



EMPLOYMENT TRIBUNALS

Claimant: Mr Hassam Sheikh

Respondent: Best Way Wholesale Limited

Heard at: Manchester

On: 9 September 2021

Before: Employment Judge Holmes

REPRESENTATION:

Claimant: In person assisted by his mother Mrs Sheikh

Respondent: Mr J Jenkins, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant was at all material times a person with a disability within the definition of Section 6 of the Equality Act 2010.

REASONS

These reasons are given following a request made at the conclusion of the hearing by the claimant.

1. This is a preliminary hearing, convened to determine the issue of whether the claimant was at the material time a person with a disability. This follows a previous preliminary hearing held on 20 May 2021 which identified the claims and the issues, and set up this preliminary hearing for the determination of the preliminary issue of disability. The disability in question relied upon by the claimant is Eczema. Although there was a discussion as to whether or not the claimant was also going to contend that a condition of Asthma was also to be considered as a potential disability, that, it transpires, was discussed in the preliminary hearing previously and the claimant has confirmed after discussion today that he is not contending that that condition was a relevant disability for the purposes of these claims. So the only issue before the Tribunal is that of whether his condition of Eczema satisfies the definition of the disability.

2. The claimant , in compliance with the Tribunal's order, has provided an impact statement . There is also a further witness statement that he did at the same time or around about the same time, which goes a bit further than that, and deals with some of the merits in the case. Primarily , he has provided the witness statement that was ordered and he has also provided extracts of some of his medical records from his General Practitioner. They are not complete , and indeed at the outset of the hearing there was a possibility that the claimant was going to seek a postponement in order to get a report or letter from his GP which might have gone rather further and given more information to the Tribunal about his condition of Eczema. After an adjournment , however , the claimant reconsidered that and did not pursue that application. Consequently, the Tribunal has proceeded on the basis of the evidence that is currently before it. As I have indicated that evidence is the claimant's impact statement and the documents that he has provided, upon which he has been cross examined , and questioned by the Tribunal.
3. There is no dispute but that the claimant has , and has had for over twelve months , it goes back quite some time into his late childhood probably, the condition of Eczema and it is clear from the medical documents that he has received and continues to receive treatment for that condition. That is a condition which he describes in his impact statement , and is one which obviously is not constant , but which flares up from time to time. He describes in his impact statement how he manages this condition by regular showers using emollients, moisturising the skin with emulsifiers and ointments. Additionally, if he has a flare up he takes other medication in the form of creams, usually steroids, in order to bring down the inflammation and reduce the symptoms of the Eczema . He explains in the witness statement how when he has flare ups , this leads to pain, soreness, uncontrollable itchiness and that leads to scratching which then leads to the weeping and bleeding of wounds. He has explained further in his oral evidence today how when there are flareups this can lead to the sores catching on his clothes, he wears long sleeved clothes generally, and tries to cover up his Eczema. When however he has the flare ups this leads to the sores then rubbing against the clothing and increases the discomfort and pain he suffers. In terms of the flareups these can occur almost at any time, there is no particular pattern to them, they can be brought on by events such as stress, but they can otherwise occur for no other reason. They do occur from time to time and have been a fairly constant feature of the claimant's life for several years.
4. The issue, effectively the sole issue between the parties is whether this condition satisfies the definition of disability in the Equality Act , in terms of having the necessary substantial effect upon the claimant's ability to carry out day to day activities which is of course part of the definition. By "substantial" as is clear from the case law, is meant no more than minor or trivial . So the focus of the Tribunal's enquiry and the submissions made by Mr Jenkins on behalf of the respondent have been towards that issue , and whether the claimant's evidence is sufficient to satisfy that test.
5. In terms of the material before the Tribunal in the documents provided by the claimant , first of all in the claimant's response to the list of issues (which is not a document specifically for today's purposes but is one that made

reference to the Asthma condition) in the bundle at pages 72 onwards, there is reference in the first paragraph to a case , Glass -v- Promotion Line Limited. It is also I think referred to in a screenshot which is at the back of the bundle and is a case of apparently was discovered by the claimant's mother and/or uncle who have been assisting the claimant in these claims . This is apparently a case on whether or not Eczema can be a relevant disability. That case was in 2012 , and is a first instance Employment Tribunal claim and consequently does not appear on the judgments database which was not in force at the time. It is apparently reported or was reported in the Equality Law Reports for 2013 , but neither party nor indeed the Employment Judge have been able to obtain a report of that judgment. From information available on internet generally , it seems that obviously the Tribunal in that case did find in those circumstances that that claimant's Eczema did amount to a disability but in terms of the reasons why that judgment was made there is only second hand , and probably incomplete, information but one of the factors that has been reported is that that claimant apparently was so badly affected by her condition that she did not leave the house apparently for days or weeks on end . This was apparently a significant factor in the Tribunal's judgment but that is as much as one knows at this moment . I mention it because the claimant made reference to it, and also latterly in submissions , the claimant having said in evidence that he avoids or avoided on occasions family gatherings because of his Eczema there was a suggestion that there may have been some influence, conscious or otherwise of the facts of that case upon the claimant's evidence . Mrs Sheikh explained that the claimant was not aware of the facts of that case, it came from her or the claimant's uncle and that he was not, as it were, being influenced by the facts of that case in terms of what he was saying, which the Tribunal accepts. It seems most unlikely the claimant would have been aware of those facts, and to the extent that the claimant has in his evidence made reference to those particular issues the Tribunal does not find particularly suspicious , and has no reason to doubt what he says. Not least of all because , whilst the claimant has not in terms said that he has suffered as a result of his Eczema with any particular mental health issues or has ever consulted his GP in relation to such issues or has ever received any medication he has in a number of places made reference to the mental effects of the condition upon him , he has in broad terms made reference to that type of thing without being more specific. The Tribunal accepts that his witness statement does not in terms refer to avoiding family gatherings , and indeed that is the main thrust of the respondent's submissions.

6. While the claimant's impact statement obviously is the starting point and the respondents invite the Tribunal to look at that primarily , they also invite the Tribunal to look less favourably and with greater scrutiny at any additional evidence the claimant has given outside that witness statement and they point out that he has gone further than that witness statement does, and has made a number of assertions in evidence that are not in that witness statement. They also, through Mr Jenkins, point out some apparent contradictions, particularly in the last two paragraphs of the witness statement whereby the claimant on the one hand suggests that no one would realise his Eczema restricted his movement unless they experienced the Eczema for themselves, but suggested in evidence that anyone looking at him might notice that he

was moving in a different way . The other matter that is referred to is that the claimant goes on to say how he manages the Eczema by keeping physically fit and positive and how he is socially outgoing and tends to cycle to keep fit, their point to an apparent contradiction there, with the claimant saying that his Eczema prevents him or makes him less inclined to undertake things like going out or playing sports and things of that nature . So in terms of the respondents' position , they invite the Tribunal to approach that evidence warily and suggest that the claimant has perhaps in evidence gone further than his impact statement has suggested.

7. In essence however, the Tribunal has to look at this matter on the evidence before it , and decide whether the claimant does or does not satisfy the definition of disability, in relation particularly to the issue of the effect upon his ability to carry out day to day activities. In doing so , of course , the Tribunal has regard , as it should do and is reminded frequently that it should do, to the ACAS guidance on matters to be considered in determining disability which is a very useful and often overlooked document . It sets out some useful points that a Tribunal should take into account in addressing these issues.
8. In general terms, the effects that the claimant relies upon in his original witness statement, regardless of what he said to the Tribunal today, that what he certainly said in that impact statement was that his Eczema wounds restricted movement , and went on to say they caused great physical, mental and emotional pain . In terms of physical effects he says there that they restrict his movement, he has elaborated upon that today and in particular has described how when he has flare ups. His mobility at work is reduced, he works more slowly than he normally would do , and therefore when there are flare ups his mobility is impaired. Whether or not someone would notice as perhaps been a difficult thing to establish, because he contends people do not really watch him when he is working . He seems to have vacillated a bit as to whether someone would or would not notice , but his evidence is that it does slow him down. Indeed given the nature of the flare ups and the fact that the claimant generally for work would wear full clothing and would wear, for example, long sleeves the Tribunal accepts that in those circumstances ,if he is experiencing a flare up, he will be experiencing more pain and that would be likely to slow down the way in which he moved around in terms of his job. That job is a fairly physical job because it involved stacking shelves, moving things on pallets , and generally arranging goods in the respondent's business. So in terms of that effect, the Tribunal accepts that there would be that effect upon his movement and it would be restricted to that extent . There is another cause for that ,of course, not only is there the effect of the sores and the irritation caused by rubbing against clothing the claimant was wearing, but the nature of the condition itself when it flares up itself means that the skin becomes tighter and less flexible and consequently the Tribunal accepts there will be a further limitation in movement caused by the very nature of those flare ups themselves. The Tribunal accepts that that is, to some extent, a limitation on movement but the Tribunal was struck by one particular example that the claimant gave in terms of getting up in the morning and getting ready for work . It noted his evidence that on some occasions if he has had a bad flare up and then gets up, that he was unable to tie his shoes on occasions and got his father to do that for him. That strikes the Tribunal

again as an illustration of the types of restriction of movement that obviously these flares up can, and the Tribunal accepts on occasion did , cause for the claimant.

9. In terms of how the claimant manages this condition as he says in his witness statement and indeed elaborated in his evidence he manages it by regular showers using emollients and moisturising the skin and emulsifiers and ointments. That is part of a routine that he has, he explained how he does that every day before he goes to work and sometimes he has more than one shower a day. He describes that as a painful experience , of course , because putting water onto skin that is already damaged by the Eczema as he describes is very painful and is like putting salt water into a wound . He goes through that routine it seems every day to get to work and in terms of mobility he described to the Tribunal which it accepts, that generally when there are flare ups he has to effectively force himself to go to work . If he had the choice of not going to work he would not leave the house . Indeed his evidence about weekends and missing family occasions was along those lines, that if he did not have to go, he would not do . If he was having flare ups in order to get to work when he has flare ups the claimant goes through this routine in order to get himself in the best position so that his skin can get through the day that he has got to then face at work.
10. Then the Tribunal heard how if there a flare up of course he treats it further by the application of the steroids and other creams that are prescribed for him and are set out in the records. Consequently, the Tribunal has a picture of the claimant suffering primarily mobility issues as a result of the Eczema, there are clearly disfigurement issues , but the condition is not relied upon as a severe disfigurement. Because of the effects upon the claimant of flare ups, particularly in relation to his face then when they occur that is what leads to his social difficulties , and his reluctance to go out and engage in social activities. That is not a mobility question as such, it is more a secondary issue arising from the physical effects and the visible effects which the claimant then suffers in these occasions.
11. So, approaching this issue and taking into account the guidance the Tribunal in particular takes into account the guidance B7 of the guidance which is headed “effects of behaviour” , which provides this.

“Account should be taken of how far a person can reasonably be expected to modify his or her behaviour for example by the use of coping or avoidance strategy to prevent or reduce the effects of an impairment on normal day to day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial, and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy there is still an adverse effect on the carrying out of normal day to day activities.”
12. Another factor that has to be considered is set out at Guidance Note B12, under the heading “effects of treatment” and that provides as follows. The Equality Act provides that where an impairment is subject to treatment or correction the impairment is to be treated as having a substantial and adverse effect if, but for the treatment or correction the impairment is likely to have that

effect. In other words, the Tribunal in assessing the effects of the impairment disregards the effect of treatment or indeed, to some extent, any other strategies that the claimant uses to minimise or reduce the effects of the impairment.

13. In approaching this issue the Tribunal has also taken into account helpful guidance as ever from the then President of the Employment Appeal Tribunal Mr Justice Elias in **Paterson -v- Metropolitan Police Commissioner [2007 IRLR 263]** where he formulated the correct approach of enquiry as to how the individual carries out the activities , compared with how he would do it if not suffering the impairment. If that difference is more than the kind of difference one might expect when taking a cross section of the population then the effects are substantial which is very akin about to the disregarding to the effects of treatment.
14. So, putting all those things together, and looking at the evidence in this case the Tribunal has come to the view that but for, for example, the claimant's showering routine , and the application of the emoluments that he does every morning before going to work, and thereafter in cases of flare up the application of steroids etc, but for those steps which could be regarded as treatment or any other behaviour then the claimant would probably suffer greater impairment and his ability to carry out day to day activities, particularly in relation to work , would be further reduced than it is at the moment. So one has to disregard those effects and ask, well, what would be the position if he just simply did not do that ? The Tribunal is quite satisfied that the position would be worse ,and it would be harder for him to even go to work and to get up in the morning and to go out at all. So the fact that he has this regime, which he has explained in some detail , which seems to be a daily part of his life is a highly pertinent one, the Tribunal considers. There is in any event the evidence of the restrictions of movement at work , and as I have said, the rather telling , the Tribunal considers, example of the claimant needing help when he has got a flare up , in tying his shoes in the morning.
15. All these things put together with , albeit to somewhat perhaps secondary degree , and taking the respondent's points , what the Tribunal accepts will be on some occasions a reluctance to engage in social activities to some degree, because of the disfiguring effects of the condition, the Tribunal is satisfied that, taken as a whole , this condition does have the requisite more than minor or trivial effect on the claimant's ability to carry out normal day to day activities, and consequently it does constitute a disability within the meaning of the Equality Act.

Employment Judge Holmes
15 September 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
20 September 2021

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