



EMPLOYMENT TRIBUNALS

Heard at: London South **On:** 23 June 2023

Claimant: Ms L Graham

Respondent: Surrey County Council

Before: Employment Judge Ramsden

Representation:

Claimant In person

Respondent Mr P Doughty, Counsel

JUDGMENT ON PRELIMINARY ISSUE

1. The Claimant was disabled in the relevant period: by reason of keracotonus from 27 October 2021 onwards, and by reason of depression and generalised anxiety disorder from 18 February 2022 onwards.
2. The Claimant's claims, including that of disability discrimination, will proceed to a hearing on commencing **5 April 2024**.

REASONS

3. These written reasons are provided at the request of the Claimant following oral judgment and reasons given in the hearing.

Background

4. The Claimant works for the Respondent as a SEND Case Officer in the South East SEND Service, and has done since 1 January 2020. She has brought complaints against the Respondent of:
 - a) Discrimination arising from disability, relating to the removal of an honorarium;

- b) Failure to make reasonable adjustments, relating to her (i) caseload, and (ii) line management;
 - c) Victimisation (engaging both assertions of disability and race discrimination) by (i) refusing to deal with her grievance until August 2021, (ii) removing her honorarium, and (iii) changing her line manager; and
 - d) Direct race discrimination relating to (i) the failure to appoint her to a more senior role on three occasions, (ii) the inclusion, in one of those senior roles, of the requirement for candidates to have Post-16 experience, which the Claimant does not have, (iii) the fact that the Respondent paid the Claimant less than a named comparator, and (iv) the offer of a temporary management role without additional pay.
5. The Respondent denies each of these claims.

The purpose of this preliminary hearing

6. The preliminary matter to be decided today is whether the Claimant was disabled for the purposes of section 6 of the Equality Act 2010 (the **Act**) at the relevant times for the purpose of her disability discrimination claims.
7. The Claimant avers that she is disabled on three bases:
- a) Her bilateral keracotonus - an eye condition which affects the corneas, causing blurred vision and sensitivity to light and glare;
 - b) Her depression; and
 - c) Her generalised anxiety disorder (**GAD**).
8. The relevant times for assessing whether the Claimant was disabled are the dates of the acts of disability discrimination complained of, i.e.:
- a) the removal of the honorarium – on or around 27 October 2021 – which complaint relates to her keracotonus;
 - b) the failure to adjust the Claimant’s caseload – from 27 October 2021 to 2 January 2022 – which again relates to her keracotonus;
 - c) the failure to change the Claimant’s line management – from the end of July 2022 to January 2023 – which relates to her depression and GAD;
 - d) the refusal to deal with her grievance from the date she raised it (26 October 2021) until the date it was finally determined (20 July 2022) – which relates to all three conditions;
 - e) putting in place an inappropriate line manager for the Claimant, namely Charlotte Marsh, from 3 March 2021 to approximately April 2022 – which relates to the Claimant’s depression and GAD;
 - f) failing to identify a line manager for the Claimant for the month of July 2022 – which relates to all three of the Claimant’s conditions; and

- g) putting in place an inappropriate line manager for the Claimant, namely, Aimee Comer, from 1 August 2022 to January 2023 – which relates to all three of the Claimant's conditions.

Between them, these acts or failures cover the period 27 October 2021 to January 2023.

9. It is accepted by the Respondent that, in relation to the Claimant's keratoconus:

- a) the Claimant had it at the relevant times;
- b) it is a physical or mental impairment; and
- c) it was a long-term condition at the relevant times,

but what is in contention is whether it has a substantial adverse effect on her ability to carry out day-to-day activities.

10. As for the Claimant's depression and GAD, the Respondent accepts that:

- a) each is a physical or mental impairment;
- b) each was a long-term condition from 24 June 2022; and
- c) each had a substantial adverse effect on her ability to carry out day-to-day activities from 24 June 2022,

but the Respondent denies that they were long-term in the period 27 October 2021 to 23 June 2022.

The hearing

- 11. The Claimant presented her own case. The Respondent was represented in the hearing by Mr Doughty, Counsel.
- 12. The parties had agreed a hearing bundle of 867 pages, in accordance with the Case Management Order of EJ Ord on 14 March 2023.
- 13. The Claimant gave evidence in support of her position that she was disabled at the relevant times. The Claimant's oral evidence was substantially more detailed and informative than her disability impact statement.
- 14. In the hearing, the Claimant conceded that her depression and GAD did not become long-term until 18 February 2022 (when she received the Respondent's investigation report in relation to her grievance). As the Respondent acknowledges that she was disabled on the basis of these conditions from 23 June 2022, this meant that in relation to the Claimant's depression and GAD the only period in respect of which there is a dispute about whether the Claimant was disabled on this basis was 18 February to 23 June 2022.
- 15. The Respondent acknowledged that, in the case of the Claimant's keratoconus, the impact it had on:
 - a) her night vision and therefore her inability to drive at night; and

- b) her experience of supermarket shopping (where the Claimant's evidence was that the glare from the lighting makes her feel dizzy and unstable on her feet, and that she struggles to read the price of items and so has to research prices and offers ahead of going),

could be regarded as having a substantial adverse effect on her ability to carry out these normal day-to-day activities, but challenged that the Claimant had been advised to wear "hard" contact lenses. The Respondent argued that that is a step she reasonably should have taken, and therefore that the Tribunal should consider the impact her keratoconus would have on her if she did wear those contact lenses, as per paragraph 5(3) of Schedule 1 of the Act, when assessing if that impact is substantial.

Law

16. The Act defines the protected characteristic of "disability" in section 6(1) as follows:
"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."*
17. The burden of proof is on the claimant to show, on the balance of probabilities, that they were disabled at the relevant time.
18. When considering the meaning of section 6(1), the following should be considered:
- a) the terms of Part 1 of Schedule 1 of the Act, entitled "Determination of disability";
 - b) guidance issued by the Disability Unit on matters to be taken into account in determining questions relating to the definition of disability (section 6(5)), the latest version of which was published on 8 March 2013 (the **Guidance**); and
 - c) the Code of Practice on Employment (2011), published by the Equality and Human Rights Commission (the **Code**)
- and, indeed, an Employment Tribunal *must* take account of (b) and/or (c) where it considers the Guidance and/or Code, as applicable, relevant, pursuant to paragraph 12 of Part 1 of Schedule 1 of the Act.
19. As a general rule, when assessing whether an impairment has a substantial adverse effect on the ability of a person to carry out normal day-to-day activities, measures taken to treat or correct the impairment are to be disregarded – but that does not apply to sight impairments "*correctable by spectacles or contact lenses*" (paragraph 5(3) of Part 1 of Schedule 1 of the Act).

20. The leading case on the examination of whether a person is disabled is the EAT decision of *Goodwin v Patent Office* [1999] ICR 302. While that case concerned the predecessor legislation to the Act, the four questions identified in *Goodwin* remain appropriate:
- (1) *The impairment condition*: Does the claimant have an impairment which is either mental or physical?
 - (2) *The adverse effect condition*: Does the impairment affect the claimant's ability to carry out normal day-to-day activities, and does it have an adverse effect?
 - (3) *The substantial condition*: Is the adverse effect (upon the claimant's ability) substantial?
 - (4) *The long-term condition*: Is the adverse effect (upon the claimant's ability) long-term?
21. The assessment is done as at the date of the alleged discriminatory act(s) to determine whether the claimant was disabled then (*Cruickshank v VAW Motorcast Ltd* [2002] ICR 729).

In relation to the second question: Does the impairment affect the claimant's ability to carry out normal day-to-day activities, and does it have an adverse effect?

22. The assessment of adverse effect is personal to the claimant.
23. As the EAT in *Goodwin* observed:
- "The focus of attention ... is on the things that the applicant either cannot do or can only do with difficulty, rather than on the things that the person can do."*
24. The Guidance includes examples of day-to-day activities, such as shopping and driving.
25. Appendix 1 to the Code states that 'normal day-to-day activities' are activities that are carried out by most people on a fairly regular and frequent basis, and gives examples such as walking, driving, typing and forming social relationships.

In relation to the third question: Is the adverse effect upon the claimant's ability substantial?

26. This is a question of fact. The effect must be "*more than minor or trivial*" (section 212(1) of the Act).
27. In determining whether an adverse effect is substantial, a tribunal must compare the claimant's ability to carry out normal day-to-day activities with the ability the claimant would have if not impaired – not what the claimant can do with what the average person can do (*Paterson v Commissioner of Police of the Metropolis* [2007] ICR 1522, EAT).
28. Paragraph 8 of Appendix 1 to the Code states:

“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”.

29. However, the Guidance (at paragraph B7) indicates that:

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

The fourth question: Is the adverse effect long-term?

30. Paragraph 2(1) of Part 1 of Schedule 1 of the Act stipulates that:

“the effect of an impairment is long-term if-

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.”

31. This is determined as at the date(s) of the alleged discriminatory act(s), by reference to facts and circumstances existing at that date (*McDougall v Richmond Adult Community College* [2008] EWCA Civ 4).

Application to the claims here

32. The Claimant has advanced three bases on which she is disabled: her keratoconus, her depression and her GAD. The parties agreed that her depression and GAD are related, and the Claimant’s evidence and submissions treated them identically, as did the Respondent’s submissions, and therefore they are assessed together by the Tribunal.

The Claimant’s keratoconus

The first question: Does the Claimant have an impairment which is either mental or physical?

33. This is not disputed by the Respondent – she does.

The second question: Does the impairment affect the Claimant’s ability to carry out normal day-to-day activities, and does it have an adverse effect?

34. As noted above, the Claimant’s evidence was that her keratoconus adversely affects her day-to-day activities. In particular, and consistent with the approach of the EAT in *Goodwin*, she cited the difficulties she has with night driving and shopping.

35. Also as noted above, the Respondent acknowledged that driving and shopping are normal day-to-day activities – a pragmatic approach, given that they are given as examples of such activities in both the Guidance and the Code.

The third question: Is the adverse effect upon the Claimant's ability substantial?

36. The Respondent challenged whether the effect on the Claimant's ability to drive at night and to do her shopping should be regarded as substantial. While noting that some of the effects on her are *currently* substantial, Mr Doughty asserted that the Claimant has so far failed to take the reasonable step of wearing so-called "hard" contact lenses (recommended by her optometrist). He said that the effect of her keracotonus should consequently be assessed as if she were using "hard" contact lenses, and then it would be found to be less than substantial.
37. The Claimant disagreed, saying that the medical advice given to her is that the contact lenses will improve her vision, but will not affect the response of her eyes to glare, which is one of the significant issues she suffers from when trying to drive at night or go to the supermarket. She said:
- a) In the case of night driving, the artificial light which is used in consequence in cities (e.g., from other vehicles, from billboards, from street lighting) causes her eyes a significant amount of discomfort and inflammation; and
 - b) In the case of supermarket shopping, the lighting gives her distorted vision, and the glare totally affects her, making her feel like she's drunk, so that her walking is not stable. She said "*I have to prepare and organise myself before going to the shops to see what offers are on, etc., because I can't see the prices and stuff unless I go very close up... I have to take the label out to see it*".
38. I have no reason to doubt the Claimant's evidence on these points. As the Claimant put it, if the lenses would make these effects less than substantial, she would be wearing them. Her evidence of the medical advice she has received on the impact of the "hard" lenses would not engage paragraph B7 of the Guidance – because the lenses would not reduce the effect of glare. I also consider her evidence on the effects of glare on her ability to drive at night and her ability to go supermarket shopping, even with "hard" contact lenses, are "*more than minor or trivial*", thereby satisfying the "substantial" threshold condition (as per section 212(1) of the Act).
39. Absent her keratoconus, the Claimant's ability to drive at night and to shop in the supermarket would be considerably different – she could drive at night, and she could do her supermarket shopping without preparatory research. Considering paragraph 8 of Appendix 1 of the Code, these difficulties are greater than those experienced by other people.

The fourth question: Is the adverse effect long-term?

40. This is not disputed by the Respondent in relation to the Claimant's keracotonus.

The Claimant's depression and GAD in the period 18 February to 23 June 2022

The first question: Does the claimant have an impairment which is either mental or physical?

41. This is not disputed by the Respondent – and I agree that she does.

The second question: Does the impairment affect the claimant's ability to carry out normal day-to-day activities, and does it have an adverse effect? And the third question: Is the adverse effect upon the claimant's ability substantial?

42. These questions can be considered together in this instance, in light of the Claimant's evidence of impact.

43. In oral evidence, the Claimant described the impact of receiving the Respondent's investigation report on 18 February 2022. She said that she "*found [herself] in an extremely dark place*", and she described suicidal feelings, and levels of extremely high anxiety. The Claimant reflected on the feeling she had when holding a knife to cut some fruit: "*I felt my hand starting to shake, my head started to rage, and that I wanted to slit my throat... my head became raging, and wanted to throw myself out the window*".

44. While the evidence sought from the Claimant on the impact of her depression and GAD on her normal day-to-day activities was not extensive, I judge that it is clear that the impact was so significant as to threaten her life. I conclude that this impact was clearly substantial, and encompasses day-to-day activities.

The fourth question: Is the adverse effect long-term?

45. The Respondent noted that the Claimant had suffered from depressive episodes in the past, and expressed its difficulty in assessing when her depression and GAD became, for the purposes of the Act, "*long-term*", either by it having "*lasted for at least 12 months*" or by it becoming clear that it was "*likely to last for at least 12 months*" so as to satisfy the description in paragraph 2(1) of Part 1 of Schedule 1 of the Act. Mr Doughty explained that the Respondent had looked to the evidence provided to assess when 12 months duration had passed, given that the medical evidence does not seem to anticipate the future duration of any episodes the Claimant has suffered. The Respondent's approach resulted in its conceding that her depression and GAD had become long-term on 24 June 2022, i.e., because it had lasted for 12 months by that point.

46. The Claimant disagreed with this approach. She said that it was very clear in February 2022 that it would take her a significant amount of time to recover from the depths she sank to at that time.
47. I acknowledge the Respondent's difficulty, given that the Claimant's disability impact statement contained very few dates and the medical evidence is "as at" a particular point in time, and does not give forward-looking timescales for recovery. However, the Claimant's evidence about the extremity of her ill-health in February 2022 is not challenged, and her point that, in light of those depths of depression it was apparent at that point that her recovery would take considerable time – certainly at least 12 months – is a powerful one.
48. On that basis I conclude that her depression and GAD were likely to last longer than 12 months from 18 February 2022, and so she was disabled for the purposes of the Act on that basis from that date.

Conclusions

49. For all of the above reasons, the Claimant was disabled in the relevant period: by reason of keracotonus from 27 October 2021 onwards, and by reason of depression and GAD from 18 February 2022 onwards.
50. As for the acts complained of in paragraph 8 above, this means:
 - a) The Claimant was disabled by reason of her keracotonus at the time she asserts the honorarium was removed from her on or around 27 October 2021;
 - b) The Claimant was disabled by reason of her keracotonus at the time she complains about the failure to adjust her caseload as a result of her keracotonus (from 27 October 2021 to 2 January 2022);
 - c) The Claimant was disabled by reason of her depression and GAD at the time she complains about the failure to change her line management – from the end of July 2022 to January 2023 (which complaint relates to her depression and GAD);
 - d) The Claimant was disabled by her keracotonus throughout the period when she complains about the refusal to deal with her grievance (from 26 October 2021 until 20 July 2022), but she was only disabled by reason of her depression and GAD for part of that period (18 February to 20 July 2022);
 - e) The Claimant herself said that her depression and GAD were not long-term until 18 February 2022, and so her complaint about the Respondent's failure to put in place an inappropriate line manager for her (when she was managed by Charlotte Marsh) from 3 March 2021 to approximately April 2022 – can only apply to the period 18 February until April 2022;

- f) The Claimant was disabled on all three bases in the period when she avers that the Claimant failed to identify a line manager for her (the month of July 2022) – a failure which she which relates to all three of her conditions; and
- g) She was disabled by reason of all three conditions in the period when she complains that the Respondent put in place an inappropriate line manager for her (namely, Aimee Comer), from 1 August 2022 to January 2023.

Employment Judge Ramsden

Date **28 June 2023**

JUDGMENT AND REASONS SENT TO THE PARTIES ON

Date **13 July 2023**

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FOR THE TRIBUNAL OFFICE

