



EMPLOYMENT TRIBUNALS

Claimant: Miss S D Vickers

Respondents: Sense, The National Deafblind and Rubella Association

Record of a Preliminary Hearing by CVP at the Employment Tribunal

Heard at: Nottingham

Heard on:

21 March 2023

Before: Employment Judge Hutchinson (sitting alone)

Representation

Claimant: Robert Oulds, Trade Union Representative

Respondent: Ameer Ismail, Counsel

JUDGMENT

1. The Employment Judge gave judgment as follows:
2. The Claimant had a disability at the material time as defined by section 6 Equality Act 2010. The claimant suffered from eczema and severe allergies and allergic reactions.

REASONS

BACKGROUND TO THIS HEARING

1. The Claimant presented her claim to the Tribunal on 26 January 2022. She had been employed as Deputy Manager at 56 Monks Dyke Road, a CQC registered care home operated by the Respondent.
2. The Respondent is a registered charity which provides residential care and supported living for deaf blind individuals and for people with complex disability needs.
3. The Claimant had been employed from 14 October 2003 until her employment ended on 10 November 2021 when she was dismissed. The Respondents say that the reason for the dismissal was the Claimant's refusal to be vaccinated against Covid 19 or provide the Government Exemption. This amounted to either conduct or some other substantial reason.
4. The Claimant claims:
 - a. Unfair dismissal.
 - b. Discrimination arising from disability.
 - c. Failure to make reasonable adjustment.
 - d. Victimisation relating to disability and/or religion or belief.
5. At a case management preliminary hearing conducted by my colleague Employment Judge Ayre she identified the issues in the case and ordered that an Open Preliminary Hearing should be conducted to determine whether at the time of the alleged acts of disability discrimination the Claimant was disabled by reason of severe allergies and allergic reactions. The Claimant did not mention at the case management preliminary hearing or indeed in her original claim form that she suffers from eczema.

THE HEARING TODAY

6. I heard evidence from the Claimant and submissions from her advocate and from Counsel for the Respondent. The Respondent did not call any evidence. There was a bundle of documents provided by the Respondent and where I refer to page numbers it is from that bundle and included in the bundle was the Claimant's impact statement at pages 96 to 98.
7. The document produced by Mr Ismail as his opening statement pointed out that

the claimant had not provided a witness statement in advance although they had seen the impact statement which itself referred to the claimant's eczema. It was clear to me that the claimant was not only relying on the severe allergic reaction and allergies, but also her atopic eczema.

FINDINGS OF FACT

8. I am satisfied that the Claimant was diagnosed with eczema in March 2012.
9. It is an inflammatory skin condition that causes itchiness, dry skin, rashes, scaly patches, blisters, and skin infections. It is an allergic condition.
10. The medical evidence shows that her eczema issues started in about 2008. This is referred to in the medical report of Dr Damien Jackson dated 26 July 2012 (pages 68/69).
11. At that time, the diagnosis was acute extensive eczema. The eczema was on her neck and had spread to the rest of her body including her scalp. She had been treated with a variety of topical steroids and emolium creams and a short course of oral Prednisolone and antihistamines. None of these had produced any improvement in her symptoms.
12. As a result, he prescribed more aggressive treatment to get the eczema under control.
13. She was reviewed in August 2012 where her condition had improved considerably because of the treatments (page 70/71).
14. At a further review in September 2012 the Consultant Dermatologist, Dr Neil Hepburn reviewed the Claimant and said that her eczema would settle with the Prednisolone, but it relapses when she discontinues it. He diagnosed that she had active excoriated eczema on her arms, legs, and scalp.
15. She was further reviewed at the end of October 2012; Dr Hepburn described the eczema as being reasonably controlled on Azathioprine. He referred to excoriated areas over her buttocks, abdomen and again on the scalp.
16. At the next review in December 2012 the eczema was again beginning to flare (pages 73/74) and this resulted in an increase in her medication.
17. In February 2013 this was improving (page 75) but it was still flaring up in April 2013 (page 76).
18. There were then further reviews on the 14 May 2013, 25 June 2013 and 1 October 2013.
19. There were further follow up consultations on the 29 October 2013, 21 January 2014, 15 April 2014, 29 July 2014 and 5 May 2015. By this date her eczema had *"remained clear despite stopping Azathioprine in July 2014"*. Whilst she had some

dry skin and small areas of eczema, she could treat those with Betnovate.

20. Her next medical consultation was on 7 April 2016. She consulted her GP, Dr James Dalton on that date (page 89). He reported "*troublesome widespread eczema*" again this included to her scalp, and he prescribed Co-codamol and Dermovate cream and scalp application.
21. The Claimant saw another GP Dr Michael Dwyer on 11 October 2016 again suffering from her eczema. Her medication was changed to Clobetasol and Cocois ointment to her scalp. His diagnosis was: "*Allergic disorder – XA1PQ*". Again, he prescribed scalp lotion and Prednisolone tablets.
22. On 5 July 2019 the Claimant saw Dr Aham at her GP's practice. The Claimant was suffering from swelling on the whole face and the diagnosis refers to allergic reaction. He prescribed Prednisolone tablets. The situation was reviewed by Dr Kerry Tyerman on 26 July 2021 (page 93) but that appeared to be an allergic reaction to an insect bite (page 93).
23. It can be seen from the above that her eczema which itself is an allergic reaction condition flares up from time to time and she has suffered allergic reactions to insect bites.
24. On 14 December 2022 she consulted with Dr Cornelia Wendt at her GP practice. Of course, this is a consultation considerably after the time that she was employed by the Respondent, but it refers to a history of allergic reactions and several allergies (page 95).
25. I am satisfied that the Claimant's eczema is an ongoing condition that the Claimant will almost certainly suffer from for the rest of her life. From time to time, it will flare up and she will need medical treatment.
26. She uses various Cortisone creams, and this involves her getting up early to apply these creams to the whole of her body. She also must use special shampoos for her scalp and take antihistamine tablets.
27. The effect of her eczema involves her having short periods of time of work.
28. I am satisfied that when her eczema flares up it is uncomfortable for her, and she has trouble sleeping. This in turn puts a strain on her ability to function normally each day.
29. At the times when the condition flares up, she feels less confident and has low self-esteem especially when it affects her scalp and her hair.
30. The condition can also affect her in her personal relationship with friends and family.

THE LAW

31. As Mr Ismail describes the burden is on the Claimant to satisfy me that she has a disability. The material time for the purposes of these proceedings is those that existed on 10 November 2021.

32. Section 6 of the Equality Act 2010 (EqA) defines what is a disability:

“1) A person (P) has a disability if—

P has a physical or mental impairment, and

the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.”

I was also referred to the definition of substantial adverse effects in section 212 (1) EqA and of the deduced effects principle referred to in paragraph 5 of schedule 1 EqA and the definition of long-term set out in paragraph 2 of schedule 1

Mr. Ismail referred me to several cases. In particular.

Woodrup v London Borough of Southwark 2002 EWCA 1716

Paterson v Commissioner of Police of the Metropolis 2007 ICR 1522

Elliott v Dorset County Council 2021 IRLR 880

Mefful v Merton and Lambeth Citizens Advice Bureau 6 October 2016
Goodwin v Patent Office 1999 ICR 302

Abadeh v British Telecommunications plc 2001 ICR 156

Hubert v One Call 24 Limited 18 February 2021 unreported

SCA Packaging Ltd v Boyle 2009 UK HL 37

McDougall v Richmond Adult Community College 2008 ICR 431

Sullivan v Bury Street Capital Ltd 2021 EWCA 1694

33. I have referred myself to the Equality Act 2010 (Guidance on the Definition of Disability) I remind myself that the guidance does not impose any legal obligations nor is it an authoritative statement of the law, however I am obliged to take into account any aspect of the guidance which appears to be relevant.

34. Paragraph B1 of the guidance provides the meaning of “substantial adverse effect”:

“Requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects a general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect”.

35. The time taken to carry out an activity is dealt with at paragraph B2 which provides:

“The time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial. It should compare with the time it might take a person who did not have that impairment to complete an activity”.

36. The way in which an activity is carried out is covered in paragraph B3 which provides:

“Another factor to be considered when assessing whether the effect of having an impairment is substantial is the way in which a person with that impairment carries out a normal day-to-day activity. This comparison should be with the way the person might be expected to carry out that activity compared with someone who does not have the impairment”.

37. The effects of treatment are dealt with at paragraph B12 which states:

“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”. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question”.

38. The recurring or fluctuating effects is dealt with at paragraph C5:

“The act states that, if an impairment has had a substantial adverse effect on a person’s ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to reoccur (in deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact reoccurred). Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purpose of the act in respect of the meaning of “long-term”.”

39. Normal day-to-day activities is referred to at paragraph D3 which states:

“In general, day-to-day activities are things people do on a regular or daily basis and examples include, shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities and study and education related activities such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents and keeping to a timetable or shift pattern”.

MY CONCLUSIONS

40. The Claimant has suffered from eczema for over 10 years and from time to time the eczema flares up and requires intensive medical treatment. At the material time the claimant also suffered from severe allergies and allergic reactions. As I have said, eczema itself is an allergic condition and the claimant in 2019 suffered a further allergic reaction when she suffered from a bite by an insect.
41. I am satisfied that the eczema allergies and allergic reactions are all intertwined and whilst the cause of the allergies has not been established it is a recurring condition that has long-term adverse effects upon the Claimant.
42. Eczema is an allergic condition which has a substantial effect on her normal day-to-day activities which include washing and getting ready in the mornings. As the Claimant described she must cover herself with cream each morning which takes a substantially longer period than it would normally take a person getting ready in the morning. The condition also has a substantial effect on her sleep, and this affects her feeling of general wellbeing and her ability to interact with others.
43. The adverse effect is more than minor or trivial. I have compared the difference between the way the claimant carries out day-to-day activities and how she would carry out those activities if not impaired. I am satisfied that the difference is substantial.
44. When I am considering the substantial adverse effects on a person's ability to carry out normal day-to-day activities any medical treatment being taken to reduce or extinguish the effect impairment should be ignored. I am satisfied that if it was not for the medical treatment the condition would be much worse. In this case it is unusual because the medical treatment itself that she must have also has an effect of her normal day-to-day activities such as when she is getting ready in the morning.
45. I am satisfied that the effect of impairment is long-term. The eczema has lasted for many years and is like last her for the rest of her life. The evidence also shows that the severe allergies and allergic reactions have come to light in 2019 and have continued since that date.
46. The burden of proof to establish a disability is on the Claimant and I am satisfied that she has established that she suffers from the physical impairments referred to above and they satisfy the definition in section 6 EqA.
47. I do not agree with Mr Ismail that the evidence in this case is of minor impact. I am therefore satisfied that the Claimant has a physical impairment that has a long-term and substantial adverse effect on her ability to carry out normal day-to-day activities and that she is therefore disabled for the purposes of section 6 EqA.
48. I also do not agree with the contention that what the claimant has suffered from can be described as 3 separate impairments. The claimant has suffered from the

various allergic conditions since 2008 including eczema and they are severe allergies and allergic reactions.

Employment Judge Hutchinson

Date: 3 May 2023

49. Public access to employment tribunal decisions

50. Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.