I heard evidence from the claimant who did not call any witnesses. No oral evidence was called on behalf of ALNL.
11. In addition to the oral evidence, the parties adduced a joint bundle of documents comprising of 139 pages. Where possible reference will be made to the documents as numbered.

Findings of fact

Sleep apnoea

12. In or around August 2010, the claimant noticed that she was becoming very tired all of the time and that her sleep was becoming significantly disturbed. When not at work she would fall asleep while watching television, which was something that she had not done before. She had always worked shifts which involved early starts and late finishes. Sometimes her shift would start to 4am and finish at 11am. On other occasions she would start at 4am and would finish around lunchtime. This made a normal sleep pattern very difficult. She was told by her partner at the time, that she would often wake up choking in the night, would snore very loudly and sometimes would stop breathing. She said in evidence that she would end up napping and that the most she was sleeping was two hours each night.
13. She was unable to concentrate; would lose her train of thought; and would have difficulty remembering things.
14. She started to feel sleepy during the day and thought it was due to the stresses in her life, such as her daughter-in-law, who had recently given birth and was staying with her baby in her home, that is, the claimant's home, from January to May 2010. The baby had a disruptive sleep pattern and combined with her shift patterns, the claimant felt it was impossible to catch up on sleep and get a proper

rest. In turn, her headaches became more severe and she was in pain all over her body.

15. In late 2010, she was referred by her doctor to the Luton and Dunstable Hospital Sleep Unit, where she met Dr PK Pillai, Consultant Physician with an interest in Respiratory Medicine, on 19 October 2010. Dr Pillai wrote on 21

October 2010, the following: –

“She had a car accident in 2004, which was not due to her own fault, and she now works in shifts between 4am and 2am as a double-decker bus driver. Once she had passed a bus stop without stopping and she feels she could have dozed off at this time. You have rightly asked her to stop driving and she is not now driving the bus.

She suffers from mild rheumatoid arthritis otherwise she is well and does not have any high blood pressure or diabetes.

Her BMI is 33, oxygen saturation is 98% on ambient air, she has good oral airway and P2 was soft.

Her Epworth sleepiness scale was 18/24.

She has all the features of obstructive sleep apnoea and I have explained this to her and arrange for an urgent sleep study for her. I have also checked her thyroid function test. I have discussed with her the importance of not driving and informing the DVLA and have mentioned to her that she would be able to start driving once she has appropriate management of her obstructive sleep apnoea. She mentioned to me she is now driving the car for a short distance and she does not have any symptoms of going off at the wheel or poor concentration during driving.

I have not arranged to meet her again but will look at the urgent sleep study result when this is available and take things further appropriately.” (Pages 64 - 65 of the bundle)

16. She was signed off from work for eight months in 2010 for ongoing diagnosis/investigation.

17. She said that Mr Sean Smalls, Manager at ALNL, advised her that she should notify the DVLA which she did from the company’s premises.

18. In a letter dated 1 December 2010, from her doctor, Dr Yan Tak Choi, the doctor stated that he had been seeing the claimant since 5 August 2010 with symptoms of tiredness, was referred to the Sleep Clinic, and was currently having her symptoms investigated. (66)

19. The claimant was seen again by Dr Pillai on 16 December 2010 and he wrote to Dr Choi on 17 December 2010, stating:

“This lady’s sleep study did not reveal any obvious sleep apnoea. She continues to have excessive sleepiness and I will refer her to Oxford for a second opinion.

She is also complaining of headache and feeling sick. Going through the history it appears that her headache has been going on since 2004 following her whiplash injury. I do not suspect we are dealing with any underlying pathology other than this, but I have asked for a CT scan of the brain for further reassurance and checked her ES are as well.

I have not arranged to meet her again.” (68)

20. Sleep apnoea is the temporary cessation of breathing while asleep.

21. Dr Pillai later wrote to Dr Choi, on 15 January 2011, that the CT scan of the claimant’s brain did not reveal any abnormalities. (69)

22. The claimant was admitted to Oxford Radcliffe Hospitals NHS Trust's Centre for Respiratory Medicine, for an overnight stay from 8 to 9 February 2011, under the care of Professor John R Stradling, Consultant Physician, who wrote to Dr Pillai, on 11 March 2011, the following:

“There was a history of snoring and possible witnessed apnoeic episodes and waking with the choking episodes. She would often require afternoon naps that she found a refreshing. Her Epworth sleepiness score was 15. She has put on two stone in one year. Her shift work schedule involves very early starts for a period and also very late starts. She has tried to do swaps so that her shifts stay the same. She has voluntarily stopped driving because of the sleepiness and her job is at serious risk now. Routine questioning did not suggest any other obvious cause of excessive daytime sleepiness, and she absolutely denied any significant depression. She drove through Oxford today and said that at no time did she feel any sleepiness and believes the problem to already be better than a few months ago as the new baby is no longer in her house.

She initially saw Dr Pillai at Luton and Dunstable Hospital who performed an overnight sleep study back in November. This was particularly abnormal although she felt she did not sleep well. She was then referred for a second opinion.

The sleep study we performed showed considerable snoring when supine with clear excessive sleep fragmentation. When lying on her side there was also snoring. There were some hours of complete normality. The oxygen desaturation index was 6 per hour but in my view it's significantly underscored the degree of sleep fragmentation she was experiencing.

I am not sure that her sleepiness can all be ascribed to this level of sleep apnoea, but it is possible. We therefore elected to give her a trial of CPAP starting today in the hope that her sleepiness would improve enough to be safe to return to her bus driving job with Arriva. I plan to communicate with her early next week when we can discuss whether this is the case.” (70-72)

23. Prof Stradling also wrote to the Drivers Medical Adviser at the DVLA on 25 October 2011, stating:

“This lady is a patient of the Oxford Sleep Unit where she is being treated for obstructive sleep apnoea with CPAP. She is currently using CPAP for the treatment of sleep apnoea with good response. When last reviewed (21/10/2011) her compliance with CPAP was four hours per night, and her Epworth sleepiness score was entirely normal at five. Therefore, I am not at all concerned that driving of a public service vehicle should be restricted. I am not at all sure why her licence was revoked originally since she has been treated for her sleep apnoea since March this year. I would be most grateful if you could organise the reinstatement of her licence as soon as possible as her job is seriously at risk.” (77)

24. A similar account was sent to the claimant's doctor at Bennetts End Surgery on 21 October 2011, in which Prof Stradling added that the Unit no longer needed to see her a regular basis, but she could contact it if there were any problems with the CPAP system. (76)

25. After Prof Stradling's report, the claimant was given permission by the DVLA, on 28 November 2011, to drive for one year. (107-109)

26. She told me that her licence is renewed now every five years.

27. She said that she trialled the CPAP machine from March 2011 as it provides a continuous flow of air overnight to keep her airways open. It had vastly improved the length of time she would be asleep, and in the process, she had lost weight

and has more energy. She returned to work on a spread shift rota with four hours of driving duties followed by four hours rest. The rest period enables her to go home to sleep before returning to work. She would also take her CPAP machine to work to use during her rest period.

28. She said that she would suffer from sleep apnoea for the rest of her life and would need the CPAP machine to help alleviate her symptoms.
29. The CPAP machine, short for Continuous Positive Airway Pressure, is a portable device, fitted with a microchip. It would check her sleeping periods and periods of apnoea. It provides air should she stop breathing and would calculate how many times that occurred.
30. Her symptoms are loud snoring; would stop breathing for a while; and choking.
31. I was satisfied that she was treated by Prof Stradling, who is seen as a leading expert in the field of sleep apnoea. He was of the view that her sleepiness can be ascribed to a level of sleep apnoea and that she was treated for obstructive sleep apnoea with use of the CPAP.
32. Her most recent Oxford Clinic review was on 20 April 2020, when it was confirmed that she was still suffering with obstructive sleep apnoea and had to continue to use the CPAP machine. She was reviewed at that time because she had taken on a new role as a Carer with shift patterns resulting in her getting insufficient rest in the day and was not able to use the machine.
33. Mr Nuttman, solicitor on behalf of LSL, said that he had written to the claimant's legal representatives requesting an independent expert report on the claimant's condition, but she had refused. This was denied by the claimant who said that she was always willing to be independently assessed but her legal advisers felt that the reports from Prof Stradling, were sufficient enough to address the issue of her sleep apnoea.
34. Mr Nuttman told me that he did not mention in his correspondence, that the second respondent, LSL, would bear the cost of an expert report.

Deafness in left ear

35. The claimant states that she is also disabled by virtue of her deafness and tinnitus in her left ear. However, the tinnitus she is not relying on as a disability. She said that when she initially got tested, she was told that there was a 30% loss of hearing in her left ear but produced no medical records or documents in support of that statement.
36. When she drove ALNL's buses, she was not required to make much contact with members of the public, and she did not have to listen to what fares the passengers wanted. The buses were modern and did not have very loud engines.
37. LSL's buses have very loud engines with routes which would require conversing with the public. The hearing aids fitted would amplify the engine noise but would enable her to hear better.
38. In the course of her work, when the engine was turned off, she would rely on her hearing aid to hear what the customers/passengers were saying to her. Without her hearing aid she would have to turn her left and press close to cabin window to hear what was being said to her or would have to lip read.

39. On 4 January 2017, she was referred to the audiology team at West Hertfordshire Hospitals Trust, by Dr H S Cutler, at the Bennetts End Surgery, for an urgent assessment. The doctor wrote that she had been wearing her hearing aids for the previous three years to treat her tinnitus having purchased them privately from Boots. While in hospital undergoing an operation, she lost them. She could not afford to replace them privately and was struggling with her symptoms. (79)
40. Mr T Hussain, Consultant ENT Surgeon, at West Hertfordshire Hospitals, wrote to the surgery on 22 March 2017, the following:-
- “Thank you very much for referring this lady who is having on-going problems with her left sided hearing loss and tinnitus for years, she thinks since her childhood. There is no discharge. There is no history of injury, ototoxicity or recurrent ear infections, no noise exposure. She has a family history of left sided deafness. ENT examination was unremarkable. Pure tone audiogram revealed left-sided asymmetrical sensorineural hearing loss and tinnitus. I have requested an MRI scan. I have referred her to audiology department for revision of her hearing aid.” (80)
41. The results of an MRI scan performed on 6 March 2017, revealed that the nerves of the hearing and balance were normal. (81)
42. The claimant wears her hearing aid all of the time. While working for ALNL she wore them so she could hear the customers/passengers. She does not wear a hearing aid in her right ear, and do not believe that her deafness is age-related. Her first audiogram was in Boots in 2015 and it was then she was told that there was a loss of hearing of 30% but there was nothing was put in writing. Her second test was in 2017.

Submissions

43. I took into account the submissions by Mr Nuttman on behalf of the second respondent, and by Ms Ball, counsel on behalf of the claimant. I do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

The law

44. 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.”

45. Section 212(1) defines substantial as “more than minor or trivial.” The effects of any medical treatment or auxiliary aids are discounted, schedule 1(5)(1).

46. In the Guidance it states that:

“..if a person with a hearing impairment wears a hearing aid the question as to whether his or her impairment has a substantial adverse effect is to be decided by reference to what the hearing level would be without the hearing aid.” B14.

47. 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.”

48. 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

49. 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.”

46. 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.

Conclusion

47. In relation to the issue of whether the claimant was, at all material times, a disabled person suffering from obstructive sleep apnoea, I am satisfied, on the balance of probabilities, that she was so disabled. Without the use of the CPAP machine, she would become tired; her concentration would be affected; she would forget things; and most likely she would be unable to drive whether in the course of her work or privately. These effects are more than minor or trivial, and are substantial.

48. I conclude that her obstructive sleep apnoea is long-term, as she had been treated for this condition for well over 9 years. Indeed, it is a condition that will last for the rest of her life.

49. As regards her hearing loss in the left ear. This is a condition that has afflicted her family as there is a family history of it. She got tested in 2015 in Boots and purchased a pair of hearing aids, but only uses one for her left ear. I accept that she was told that there was a 30% loss of hearing in her left ear. Hearing loss in the left ear is consistent with the family trait.

50. She uses her hearing aid in order to hear what her customers/passengers were saying, particularly when she turned off the engine. Without it she would have to

lip read what the passengers were saying. She wears it constantly and is not confined to her work.

- 51. The deafness in her left ear is long-term and, having regard to the family history of it, is not age-related, and is not to reduce the effects of her tinnitus.
- 52. A purposive construction must be given to section 6, schedule 1, Equality Act 2010, to bring those deserving of protection within the ambit of the Act. Both conditions are physical impairments and are covered under the Act. Accordingly, at all material times, the claimant was a disabled person.

Knowledge

- 53. On a separate issue, of note is what the claimant said in cross-examination. In her Disability Impact Statement, dated 5 March 2020, she made reference to knowledge of disabilities by the ALNL. She stated that she understood from ALNL, that she was going to be transferred to LSL. She was offered a position at Palmers Green, but it was unsuitable. The promise of a role in Hemel Hempstead was also not going to be suitable for her due to the shift patterns. She said that her name was not put on the list of employees to be transferred to LSL.
- 54. From that account she was asked by Mr Nuttman whether she had any communication or correspondence with LSL. She replied that she did not know how to get in touch with the company and did not tell them about her medical conditions. She then said that she did not believe that she was on the transfer list.
- 55. Her evidence calls into question knowledge, whether actual or constructive, on the part of LSL of her disabilities in relation to specific claims of discrimination against it as opposed to being liable for any discriminatory conduct on the part of ALNL following a transfer. Could knowledge be established by her? I ordered that she should clarify her position in relation to whether she intends to continue with her discrimination claim against LSL, by 22 December 2020. Before drafting this judgment, her legal representatives responded on 18 December 2020, stating that it is the claimant's intention to continue with her claim of failure to make reasonable adjustments against LSL. What the claimant said under oath is evidence which a Tribunal can take into account in determining the issue of knowledge.
- 56. The case is listed along with the other claimants, ALNL and LSL on 18 January to 2 February 2021 before a full Tribunal.

Employment Judge Bedeau

31 December 2020

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Sent to the parties on:

4th January 2021

For the Tribunal: ...T Henry-Yeo..