



EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

“This has been a remote hearing not objected to by the parties. The form of remote hearing was CVP A face to face hearing was not held because it was not practicable and no-one requested the same.”

Claimant		Respondent
Mr B McMullan	v	Clancy Plant Ltd

Heard at: Watford by CVP **On:** 26 July 2021

Before: Employment Judge Alliot (sitting alone)

Appearances:

For the Claimant: Ms Jenny Millar, Niece
For the Respondents: Mr Gareth Price, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. At all relevant times between 2 and 23 January 2020 the claimant was disabled within the meaning of the Equality Act 2010 by reason of Type 2 Diabetes.

REASONS

1. This open preliminary hearing was directed by Employment Judge Lewis at a preliminary hearing heard on 15 March 2021 to decide, if at the relevant time (ie before the end of his employment with the respondent) the claimant met the definition of disability found in s.6 of the Equality Act 2010.
2. S.6 of the Equality Act 2010 provides as follows:-

“6. Disability

(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.

...

- (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of sub-section (1).”

3. Schedule 1 to the Equality Act 2010 provides at paragraph 5 as follows:-

“5. Effect of medical treatment

- (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out day to day activities if –
- (a) Measures are being taken to treat or correct it, and
- (b) But for that, it would be likely to have that effect.”

4. The guidance on the definition of disability (2011) provides as follows:-

“B7 Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day to day activities.

B12 The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, “likely” should be interpreted as meaning “could well happen”.

B13 This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect.

B14 For example, 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. Similarly, in the case of someone with diabetes which is being controlled by medication or diet should be decided by reference to what the effects of the condition would be if he or she were not taking that medication or following the required diet.”

5. By reference to the IDS Employment Law Handbook Discrimination at Work at 6.162 I note that:-

“Particular difficulties have arisen with regard to assessing what account should or not be taken of “measures” taken to control Diabetes.”

6. Mr Price has put before me two cases, namely Metroline Travel Ltd v Stoute (Debarred) [2015] IRLR 465, EAT and Taylor v Ladbrokes Betting & Gaming Ltd [2017] IRLR 312 EAT. Both cases are discussed within the IDS Handbook at 6.162.

7. I take from the Metroline case the following propositions. Firstly, that Type 2 Diabetes per se is not necessarily a disability within the meaning of the Equality Act. Secondly, that the issue of disability is fundamentally one of fact. And that, in the Metroline case, where the diabetes was controlled by way of dietary measures, namely avoiding sugary drinks, that was held not to be a measure.

8. Concerning evidence of deduced effects, the IDS Handbook at 6.164 states as follows:-

“Relatively little evidence is required to raise the issue of “deduced effects”. If there is material before the Tribunal to suggest that measures were being taken that may have altered the effects of the impairment, then the Tribunal must consider whether the impairment would have had a substantial adverse effect in the absence of those measures.”

and

“However, Tribunals are likely to require reliable evidence in order to make findings of deduced effects. A claimant’s assertion as to what might happen if he or she were to come off medication is unlikely to be sufficient.”

The evidence

9. I heard oral evidence from the claimant. The claimant has put in two disability impact statements and has submitted a letter from his GP, an extract from his GP records dealing with medication prescriptions and extracts from the information leaflets concerning some of the medicines that he was taking.
10. It is clear that the claimant has a number of health issues. The letter from the GP lists Type 2 Diabetes Mellitus, diagnosed 26 April 2007. Three further medical conditions have been redacted but I was told one of them was obesity with sleep apnoea. In an unredacted part of the GP’s letter reference is made to the claimant’s medications and the comment is made that “these medications are principally for his diabetes, blood pressure, gastric protection and cholesterol.
11. From the GP medication chart it can be seen that the claimant was regularly taking at least three drugs relating to the control of his Type 2 Diabetes. These were Amlodipine, Lisinopril and Empaglifloxin. From the information sheets the Empaglifloxin was to treat Type 2 Diabetes and the following is recorded:-

“What is Type 2 Diabetes?

Type 2 Diabetes is a disease that comes from both your genes and your lifestyle. If you have Type 2 Diabetes your pancreas does not make enough insulin to control the level of glucose in your blood and your body is unable to use its own insulin effectively. This results in high levels of glucose in your blood which can lead to medical problems like heart disease, kidney disease, blindness and poor circulation in your limbs.”

12. The Amlodipine leaflet indicates that it is used to treat:

“High blood pressure (hypertension) and a certain type of chest pain called angina.”

13. The Lisinopril leaflet indicates that it is used: “To treat kidney problems caused by Type 2 Diabetes in people with high blood pressure”. In addition the claimant has treated his diabetes with diet and abstinence from alcohol. Nevertheless, I distinguish the Metrolin case on the grounds that the claimant was using more than diet to control his Type 2 Diabetes and was taking a number of drugs to control it.

14. In his disability impact statement the claimant says as follows:-

“If I fail to monitor my medication this can cause my sugar levels to go too low and this can become dangerous. Hypoglycemia occurs when blood glucose levels fall below 4mmol/l. I therefore have to watch out for the main symptoms of hypoglycemia: sweating, fatigue, feeling dizzy but can also include being pale, feeling weak, feeling hungry, a higher heart rate than usual, blurred vision, confusion, convulsions, loss of consciousness (in extreme cases coma).”

15. In another disability impact statement the claimant also states that:-

“Hypoglycemia in severe cases can lead to diabetic ketoacidosis which requires urgent medical attention, symptoms are:

Feeling, being sick
Abdominal pain and diarrhea
Rapid, deep breathing
A fever for more than 24 hours
Dehydration: headache, dry skin, weak, rapid heartbeat
Difficulty staying awake”

16. I have taken into account the fact that the GP letter states as follows:-

“I last had contact with Mr McMullan on 15 June 2020 for a review of his diabetes. He had well controlled diabetes at that juncture and there were no problems to report of.”

17. Nevertheless, pursuant to the guidance I have to consider the likely effect on the claimant’s ability to undertake normal day to day activities were he not taking the medication he was or following the required diet.

18. In my judgment, it is quite clear that were the claimant not to be taking his medication or controlling his Type 2 Diabetes with diet then the condition would have a substantial adverse effect on his ability to undertake day to day activities. In that context it is quite clear that heart disease with the corresponding effect on an individual’s ability to function, kidney disease, blindness or poor circulation in limbs that could lead to amputation are going to adversely affect the ability to undertake most day to day activities. Similarly, an episode of hypoglycemia would, in my judgment, severely affect a whole range of normal day to day activities.

19. Consequently, in my judgment the claimant was disabled within the meaning of the Equality Act 2010 at all material times between 2 and 23 January 2020.

CASE MANAGEMENT SUMMARY ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. **Judicial mediation**

1.1 The parties are referred to the “*Judicial Mediation*” section of the Presidential Guidance on ‘General Case Management’, which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-

[practice-directions/](#). Both parties are interested in judicial mediation and the case file will be passed to the Regional Employment Judge for a decision as to whether to offer them judicial mediation.

2. Updated schedule of loss

2.1 The claimant must provide to the respondent by **4pm on 15 October 2021** or two weeks prior to any Judicial Mediation hearing, if sooner, an updated schedule of loss.

3. Other matters

3.1 The respondent is ordered to prepare a cast list, for use at the hearing. It must list, in alphabetical order of surname, the full name and job title of all the people from whom or about whom the Tribunal is likely to hear.

3.2 The claimant is ordered to prepare a short, neutral chronology for use at the hearing.

3.3 These documents should be agreed if possible.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

6/8/2021

Employment Judge Alliott

Sent to the parties on:26/8/2021

For the Tribunal:

N Gotecha