EMPLOYMENT TRIBUNALS

Claimant: **Ms Karen Pennicott**

Respondent: **London Design and Engineering University Technical College**

Heard at: **East London Hearing Centre**

On: **22 October 2021**

Before: **Employment Judge Russell**

Representation:
For the Claimant: **Mr S Robson (Solicitor)**
For the Respondent: **Mr R Dunn (Counsel)**

JUDGMENT having been sent to the parties on 25 October 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. By claim form presented to the Employment Tribunal on the 6 November 2020, the Claimant brought claims of unfair dismissal and disability discrimination arising out of her brief employment with the Respondent from 6 January 2020 to 18 June 2020 as a part-time teacher. The unfair dismissal claim was dismissed as the Claimant lacked the necessary qualifying service. The Claimant has confirmed that there is no claim for other payments. The remaining claims as identified by Employment Judge Gardiner are brought under sections 15 and 20 of the Equality Act 2010.

2. Judge Gardiner set up today's hearing to decide two preliminary issues: (1) was the Claimant was a disabled person for the purposes of the Act; and if so (2) did the Respondent had, or could reasonably have been expected to have had, knowledge of that disability.

3. I heard evidence from the Claimant on her own behalf. For the Respondent I heard evidence from Miss Martin, Mr Fowler, Mr Watherston, Mr O'Sullivan and Mr Gilchrist. I was provided with an agreed bundle of documents and I read those pages to which I was taken to in the course of evidence.

Findings of Fact

4. The Claimant was employed as a part-time teacher from the 6 January 2020, she was subject to a probationary period and was provided with a laptop for the purposes of her work. A nationwide period of lockdown by reason of the Covid-19 pandemic began in March 2020. As a result, educational establishments including the Respondent were largely forced to deliver their teaching online. Inevitably, as a result of that move to more online teaching, the Claimant was required to use her laptop to a greater extent than before.

5. On 2 April 2020, the Claimant informed Mr Gilchrist in the Respondent's IT department that she was noticing that her right eye was becoming increasingly red and sore each time she used the school laptop, despite taking eye breaks and trying not to look at the screen as intensively. She wondered whether there may be a particular problem linked to that computer because she had not experienced similar difficulty using her own higher specification SurfacePro laptop. Mr Gilchrist provided some generic advice with regards to health and safety when using display screens and their set up.

6. On 20 April 2020, the Claimant wrote again to Mr Gilchrist stating that the problem only happens when using the school laptop but it happened each time she used it.

7. On 5 May 2020, the Claimant advised Mr Gilchrist of increasing problems with the computer, suggesting that it may be problems linked with the resolution or its age. She informed Mr Gilchrist that her eyes were becoming increasingly red and sore and that the problem was getting worse. Whereas before the Claimant said that she could use the computer for a day before experiencing difficulties, by now she was experiencing redness, pain and a feeling of swelling within her right eye within an hour. The Claimant had started to wear anti-glare glasses to try to reduce her symptoms. Mr Evans in the IT department suggested possible ways to improve the laptop. I find that by 5 May 2020 the Respondent clearly knew that the Claimant was experiencing problems with her eyesight which she attributed to use of the school laptop.

8. On 14 May 2020 the Claimant made clear to Mr Gilchrist that she had not experienced problems with her eyesight when using other devices and concluded that the problem was the device itself which was causing her vision problems.

9. By 1 June 2020, the Claimant had been issued with a new laptop which was a little faster than the previous one. The Claimant informed Mr Gilchrist and Mr O'Sullivan that she was continuing to experience problems with her eye, describing it as quite sore again despite the use of anti-glare glasses and, suggesting that it may be the particular brand.

10. The Claimant attended Moorfields Eye hospital on 1 June 2020 due to the worsening symptoms affecting her right eye. The Moorfields report states that the Claimant presented with a sensation of a foreign body within her eye whilst working at the computer and had noted nasal injection in the right eye for a few days. There was no change to vision, no photophobia, no discharge and no double vision. The Claimant had noted right eye sectoral injection but no pterygium or limbal papillae and the left eye was white. Doctor Arunakirinathan diagnosed likely right nasal episcleritis and prescribed eye drops, resting the eye and using hot compresses.

11. The Claimant attended her GP on 2 June 2020. The GP notes confirm that the Claimant presented with eye pain which the GP diagnosed as pterygium in the right eye, with some indication of presence in the left cornea. The Claimant was provided with advice on eye drops subject to review if there was no improvement. The four-week Statement of Fitness to Work provided to the Respondent gave the diagnosis of pterygium in the right eye, aggravated with close computer work and recommended workplace adaptions and discussion with Occupational Health.

12. The Claimant attended a telephone assessment with a Senior Occupational Health Nurse Advisor on 8 June 2020. The report provided to the Respondent on 9 June 2020 states that the Claimant had no previous eye issues but that since March 2020 her eye was becoming sore and anti-glare glasses had little effect. The Claimant said that her GP had prescribed moisturising eye drops. The report states:

> "**I understand the GP is of the opinion she has a form of growth in her right eye, although this may be spurious, she states**"

The Claimant denies saying that it may be spurious. I accept that there may have been some miscommunication but this was the information provided to the Respondent which had no reason to doubt its veracity.

13. The report goes on to state that the Claimant could still read paper-based documents and could manage up to 15-20 minutes of computer work, was awaiting a GP review and possible referral to a specialist but was not keen to have invasive treatment at that stage. Under the heading "Outlook for Recovery", it was suggested that it would be beneficial to offer the Claimant workplace adjustments if feasible until such time as her condition improved or treatment became effective. A recovery in due course was hoped for, dependent on a confirmed diagnosis and treatment plan. Specific recommendations included provision of voice activated software, a magnifier and that the Claimant avoid computer-based work for a further 3 weeks then, subject to medical advice, try a phased return to screen use, starting with 10 minute blasts per hour and building up if her condition allows. A return to her usual role on the school site could be more suitable as it would require less screen time but there was no timeframe for that as yet.

14. A revised Statement of Fitness to Work was issued by a locum GP on 12 June 2020 which diagnosed pterygium aggravated by extended computer use/screen glare and advised reduced time using computers and workplace adaptations. The statement was provided to the Respondent.

15. I accept the evidence of Ms Martin and Mr Gilchrist that when they received the Statements of Fitness to work, they undertook some Google searches to try to understand better the condition of pterygium. Whilst they cannot recall the extent of the information obtained due to the passage of time, I accept their evidence as reliable and plausible that what they read did not suggest that this was going to be a long-term condition.

16. On 18 June 2020, the Respondent terminated the Claimant's employment on grounds that she had failed to pass her probationary review. After her dismissal, the Claimant continued to see her GP about her eye. By September 2020, she had a revised diagnosis of pinguecula and meibomianitis.

17. The Claimant gave evidence on oath. I accept her evidence as to the substantial effect that her eye impairment had upon on her day to day activities from as early as April 2020, reducing her abilities to use devices with screens. This substantially adversely affect her life as she had to stop using not only her work laptop but also all other screen use such as checking her mobile phone. This was during the lockdown, a time when people were increasingly reliant on IT and screen technology for example, the use of Zoom in order to communicate with family members or to shop on-line given the restrictions in place. For these reasons, I find that during the period from 2 April 2020 until her dismissal on 18 June 2020, the Claimant had a physical impairment to her right eye which had a substantial adverse effect on day to day activities. The real dispute between the parties is whether that substantial adverse effect was long term as required by section 6 of the Equality Act 2010.

Law

18. To meet the long term requirement, the effect must have lasted either for 12 months or more *or* that it was likely to last for 12 months or more.

19. "Likely" is a question of whether it is something that could well happen, **Boyle v SCA Packing Limited** [2009] UKHL 37. Likelihood is to be determined at the time of the alleged discrimination, not with the benefit of hindsight, **All Answers Limited v W & anor** [2021] EWCA Civ 606.

20. The Respondent will not be liable for any unfavourable treatment arising in consequence or for any failure to make reasonable adjustments if it can show that it did not know, and could not reasonably be expected to know, that the Claimant was a disabled person at the material time. This applies to each element of the definition of disability, **Stott v Ralli Limited** UKEAT/0223/20/VP.

21. In deciding long term effect, likelihood and knowledge, I had regard to the Equality Act 2010 guidance issued by the Office for Disability Issues on behalf of Her Majesty's government. At paragraphs C3 and C4, the guidance makes clear that "likely" should be interpreted as meaning that it could well happen. In assessing the likelihood of an effect lasting for 12 months, the focus is on the circumstances at the time of the alleged discrimination and anything which occurs after that time will not be relevant. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).

22. The Equality and Human Rights Commission has published a Statutory Code of Practice on the Equality Act and employment. Knowledge as required by section 15 of the Act is dealt with in chapter 5 and chapter 6 deals with knowledge as required by section 20 of the Act. Employers should consider whether a worker has a disability even where one has not been formally disclosed. They must do all that they can objectively reasonably be expected to do in all the circumstances to find out if a worker has a disability. The duty to make a reasonable adjustment will only arise if the employer knew or could reasonably have been expected to know that the worker was or was likely to be placed at a substantial disadvantage by the operation of the provision, criterion or practice in question.

Conclusions

23. From April 2020, the Claimant began to experience an impartment to her right eye which progressively got worse. The Claimant relied on the diagnosis of pterygium as a fact from which I could infer that her eye impairment was likely to last for more than 12 months. However, I must consider the position between April 2020 and her dismissal on 18 June 2020 rather than reach a conclusion with the benefit of hindsight. By 18 June 2020, the Claimant had experienced problems for only two months. She had no previous history of eye problems. The Moorfields report states that there is no pterygium and suggested that it was episcleritis, which in most cases will recover on its own and may not need any treatment. This is consistent with the treatment recommended of eye drops, rest and hot compresses. The GP diagnosis of pterygium on 2 June 2020 also prescribed treatment of eye drops and avoiding computer work. The Occupational Health outlook suggested recovery in due course. It was only in September 2020, after the material time, that a revised diagnosis of pinguecula and meibomianitis was given.

24. There was no medical evidence before me to suggest that the physical impairment to the right eye would not have been of short duration and fully resolved in due course either by natural progression or with the successful use of the prescribed eye drops. At the material time, the impairment had lasted only two months and there is insufficient evidence before me to conclude at that time that it was likely to last for a further 10 months rather than be permanently treated successfully. The diagnosis of pterygium alone is not sufficient for the Claimant to establish that her eye impairment could well last for 12 months or more.

25. In any event, even if the Claimant were able to establish disability at the material time, I conclude that the Respondent could not have known or reasonably be expected to know that the Claimant's eye impairment was likely to last more than 12 months. The information provided to the Respondent at all times up until the beginning of June 2020 was very clear: there was a problem with a particular laptop that was causing the Claimant eye strain. That is not an unusual complaint, particularly in a period of extensive screen use by reason of the pandemic. It was certainly not sufficient to have put the Respondent on constructive notice that there may be a long-term impairment. The fact that the difficulty persisted even after provision of the new laptop, did not change the position as the Claimant herself attributed the problem to the brand of laptop. The Claimant expressly told the Respondent that her own device at higher specification did not cause the problem. Considered objectively, the Respondent could not reasonably be expected to know that the problem was a long-term impairment rather than a problem with IT equipment.

26. At the beginning of June 2020, medical evidence became available. The Respondent received the Statements of Fitness to Work from the GP and the Occupational Health report. The information contained was limited and the diagnosis of pterygium is not an obvious condition which would, or should, put the Respondent on notice. The Respondent acted reasonably in undertaking searches on Google to find out more about pterygium and did not read anything to suggest that this was going to be a long-term condition. That it is consistent with the relatively short periods of time covered by the Statements of Fitness to Work and the Occupational Health report. Nothing was provided to suggest a significant impairment likely to last more than 12 months (with or without treatment).

27. In conclusion, the Respondent took reasonable steps to find out more about the medical information provided both by obtaining Occupational Health input and their own Google searches. Given the short duration of the problem and the Claimant's express attribution of its cause to an inadequate laptop or particular brand of laptop, they had done all that could objectively reasonably be expected of them. The Respondent did not know, nor could it reasonably have been expected to know, by 18 June 2020 that the Claimant's eye impairment would or was likely to last for more than 12 months.

28. For all of these reasons, the claims fail and are dismissed.

Employment Judge Russell
Dated: 21 March 2022